

# Trade and Climate Change

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# Current Balance under UNFCCC

- Emphasis on Common But Differentiated Responsibilities and actions based on respective capabilities
- Recognition that share of global emissions originating in developing countries will grow to meet their social and development needs- that they have “legitimate priority needs”
- Mandatory binding obligations (quantitative emission reduction) only on Developed countries
- Developing country obligations- made contingent on financial resources and transfer of technology from Developed countries

# Post 2012: Main Issues

- Current levels of funding and technology transfer is not sufficient.
- Developing countries in particular face an up-hill task - in that they have to face both the '*development*' challenge as well as the '*climate change*' challenge.
- Significant body of literature which establish that technological solutions for Low Carbon Growth exists; *however* such a switch would entail unprecedented and potentially very costly socio-economic adjustments.

# T-CC Linkage under UNFCCC

- **Article 3.5 of UNFCCC:** The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. *Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.*
- Apart from the above, no formal linkage between Trade and CC policy.

# Limitations of Article 3.5

- Very broad policy guidance; No formal trade policy instruments are sanctioned under the UNFCCC
- No concrete criteria on how or when Unilateral Measures can be made applicable
- Key Questions for which UNFCCC silent:
  - Whether a UTM is *necessary*
  - Whether ‘*less trade restrictive*’ alternatives are available
  - Should not such measures be applied in a differentiated manner based on the different circumstances and obligations of each party?

# Post 2012: Rising Unilateralism

- Increasing threat of use of Unilateral Measures
- Examples:
  - **EU-ETS on Aviation: From January 1 2012 onwards, the EU ETS will require all aircraft carriers to buy allowances equal to the carbon di-oxide emissions of each flight (including those emissions attributable to the non-EU leg of a journey falling within the definition).**
  - Possible Maritime related unilateral measures
  - EU-ETS: Carbon Equalization
  - US: Possible Legislation
  - Carbon Labeling and Standards

# Problem with Unilateralism

- Financial implications for ALL countries, irrespective of CBDR
- In effect, *forces* countries to adopt ER obligations, or pay for non-adoption
- Choice of such obligations- not 'economy-wide' as currently allowed under UNFCCC. i
- This will amount to transfer of the mitigation burden to developing countries even when the UNFCCC does NOT require any ER obligations by such countries
- Renders CBDR redundant

# A Second Fundamental Problem with Unilateralism

- UTMs do not follow the ‘economy-wide’ emission reduction approach as currently allowed under UNFCCC.
- *In fact, irrespective of ‘economy-wide’ emissions being low, UTMs will force sector-specific measures*
- Sector-specific measures under Kyoto Protocol- currently envisaged only for Aviation and Maritime- *AND* only for Annex I countries
- For everything else- ‘economy-wide’ emissions
- UTMs- will force sector-specific action: Examples-
  - *Reference in US bills to steel, aluminium, or cement sectors;*
  - *EU-ETS: reference to certain energy-intensive sectors which compete internationally (not defined as yet)*

# Aviation Emissions under UNFCCC & Role of ICAO

- Kyoto Protocol- Aviation ER by Annex I countries to be decided under ICAO
- No consensus among ICAO Members
- ICAO Res. A37-19, Oct. 2010: *Countries should undertake market-based measures on aviation emissions only subject to bilateral and multilateral agts.*
- Maximum no. of Reservations filed by countries
  - Most Developing country reservation- no MBMs unless unilateral consensus
- EU Reservation: Mutual Agreement cannot be made a pre-condition for MBMs!

## EU-ETS- Aviation

- All aircraft carriers carrying out “aviation activities” should buy allowances equal to the CO<sub>2</sub> emissions of each flight (including those emissions attributable to the non-EU leg of a journey).
- Key concern arising from the EU-ETS requirement is that it imposes on non-EU airlines obligations in airspace outside of the EU
- Main obligations- reporting, monitoring
- Amounts to an extra-territorial enforcement of EU laws.
- Failure to comply would attract penalties.
- Case pending at ECJ
- Possible DR remedies under ICAO/Chicago Convention

# Maritime Emissions

- Approach of Kyoto Protocol- Mandate with IMO
- Obligations envisaged only for Annex I countries under Kyoto Protocol
- Discussions at IMO:
  - Energy Efficiency Design Index (EEDI) mandatory for *new* ships
  - Ship Energy Efficiency Management Plan (SEEMP) mandatory for *all* ships
  - 3 track discussion: Technical, Operational, MBM
  - Opposition from **China, Chile, Brazil, Kuwait, Saudi Arabia**- only 5 out of 49, to the IMO resolution
  - MARPOL decision making: 2/3 majority (50% tonnage of world merchant fleet to be represented).
  - So 5 out of 49, may not really work in favour of Developing countries

# Maritime Emissions

- EEDI requirements: Jan. , 2013.
  - Transition period for Developing countries- Jan. 1, 2019
- EU, US proposal to deny Port entry to non-EEDI compliant ships- was voted out.
- EU emphasis to IMO to take decision on use of 'market-based measures'
- EU- seems to be taking an approach of monitoring IMO developments before deciding on course of action on bunker fuels.

# EU-ETS- Carbon Equalization

- Still formative stages- nothing concrete.
- Main principles: In the event other developed countries or major emitters of greenhouse gases fail to participate in an international agreement to curb emissions, such failure could result in increased GHG emissions in third countries where industry is not subject to comparable carbon restraints and put certain energy-intensive sectors of the EU which compete internationally, at an economic disadvantage
- EU will then work out methods for ‘carbon equalization’- form and content to be seen

## United States- Proposed Laws

- Mandate that there should be “Equitable reductions” by “Major GHG Emitting countries”
- Exemption for countries that:
  - have GHG reduction obligations “*as stringent as*” that established under US law
  - GHG intensity for a sector that is equal to or less than US
- Domestic producers have access to free allowances/rebates/borrowing from future allowances; not so for importers

# Carbon Standards/ Labeling

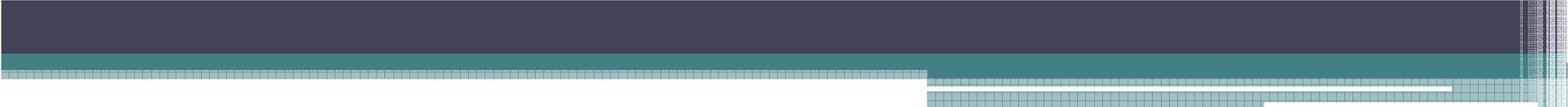
- Projected as only voluntary standards, informational tools for consumers
- BUT, in reality, are they providing any inaccurate information?
  - *E.g. of Food Miles: Penalization of non-locally produced food*
- No consensus on elements of a 'Life-cycle' approach used in Carbon Footprint standards
  - *How a product is used often determines its GHG potential; not just how it was produced!*
  - *A UK House of Commons report: LCA very complex; based on "highly hypothetical average use"- can be misleading*
- Examples: UK Carbon Trust; France- Grenelle 2, Japan Carbon Footprint

# ISO related developments

- ISO standards relevant basis for determining “international standards” under WTO TBT Agreement
- 2/3 majority sufficient
- ISO Membership- National Standardising bodies; significant representation of industry from Dd countries
- ISO 14000 series:
  - Environmental management
  - Environmental assessments
  - Product labeling
  - Environmental communication
- ISO- uses Life-Cycle Analysis approach
- ISO- dominated by Developed country industry

## Unilateral Measures: Risks

- **Any Unilateralism would pose a threat to both:**
  - **UNFCCC system**
  - **Trade system under the WTO**
- **Question therefore: Should there be a more formal, structured linkage between Trade and Climate Change?**



## No real answers under WTO system

- Design of measures would determine WTO evaluation
- Not all unilateral measures are strictly ‘trade measures’
- WTO ill-equipped to handle issues relating to ‘CBDR’

# Charges on Carbon as a Border Tax Adjustment?

- Working Party on BTA: Such measures can be imposed in respect of *indirect taxes* on domestic products
- Did not consider:
  - Impact on energy consumed in manufacturing process
  - Whether the tax has to be on inputs *embodied* into the final product
- *US-Superfund Case (1987 GATT Panel)*
  - US levy of taxes on certain chemical inputs and end-products, based on whether or not domestic taxes applicable
  - Panel silent on whether the chemical input has to be present in final product

# Issue of PPMs

- Traditional GATT jurisprudence- that distinguishing products based on PPMs- violates principles of non-discrimination
- “Like products” are those that are distinguishable by their characteristics as products
- Issue of Carbon Measures- ETS allowances or carbon tax, or any other measure- they are based on argument that imported and domestic products are *like*; therefore imported products have to pay same amount as domestic products based on emissions generated in manufacturing process
- Issue of PPMs- will become more relevant if standards such as ISO 140001 become mandatorily applicable- because here the issue will be – are the products being differentiated based on process of manufacturing
  - As of now this is only hypothetical
- TBT principles will be applicable

# Article III tests

- So issue now is whether the measures contemplated- i.e., emission allowances or carbon tax, etc.- are:
  - *Internal Taxes for purposes of Article III:2; or*
  - *Laws, regulations, requirements for Article III:4*
  - *And whether design of is measure such that it:*
    - *Is it treating domestic products differentially to afford protection?*
    - *Is it treating imports “less favourably”?*
    - *Is it modifying conditions in the market for imported products?*

# WTO- Exceptions

- Even if a measure is found violating Articles II or III, Article XX General Exceptions available
- XX(b) and (g)- most relevant
- Both US and EU measures- seem to be reflecting the *US-Shrimp Turtle principle* on when environmental measures having *extra-territorial* impact can be considered
  - This principle is that Parties should have *tried to* conclude an international agreement;
  - Not that they should *actually conclude*.
  - Trying is enough.

# Use of Trade Measures in other Multilateral Environmental Agreements

- Montreal Protocol on Substances that Deplete the Ozone Layer :
  - Trade measures against Non-Parties: To deter non-participation
  - Against Parties for non-compliance
- **CITES**: Import prohibition for non-complying countries
- **International Convention for Conservation of Atlantic Tuna**: Punishment for parties and non-parties for Illegal, Unreported and Unregulated Fishing

# How to tackle Unilateralism under UNFCCC

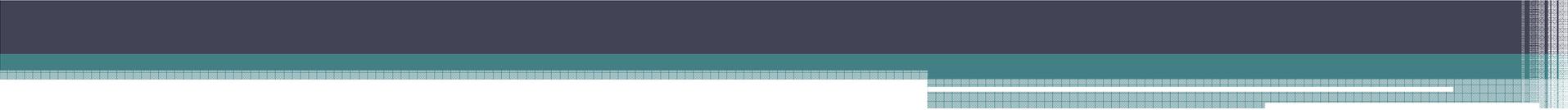
- Option 1: A clear mandate against any Unilateral Trade Measures (Tariff, Non-Tariff, Fiscal, Non-Fiscal) against Developing Countries
- Developed country argument- this will go against Article 3.5 of UNFCCC
- In view of developments in other forums, should Parties consider any alternative positions?
- Should the focus be on only Unilateral Trade Measures, or ALL Unilateral Measures?

# Principles for Use of Unilateral Measures

- Unfettered Unilateralism?
- Or regulated approach for multilaterally agreed principles for Unilateral Action?
- This is necessary to ensure that:
  - Unilateral measures are not used for Protectionist purposes
  - Unilateral measures take into account balance of legal rights and obligations

# Trade Measures- Possible Disciplines- Option 2

- Unilateral Measures should be confined only against only Non-Parties
  - No party to a binding protocol under the UNFCCC can take any unilateral trade measures related to climate change against another party to such a protocol.
- If Unilateral Measures against a Party is contemplated, then such measures should be taken only to:
  - (i) ensure compliance and enforcement of agreed obligations of a Party, **and**
  - (ii) subject to a multilateral framework for assessment.



Thank you!