



Global Policy Coherence 2009

Governance | climate - finance - trade

“Interface between the Climate negotiations and WTO rules”

The Perfect Storm I: Trade, Finance and Climate in 2009

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INTRODUCTION

The theme of this first session is on policy coherence, and the interface that I want to examine briefly is the one between climate negotiations and WTO rules. Let me say straight away that I'm indebted to both Quentin Huxham and Elena Dzhurova, for their insights into this issue, and we're working together on these issues in the European Parliament.

I'm a member of both the International Trade Committee of the Parliament, and of its Environment and Climate Change Committees, and what sometimes strikes me is indeed the lack of coherence between the different discussions and policy regimes.

In the run-up to the WTO Ministerial Conference which collapsed in disarray at the end of July, Peter Mandelson made the potentially powerful but ultimately unprovable political assertion that the failure of the Conference could have serious spill-over effects on other forthcoming global negotiations, and he identified the climate negotiations in the run-up to next year's Copenhagen COP in particular. Whether that assertion turns out to be accurate or not, there is a strong case to be made for reinforcing the links between the climate negotiations and any resumption of the trade talks, not just to minimise any negative spill-over effects from one to the other, but even more importantly to ensure that both sets of negotiations are mutually reinforcing and compatible - the original remit, you'll recall, of the WTO's Committee on Trade and Environment.

What concerns me is that in the discussions on climate negotiations, we are already quite advanced in discussions about border measures to counter carbon leakage, for example, about sustainability criteria for biofuels, about compliance with the ETS and effort-sharing legislation, to name just a few of the issues which will have clear trade-related impacts.

Yet, as far as I can see at least, there's been relatively little thinking so far about how to construct a way of making these WTO-compatible. And that's why, it seems to me, negotiations urgently need to start on constructing a compliance regime within the UNFCCC that is at least as robust as those for CITES and Montreal, and which includes a range of trade-related measures.

TREMS AND THE WTO

The concept of Trade Related Environmental Measures, or TREMS, was first formally enshrined in international law in a Decision of 15 December 1993 on Trade and Environment, in which WTO Member States are required "to identify the relationship between trade measures and environment measures, in order to promote sustainable development."

TREMS were then formally incorporated into the WTO legal order by the Decision on Trade and Environment taken in Marrakech as part of the Uruguay Round in April 1994. Ministers at that time formally laid down that the objective was to make "international trade and environmental policies mutually supportive, including those pursuant to multilateral environmental agreements."

Although in theory it can be read that this decision reverses the burden of proof under the WTO's legal system when it comes to TREMS, in the sense that the pursuit of 'sustainable development' is an explicit part of the WTO's fundamental remit, which was not the case with the GATT, unfortunately the precise legal interaction between the trade and environmental communities has never been properly tested in case law.

The proposal to make "recommendations on whether any modification of the provisions of the multilateral trading system are required", on the basis of the "open, equitable, and non-discriminatory nature of the system" was supposed to have been the

responsibility of the Committee on Trade and Environment set up by the 1994 decision, but - to date - it has yet to make any such recommendations.

TREMS AND THE WTO INTERFACE

So that doesn't make our life very easy when we're looking for advice or precedents on how to make the trade and environment policy regimes mutually compatible.

This is increasingly urgent, since TREMS will be vital to ensuring a rigorous and effective international climate agreement.

To take an example: measures to distinguish between products on the basis on which they were produced or processed - for example the carbon intensity of that process - will be crucial. Yet such a distinction based on PPMs is not immediately compatible with the WTO.

The general principles of GATT around non-discrimination, for example, include the most favoured nation clause, which lays down that WTO members must treat equally "like products" originating in, or destined for, the territory of all other Members; and the national treatment clause which prohibits discrimination between imported and domestic "like products."

I won't go through the whole process of how a case for TREMS would have to be made, but just briefly to say that clearly we would need to be interpreting the technical requirements of one or more of:

- the provisions of Article XX of the GATT
- the provisions of Agreement on Technical Barriers to Trade (the TBT Agreement),
- and the Agreement on the Application of Sanitary and Phytosanitary measures (the SPS Agreement).

These agreements do recognise the rights of WTO members to establish national requirements that are more stringent than international standards, but you have to be able to demonstrate that such requirements conform to WTO rules that protect against unnecessary, unjustified, arbitrary and disguised discrimination towards products of other WTO members.

The challenge to the trade regime is to ensure that trade rules will incorporate any TREMS that are included in any international climate package; and the challenge for environment policy is to ensure that TREMS are indeed demonstrated to be necessary, justified, and not artificially discriminatory.

It will require some new and imaginative thinking, and a lot more dialogue between the WTO and UNFCCC staff. It will mean we have to operationalise the Precautionary Principle, for

example; to construct the legal case for, and characteristics of, a robustly WTO-safe compliance and enforcement system, and to explore what global rules should apply to the trade in emission rights.

And I think we need to be doing it now. Clearly the more WTO Member States that are signed up to the post-Kyoto compliance regime, the more robust those measures can be. But we can't wait until after a post-Kyoto architecture is agreed (or not) - we need to have done much more thinking in advance. Without the promise of a reasonably robust enforcement regime, for example, we might not get international agreement in the first place. For example, I can quite imagine the US insisting on it so they could have confidence that China and India will honour their commitments following ratification.

CONCLUSION

So how likely is any of this to happen?

I think the failure of the WTO round in July can be seen as an opportunity, not as a threat. By limiting the heart of the negotiations to Agriculture and NAMA, we also limited the scope for trade-offs between the different sectors.

If we can broaden the scope of any future negotiations to include trade and environment, it's just possible - perhaps somewhat counter-intuitively - that the EU might be more prepared to give on market access, in return for movement on environment.

What happens in the US elections is obviously key. But whoever gets elected to the White House, there is going to be much more US pressure for doing something serious about climate change, and - assuming increased Democrat majorities in both Houses, a much higher priority to getting Trade and Environment into any relaunched Round.

Which simply makes this debate even more urgent!

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