

**CONFLICTS AND LINKAGES BETWEEN THE UN
CLIMATE CHANGE REGIME AND THE WORLD
TRADE ORGANISATION:
DEVELOPING COUNTRIES AND BORDER CARBON
ADJUSTMENTS**



**Bill Butcher-UNSW
Selina Cheng-UNSW
Natalie Stoianoff-UTS**

Presentation Outline

- ❖ **Establishing the Linkage:** International trade, Border Carbon Adjustment, UN Climate Regime and Developing countries
- ❖ **Differential Treatment in the UN Climate Regime**
- ❖ **Differential Treatment in the WTO**
- ❖ **Conflicts between the UN climate Regime and the WTO on Differential Treatment**
- ❖ **Proposal of BCAs Related Differential Treatment Rules in a WTO Climate Waiver**

Establishing the linkage

- Why research BCAs under differential treatment in the climate change and trade regimes
 - Importance of participation of developing countries
 - Value of WTO involvement in Climate Change Mitigation
 - Need to address BCAs

Terms

- BCA – tax/tariff on imports that were not subjected to an equivalent price on carbon. MFN? Art XX?
- Developing country – self-declared in WTO (current issues)
- Least developed country – UN list
- WTO climate waiver – waiver of WTO rules against discrimination for genuine BCA's

Differential Treatment in the UN Climate Regime

- Common But Differentiated Responsibilities (CBDR)
 - First formalised –1992 UNFCCC
 - 1997 Kyoto Protocol
- **Characteristics:**
 - Deviation from Principle of Reciprocity shows more equality and fairness: the UN Climate Regime demonstrated equality through taking into account that developing countries are faced with the dual pressure of environmental protection and economic development and not requiring them to bear unreasonable obligations that are not proportional to their historical and current capabilities;
 - Coordination of public interest and national interest : the UNFCCC is an important milestone in the internal law development by recognising that the development of an individual country also depends on global sustainable development, and for the purpose of global sustainable development, it should be permitted under international laws to limit the sovereignty of a country in some areas based on such restrictions are necessary for the common interests of the world.

Differential Treatment in the UN Climate Regime-con'd

- 2016 Paris Agreement
 - the Paris Agreement requires all countries to prepare nationally determined contributions (NDCs), take measures to achieve their objectives, and report on progress.
 - Article 6.1 of the Paris Agreement allows parties to pursue voluntary cooperation in the implementation of their carbon emissions targets to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity;
 - Article 6.4 of the Paris Agreement allows parties to mandate the creation of a mechanism to contribute to GHG emissions mitigation and support sustainable development.
- This means BCAs rules agreed by the WTO members (who are also the members of the UNFCCC and Paris Agreement) are therefore compatible with the UN Climate Regime.

Differential Treatment in the WTO

The Enabling Clause : ‘contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties’

Thus, it allows developed countries to offer unilateral, non-reciprocal preferences to imports from developing countries.

Counters most favoured nation rule (MFN)

Differential Treatment in the WTO –Con'd

It can be argued that in light of the special development needs of developing countries and the importance of having developing countries participate in climate change mitigation, consideration should be given to reaching further and ***requiring*** developed countries to grant waivers from BCAs in certain cases.

Analysis

- Uncertainty of the legality of BCAs under the WTO;
- BCAs rules agreed by the WTO members (who are also the members of the UNFCCC and Paris Agreement) are therefore compatible with the UN Climate Regime;
- How do we make sure BCAs are permissible and are truly being imposed for the climate reasons?

WTO Waiver

- Article IX WTO Agreement
- This study proposes to have a WTO Climate Waiver and include BCAs related differential treatment rules in the Waiver.
- This approach will be beneficial for future negotiations within the UN Climate Regime as well as dealing with potential BCAs disputes within the WTO.
- Issues with waivers:
 - Duration;
 - Single issue

What is a WTO Waiver and how do you get one?

- The WTO's waiver power is set out in Article IX:3 of the WTO Agreement, which empowers the WTO Ministerial Conference “[i]n exceptional circumstances...to waive an obligation imposed on a Member by this Agreement or any of the Ministerial Trade Agreements, provided that such decision shall be taken by three-fourths of the Members...”

Circumstances are set out in Article IX:4

- “[a] decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate.”
- no definition is given in the treaty for “exceptional circumstances”.
- Waivers must be reviewed annually, and, “[i]n each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met.”
- On the basis of this review, the Ministerial Conference “may extend, modify, or terminate the waiver.”

Type of waivers

- There are two kinds of WTO waivers:
 - individual waivers and
 - collective waivers
- The proposed Climate Waiver would be a collective waiver similar to the:
 - 2003 TRIPs Waiver, Decision of the General Council of 30 August 2003, WT/L/540 and Corr.1 (1 September 2003) and
 - 2003 Kimberley Waiver –see WTO, General Council, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 May 2003, WTO Doc WT/L/518 (27 May 2003).

WTO Waiver – 2003 TRIPs Waiver

- In response to the Declaration on the TRIPs Agreement and Public Health (WT/MIN(01)/DEC/2)(the “Declaration”).
- Particularly, “the instruction of the Ministerial Conference to the Council for TRIPs contained in paragraph 6 of the Declaration to find an expeditious solution to the problem of the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the TRIPs Agreement”.
- Finding a rapid response to this constituted “exceptional circumstances... justifying waivers from the obligations set out in paragraphs (f) and (h) of Article 31 of the TRIPs Agreement with respect to pharmaceutical products”

Article 31 TRIPs

Article 31 Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

...

- (f) Any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;...
- (h) The right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;...

Recommendations

- Recommendations : make the following differential treatment improvements in the WTO Climate Waiver for BCAs :
 - Comparable effort to be defined -- in line with UN climate regime (e.g. INDC of Paris agreement);
 - Clear definitions needed for ‘developed’, ‘developing’ and ‘least developed’ countries; and enabling of differentiation among developing countries needed;
 - BCAs collected by developed countries should be used to contribute to the Green Climate Fund
 - Provide exemptions from BCAs for least developed countries and countries with low greenhouse gas emissions (less than 0.50 percent of world greenhouse gas emissions).