Climate Change, Renewable 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 economic 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
How does trade law (WTO) interfere with climate or energy regulation?

Use of economic instruments in climate/energy regulation

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)
The WTO

• Result of the Uruguay Round: January 1995
• International Organization
• Governing Bodies: Ministerial Conference and General Council
• 159 members

• Purpose:

  ‘ to facilitate the implementation, administration, and operation as well as to further the objectives' of the WTO Agreements ‘
The WTO

Preamble:

‘all trade relations should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.’

(1994 Marrakesh Agreement, Preamble, para 1)
Dispute Settlement System

• Compulsory

• Administered by the Dispute Settlement Body (DSB)

• Jurisdiction: Art. 1(‘covered agreements’) listed in Appendix I of the DSU

• Interpretation: Art. 3.2 DSU: in accordance with customary rules of interpretation of public international law (= reference to the VCLT)

• P: general international law: Art. 31.3(c) VCLT ”application of any relevant rules of international law applicable in the relations between the parties”
Dispute settlement system

- Legal effect: Panel and Appellate reports are binding on the parties to the dispute (if adopted by the DSB), no precedent

- Consultations, adjudication by panels (ad hoc), appeal to the Appellate Body (standing body)

- Decisions must be implemented within reasonable time, otherwise subject to sanctions
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.
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, WT/DS426/AB/R (6 May 2013)

• **DS426** Canada — Measures Relating to the Feed-in Tariff Program (Complainant: European Union) 11 August 2011; WT/DS426/AB/R (6 May 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

• DS456 India - Certain Measures Relating to Solar Cells and Solar Modules (Complainant: United States) [10 February 2014]

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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, 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).

Feed-in-programm provides for guaranteed, long-term pricing for the output of renewable energy generation facility that contain a defined percentage of domestic content 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.


Articles 3.1 (b) of the SCM Agreement.

On September 28, 2010, US and EU joined the complaint (cited a significant trade interest as developers and exporters of renewable energy).

Panel composed in October 2011, report of the Panel 19 November 2012.

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, 10 February 2014
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

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Up in the Air: Aviation in the EU Emission Trading Scheme and the Question of Sovereignty
Outline:

1. Aviation Emissions and Climate Change
2. Regulatory Framework
3. International Criticism
4. The ECJ and the Issue of Extraterritoriality
5. What’s next?
1. Aviation Emissions and Climate Change

- Aviation has a climate impact
- In the EU, GHG emissions from international aviation increased by 73% from 1990 to 2003
- If continued: emissions from international flights from EU airports will by 2012 have increased by 150% since 1990
- International aviation emissions could offset more than 25% of EU reductions
1. Aviation Emissions and Climate Change

- 2 degrees centigrade goal
- EU pledge for 2020: 20-30%
- “...action needs to be taken to ensure that aviation does not undermine, but contributes to, achieving these objectives.”
- “From an economic and environmental point of view, the inclusion of aviation [in the EU ETS] seems the best way forward.”

(Communication from the Commissions to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, “Reducing the Climate Change Impact of Aviation”, COM(2005)459 final)
2. The Regulatory Framework

• UNFCCC ("memo item")

• Article 2.2 KP
  "The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation..., working through the International Civil Aviation Organization...”

• ICAO (Environmental Report 2010)
  "Ultimately, one of the issues to explore is whether emissions trading and offset approaches may have potential, not only to promote cost-effective reductions in emissions, but also to offer solutions to the difficult issue of how the effort for reducing international transport emissions may be distributed.”

• COP 17 (Durban, December 2011)
  "...Parties agreed to continue its consideration of issues related to addressing emissions from international aviation (Outcome of the work of the AWG-LCA, p. 14, paragraph 78)."
2. The Regulatory Framework


• Objectives:
  • Reducing climate change impact attributable to aviation, in order to avoid distortions of competition
  • Improving environmental effectiveness

• All aircraft operators have a cap on their emissions (97% of average emissions 2004-2006)

• Allocation of allowances: 85% free, 15% auctioned

• Allocation based on tonne-kilometres

• Each year, operator must surrender a number of allowances equal to their actual emissions

• Penalty: €100 per tonne CO2
3. International Criticism

- **India:** ”Discriminatory”, ”Violation of international law”, ”We think that the EU’s proposal is illegal because it seeks to charge airlines for the lag of the journey outside its airspace.” ”This is an extra-territorial principle, which is illegal.” (S.N.A. Zaidi, Civil Aviation Secretary) ”How can they dictate terms to us and why should we accept it?” (Civil Aviation Minister V. Ravi), Durban negotiations

- **China:** ”EU initiative is... an attack on other countries’ sovereignty”, ”We oppose any unilateral and mandatory moves that are taken without the agreement of involved parties...” (Joined Statement by China and Russia, 27 September 2011), stalling order of airbusses, violation of the CBDR principle

- **Russia, Japan, Australia, US:** ”Inclusion of aviation in the EU scheme is ... a violation of the cardinal principle of State sovereignty” ICAO Working paper (2.11.2011)

- **US:** The US would respond with ”appropriate action” if the scheme went ahead, H. Clinton, 19. December 2011

- **US Airlines:** violation of international law, challenged implementation regulation in court
4. The ECJ and the Issue of Extraterritoriality

- High Court of England and Wales (Queens Bench Division, Administrative Court) request for a preliminary ruling from the ECJ on 8. July 2010 under Article 267 TFEU
- Opinion of Advocate General Kokott, delivered 6 October 2011
- ECJ Judgment, 21 December 2011, C-366/10
4. The ECJ and the Issue of Extraterritoriality

Claim:

– Directive 2008/101/EC invalid, EU infringed various international agreements:

• Chicago Convention on International Civil Aviation,
• The Kyoto Protocol to the UNFCCC and the
• “Open Skies Agreement” – Air Transport Agreement between the USA and the EC

and several principles of customary international law:

• The principle that each State has complete and exclusive sovereignty over its airspace
• The principle that no State validly purport to subject any part of the high seas to its sovereignty
• The principle of freedom to fly over the high seas
• The principle that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered.
4. The ECJ and the Issue of Extraterritoriality

The questions raised concern:

1. The circumstances in which principles of international law and provisions of international treaties may be relied upon in the context of a reference for a preliminary ruling on the validity of a measure, and

2. The validity of Directive 2008/101/EC in the light of international treaties and customary law in so far as that Directive extends the EU ETS to sections of flights that take place outside the air space of the Member States of the EU.
4. The ECJ and the Issue of Extraterritoriality

In the words of Advocate General, the preliminary ruling

“is of fundamental importance not only for the future shaping of European climate change policy but also generally to the relationship between European Union (“EU”) law and international law. In particular it will be necessary to consider whether and to what extent individuals are entitled to rely in court on certain international agreements and principles of international law in order to defeat an act of the European Union.”

(Opinion of Advocate General Kokott, delivered 6 October 2011 in case C-366/10)
4. The ECJ and the Issue of Extraterritoriality

• AG on ”direct effect”:
  1. EU must be bound
  2. The nature and broad logic of the agreement concerned must not preclude a review of validity
  3. The content of the provisions of the agreement must be unconditional and sufficiently precise
  4. Agreement must be capable of conferring rights which an individual can invoke before the courts

• AG: Applies both to international agreements and customary principles
4. The ECJ and the Issue of Extraterritoriality

• AG on extraterritoriality:
  – ”The fact that calculation of emission allowances... is based on the whole flight... does not bestow upon the Directive any extraterritorial effect. ... account is taken of events that take place over the high seas or on the territory of third states....” (para 147)
4. The ECJ and the Issue of Extraterritoriality

• ECJ on extraterritoriality:
  – “...as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191 (2) TFEU, the European Union legislature may ... choose to permit a commercial activity...to be carried out in the territory of the EU only on condition that operators comply with the criteria that have been established by the EUI and are designed to fulfill the environmental protection objectives which it has set for itself (para 128)
  – The fact that “certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call in question... the full applicability of EU law in that territory.” (para 129)
4. The ECJ and the Issue of Extraterritoriality

- Distinction between:
  - extraterritorial jurisdiction and
  - domestic measures with extraterritorial implications

- "outward-looking" environmental legislation in order to:
  - discourage poor environmental behaviour beyond their jurisdiction
  - reduce transboundary environmental risks
  - create level playing field
4. The ECJ and the Issue of Extraterritoriality

• Sufficient link necessary?
  – “adequate territorial, personal or universal link” (AG)
  – “Contribution to the pollution of the air, sea or land territories of the Member States” (ECJ)

• Universality principle:
  – AG: “Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union.” (para 154)
5. What’s next?

• **China** has barred its airlines from participating in the EU ETS (6 February 2012) – airlines cannot join the EU ETS without governmental approval; and considers a claim under the Kyoto Protocol (CBDR)

• **US House of Representatives** on 24. October 2011 passed a ”European Union Emissions Trading Scheme Prohibition Act of 2011”, which would render it illegal for US airlines to participate in the EU ETS.

• **India** considers WTO claim against EU’s “unilateral trade measure”

• **EU**: April 2013: EU “temporarily suspended” the enforcement of the Directive

• **ICAO**: October 2013: ICAO Assembly agreed to develop by 2016 a global market-based mechanism (MBM) addressing international aviation emissions and apply it by 2020. Until then countries or groups of countries, such as the EU, can implement interim measures.

• **EU**: March 2014: suspension extended until 2016
5. Trade war?

Could the EU ETS measure be challenged in the WTO:

• Trade in goods or service?
• GATS: Annex on Air Transport Services
• GATT:
  – Indirect effect on trade in transported goods?
  – Discriminatory treatment? (*de facto* longer flights )
• Art. XX
  – *Chapeau*: flexibility, negotiations, consideration of trade implications?