



Bali UNFCCC Climate Change Negotiations, 2007. Photo: Flint Duxfield

Climate change is being labelled as the biggest market failure in history. This is a testament to the goals that have permeated international trading and the constant need for growth at all costs. The incapacity of the free market to factor in the impact of the environment has placed us in the position where we face dangerous climate change.

Increasing trade liberalization, promoted by institutions such as the World Trade Organisation and the World Bank, has meant that trade-related transport emissions are growing faster than emissions from any other sector.¹ The priority given to ensuring goods can be shipped around the world is overriding concern about the impacts of climate change.

Governments are increasingly under pressure to respond to the issue of climate change. Whilst governments weigh up their options, the shadow of international trading agreements is creeping up on them. Some trade lawyers are reassuring governments that they will still retain the ability to take the action needed. Others however, believe that if recent history is any example, free trade imperatives will overwhelm actions taken to address climate change.

The WTO and Climate Change Responses

As one of the only global bodies able to enforce its rules, the WTO and its decisions have far reaching consequences for countries. Established in 1995, the

WTO aims to liberalise trade by removing tariffs, taxes and other policies deemed 'barriers to trade'. This drive to open up trade has seen the WTO challenge and overturn a number of domestic regulations aimed at protecting the environment or human health. It's against this backdrop that governments are deciding their responses to climate change.

Exception Clause

Currently the WTO has exceptions that protect domestic law aimed at protecting the environment. Article XX of the General Agreement on Tariffs and Trade (the precursor to the WTO) contains exceptions for measures that violate WTO rules if they are "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"². An elaborate set of requirements must be met in order to qualify for this exception³. This exception has been used eleven times to defend a domestic law, but it has only been upheld twice, thus overturning those other nine laws⁴.

Given the dismal record that domestic regulation has had in applying the exception clause, coupled with the divided legal opinion, it would seem reckless for governmental climate responses to rely on this defence.



CASE STUDY: WTO RULING VS THE ENVIRONMENT

The WTO Tuna-Dolphin case (1991) – A US law banning the sale of tuna caught using dolphin-deadly nets was found to be contrary to WTO rules, as the WTO argued that the US could only apply regulations to the quality or content of the product, (tuna imports) not to the process by which it was caught.

WTO Vs US Clean Air Act (1996) – The US attempt to apply domestic emissions standards to imported fuel was found to discriminate against countries whose fuel did not meet those standards.

Carbon Taxing

A decision to tax domestic products based on the amount of carbon that is emitted from their production would undoubtedly be applied to imports so as to retain domestic competitiveness. A Border Tax Adjustment (BTA) would be used to ensure that goods produced in countries that didn't have a carbon taxing program could not undermine efforts to curb emissions locally.

This would see a higher tax rate apply to imported goods produced in carbon intensive ways as opposed to those produced in more climate friendly ones. Under WTO rules it is illegal to differentiate against two 'like' products based on the way they were produced. This rule would include carbon emissions in the production process.

Emissions Trading

Emissions trading is the solution being most widely adopted by governments to address climate change. As it currently stands emissions trading is yet to be defined under the WTO. There is uncertainty about exactly how and if it will come under WTO jurisdiction.

The role of the WTO will be in determining if the implementation of a domestic emissions trading scheme acts as a barrier to trade for foreign producers. Many fear that a domestic scheme will be undermined by countries that don't have emissions standards or a similar scheme in place. It's the settling of this problem that will most likely involve the application of WTO trading rules. Already the Bush administration has pressured the European Union (EU) to drop provisions in its cap-and-trade scheme that would force importers of carbon intensive goods to buy credits by referring to the possibility of WTO violations .

Whilst there is debate around the potential impacts of an emissions trading scheme on addressing climate change, whether or not such a scheme would be WTO permissible is still to be decided.

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CASE STUDY: S 2191 – “America’s Climate Security Act of 2007”⁶

The S.2191 bill establishes a cap-and-trade system that covers the electricity generation, transportation, and manufacturing sectors, which account for over 80% of US emissions.

The key feature of concern for the WTO is the International Reserve Allowance Program. This scheme allows for an additional emissions reserve that is additional to the national level to be offered for sale to US importers of a range of ‘covered goods’ that are carbon intensive.

The program may restrict the import of covered goods by placing quantitative restrictions, or a cap, on them. This may contradict GATT 1994 Article III because it imposes regulation to imports that may be in excess of what is applied to domestic products. A WTO disputes body would rule on whether or not the aims of the IRAP were being achieved through the use of such impositions on imports. If they found it wasn’t they could order it to be changed or enforce economic sanctions against the US.

Intellectual Property Rights

The Trade Related Aspects of Intellectual Property (TRIPS) aims to encourage innovation and the development of new ideas by offering protection for intellectual property. This protection can have the effect of inhibiting the transfer of technology as was shown in the controversy over the production of cheap, generic drugs to treat HIV/AIDS in Brazil and South Africa.

In the matter of climate change, weakening patent protections on climate friendly technologies could have immediate climate benefits⁷. Technology transfer to developing countries and more open access to licensing, including allowing reverse engineering, could assist developing countries reduce greenhouse gas emissions.

There is scope within TRIPS to allow for the issuing of compulsory licences for climate friendly technologies, a process that remunerates the patent holder but allows someone else to produce a product or process without the consent of the patent owner, or paying full royalties.

Emissions Labelling

Labelling the levels of emissions that goods or services produce can be a good way of ensuring that people are aware of the impacts of their purchases. Emissions labelling may however be problematic under the WTO’s agreement on Technical Barriers to Trade (TBT). A labelling scheme would have to prove that it was not “more trade restrictive than necessary” to achieve its outcome, something decided on a case by case basis.

Emissions labelling could also be seen to favour domestic producers as other countries may not be



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able to adapt due to technical and financial restraints. Already labelling has been listed as a potential barrier by India, Republic of Korea, Morocco and Egypt⁸.

Subsidies

Measures to encourage switching to climate friendly technologies can be aided through the use of subsidies. Government support for domestic industry through subsidies, however, is not allowed under the WTO if it is proved to negatively impact on imports or increases the export share of domestic products.

A now expired clause in the Subsidies Agreement allowed for one-off support for companies to adapt to changes in environmental regulation. Whilst there were limitations to this exception, some adaptation responses to climate change would have been covered by this clause⁹.

WTO rules must be changed to ensure that governments can offer support for companies to adapt to changes in environmental regulation.

Tariff Free Environmental Goods and Services

Currently the US and EU are pushing for the main WTO response to climate change to simply ensure that tariffs are reduced on goods and services deemed ‘green’. This proposal however will trap governments into not being able to increase tariffs on goods that may over time become relatively carbon intensive. For example,

currently natural gas is deemed cleaner than other fossil fuels. If taxes are reduced to zero on gas they may not be raised again to encourage use of cleaner technologies like wind and solar. The reliance on the market alone to promote green goods is likely to be too little too late as a response to dangerous climate change.

Australian Government Responses to Climate Change:

Green Car Innovation Fund – Offers \$500 million to develop and manufacture low emission cars.

Re-Tooling for Climate Change – Provides \$75 million over four years for manufacturers to adapt to emissions reducing technology.

These programs could possibly be challenged as unfair subsidies unless WTO rules are clarified to allow such subsidies.

A Green World Trading System

Governments must be able to take the action needed to prevent dangerous climate change. AFTINET is calling on the World Trade Organisation to ensure that its rules will not be a threat or act to prevent governments taking such action.

The WTO must:

- 1) Clearly recognize the primacy of UN environmental conventions and agreements on climate change; and
- 2) Recognize that governments have the right to regulate to mitigate climate change, including for example mandatory emissions targets, pricing or taxing carbon, and incentives for development or environmentally sustainable and renewable energy industries.

To make this possible there are a few concrete steps that the WTO needs to take.

Environmental Exception – There currently exists space within the WTO for governments to undertake action that is contrary to trade law provided it is on the basis of being necessary to protect the environment. There is still uncertainty amongst trade lawyers as to whether or not this will hold up in the WTO.

The WTO needs to clarify that this exception does apply to responses by government to climate change.

Intellectual Property (TRIPS) – The transfer of technology will be a key issue for developing countries adapting to less climate intensive technologies. In response to this something similar to the Medicines Agreement should be created, as this provided for the compulsory licensing of pharmaceutical drugs to meet epidemics.

WTO rules need to be developed so that they would allow environmental goods and services to be compulsorily licensed.

Free Trade of Environmental Goods and Services – The total removal of tariffs and taxes on goods or services deemed to be good for the climate raises many issues for developing countries. If they are flooded with imports of patented technology, they will lose developmental control over this vital area of their economies.

Environmental goods and services should be subject to special and differential treatment for developing countries, as are other goods and services, so there are opportunities for the transfer of technology and development of domestic industries (see TRIPS point above).

The total removal of tariffs on environmental goods and services should not be viewed in the WTO Doha negotiations as a solution to climate change.

Environmental Tariffs – The application of any domestic emissions trading scheme will most likely create inconsistencies with WTO rules. Whilst environmental tariffs may be problematic and hotly debated amongst the climate movement, WTO rules should not be used to stop their use.

Governments should be allowed to take border adjustment measures that are consistent with them fulfilling the aims of international environmental agreements.

A global trading system that supports responsible action on climate change is possible.

AFTINET

www.aftinet.org.au

phone: +61 2 9212 7242

fax: +61 2 9211 1407

email: campaign@aftinet.org.au

Level 3, 110 Kippax St

Surry Hills, NSW 2010 Australia

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