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Understanding the interplay between the climate regime and the trade regime

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1. Introduction

Most of the scholarship by international lawyers and international relations theorists on the interplay between international regimes has focused on the conflict and synergy between overlapping principles and rules. I offer a broader framework for understanding regime interplay that builds on this work but also directs attention to the interplay between contested transnational policy discourses that surround, shape and constrain how actors interpret and seek to reconcile actual conflict, or prevent potential conflict, between regimes. This broader framework will be used to assess the claims of environmental non-government organisations (NGOs) and others that the WTO is undermining the climate regime.

2. Understanding regime interplay

An international regime may be understood as constituted by:

- (1) the detailed prescriptive rules (including policy instruments) which constitute the operative or binding provisions of a regime,
- (2) the general objectives and principles that guide the formulation and implementation of the rules, and
- (3) the broader discourses that articulate the collective meaning and significance of the principles and rules.

While prescriptive rules are more or less unique to particular regimes, general principles (such as the polluter pays principle or the precautionary principle) and broader discourses¹ (such as ‘the Washington consensus’) are more ubiquitous and can form part of transnational discourses promoted by actors and organizations working across a range of policy networks and rule-making bodies. Policy discourses of economic and environmental integration (such as ‘sustainable development’) represent specialized, transnational discourses that have become increasingly influential in shaping the way different economic and environmental

regimes are interpreted and managed. The advantages of focusing on transnational policy discourses in the interplay between regimes is that it become possible to look for linkages or patterns in the discourses that are employed to construct and defend the principles and rules of different regimes. Discourses also shed light on the priority and weight given to particular principles and norms in legal texts. In effect, they determine which features of the regime are salient or operative and which are less important.

Below, I map the evolving relationship between the principles and rules of the trade and climate regimes and then show how ‘synergy’ between the two regimes has been constructed through a particular discourse of trade-environment integration. My quasi-explanatory task is to discover whether and to what extent the climate regime has been undermined by the trading regime, as claimed by environmental NGOs. My critical and normative task is to expose what is concealed or sidelined by the dominant integration discourse and to suggest ‘what could have been otherwise’ by highlighting some of the integration opportunities that were available but not taken by the parties, and which might have promoted a stronger harmony between the regimes.

3. The WTO and the climate regime

Compared to the relationship between the WTO and the Biosafety Protocol, the relationship between the WTO and the Kyoto Protocol (and the broader climate regime) appears to be relatively harmonious and there has so far been no direct collision at the level of rules, and no instances of ‘forum shopping’ by parties with axes to grind. Yet this is not necessarily an indication that the two regimes are perfectly harmonised. In the following summary, I show that the potential conflict has been managed through a particular transnational discourse of economy-environment integration that constructs an open and expanding international economy as compatible with the goal of curbing global aggregate emissions of greenhouse gases.

4. The interplay of principles

A comparison of the principles of the two regimes reveals four significant points of overlap: the endorsement of sustainable development, special consideration of the circumstance of developing countries (albeit expressed in different language for different purposes), support for an open economic system (including avoidance of any arbitrary or unjustifiable discrimination or disguised restrictions of trade) and the maintenance of economic growth (this is basic to, though implicit, in the liberalization agenda of the WTO). As we shall see, these are the principles that have received the most emphasis in the dominant ‘integration’ discourse discussed below.

However, there are also significant tensions among some of the nonoverlapping principles. In particular, the UNFCCC’s principle that developed countries take the lead in combating climate change on the basis of their greater historical responsibilities and capacity sit uncomfortably with the trade regime’s principles of nondiscrimination and reciprocity (hereafter CBDR), which – if applied to the climate regime – would require tit for tat reductions in emissions without any positive discrimination or affirmative action in favour of developed countries to account for their development needs. This has significant implications for the emerging debate about the appropriateness of border tax adjustments (BTAs) to address the problem of carbon leakage, particularly if they are applied only to Annex B parties in deference to CBDR (discussed below). Likewise, the climate regime’s

precautionary approach to risk could potentially justify a wide range of environmental regulations that might not be in conformity with the strictures of the WTO's rules on environmental exemptions.

5. The interplay of rules

The Kyoto Protocol remains faithful to UNFCCC's principle of avoiding arbitrary or unjustifiable discrimination or disguised restrictions on international trade by avoiding any explicit authorization of restrictive trade measures. This is despite the success of such measures in earlier multilateral environmental agreements, particularly in the fields of hazardous waste regulation, the wildlife trade, and ozone protection. Indeed, Article 2(3) of the Kyoto Protocol takes this further in stipulating that the developed countries shall 'strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects ... on international trade.'²

Despite the absence of any direct conflict between the rules of the WTO and the Kyoto Protocol, there is nonetheless still considerable potential for conflict, depending on how parties choose to implement their obligations. Thomas Brewer (2004, 4) has identified 250 points of potential intersection between the five key operative provisions of the Protocol – Emission Trading, the Clean Development Mechanism, and Joint Implementation as well as compliance and domestic policy measures - and the 50 or so WTO agreements. However, the most significant area of potential intersection is the unilateral use of BTA's on imports or exports to address the problems of competitive disadvantage and possible 'carbon leakage' arising from new national climate policies such as cap-and-trade schemes and/or carbon taxes. While the balance of legal opinion tends to suggest that appropriately designed and nondiscriminatory unilateral BTAs are likely to be WTO compatible, there is sufficient uncertainty to create the possibility of a legal challenge under the WTO's dispute settlement procedures.³

The problem with the BTA option is that schemes that are most consistent with the objectives and principles of the climate regime (in respecting CBDR) are likely to be least consistent with the WTO rules. So, for example, an EU BTA scheme that was directed only against US imports (as suggested by Joseph Stiglitz [CGD 2006]) or only against imports from developed countries with weak climate policies (as suggested by Biermann and Brohm 2005, 291) would be likely to provoke a legal challenge in the WTO on the grounds that it is discriminatory, unless it can be justified as an environmental exemption under Article XX of the GATT.⁴ However, non-discriminatory BTAs would offend the principle of northern leadership and CBDR in the climate regime and can be expected to be strongly resisted by developing countries.

6. The interplay of discourses

(i) Trade and climate protection synergy according to the WTO

The speech delivered by Pascal Lamy, Director-General of the WTO, at the informal Trade Ministers' Dialogue on Climate Change held at the Bali climate change negotiations on 8-9 December 2007 (Lamy 2007a) provides an exemplary illustration of the official WTO framing of the trade-climate protection relationship, which is compatible with the dominant neoliberal economic consensus that also informs the framing of the climate change regime.⁵ This framing may be encapsulated in the argument that 'trade liberalization generates wealth

and innovation for climate protection'. This framing rests on the following interlocking propositions:

- the law of comparative advantage enables the most efficient allocation of resources
- trade builds environmental capacity
- trade enables diffusion of environmental goods and services (EGS)
- the WTO rules provides adequate environmental exemptions while guarding against protectionism

Lamy has warned against the unilateral use of BTAs (2007 and b, 2008) and argued that the problem of climate change is best dealt with in a global climate change accord, not the global trade forum (which is already over-burdened). Other defenders of the WTO have pointed out that stronger environmental exemptions in the WTO would disadvantage developing countries (e.g. Bhagwati 2000).⁶

(ii) Counter-discourses on trade and climate protection

The general claim that 'trade liberalization generates wealth and innovation for climate protection' has been challenged by a range of environmental NGOs, green think tanks/research institutes, and academics working in the cognate fields of ecological economics and global political ecology.⁷ There is, of course, no single, unified NGO or academic view on the relationship between trade and climate protection. However, it is possible to draw together a generic counter-discourse, built on the elements and fragments of a variety of recurring counter-arguments about trade and environment in general, and trade and climate protection in particular, which provides a general counterpoint to the official WTO 'win-win' discourse (which selectively highlights the virtues of trade liberalisation in EGS). These counter-discourses mostly acknowledge the benefits of removing distorting subsidies and liberalizing trade in EGS, but these areas of mutual synergy are considered minor when set against the more general consequences of trade liberalization that is not effectively disciplined by the climate concerns. The core elements of this general counter-discourse are:

- the growing scale of trade following liberalization leads to rising aggregate GHG emissions; reductions in the emissions intensity of production merely reduce the rate of aggregate increase
- trade leads to 'ecologically unequal exchange' (the North imports more materials, energy and biocapacity that it exports) and therefore undermines environmental capacity in the South
- the WTO's rules permit countries to use the environment as a 'free resource'; the failure of the WTO to apply the polluter pays principle allows unfair subsidization
- the WTO's environmental exemptions are inadequate, and that WTO rules undermine the climate regime by restricting the range of effective policy measures that can be used

These contending discourses pick up different elements of the standard economic framework for assessing the environmental effects of trade, which focuses on scale, composition, technology and environmental regulatory context (both international and domestic). In particular, the official WTO discourse emphasises the virtues of new technologies and the significance of the international environmental regulatory context whereas the counter-discourses emphasise the problem of scale and composition (particularly, the relocation of emissions intensive industry to developing countries).

7. From sustainable development to neoliberal environmentalism

While the more general case for trade liberalization enjoys strong support within the discipline of neoclassical economics and among state elites, it has not always been thus. Despite the continuity in the principles of the GATT and the WTO, the international consensus about their meaning and application has evolved significantly since the 1940s. In broad outline, we have seen a shift from what John Ruggie (1998) has called the ‘embedded liberalism’ of the immediate post-war period to the ‘Washington consensus’ or ‘neoliberalism’ of the 1980s, which has more or less prevailed through to the present, despite the debate about an emerging ‘post-Washington’ consensus.⁸ Most noteworthy for our discursive explanation is that the rise of the new orthodoxy of neoliberalism in the 1980s coincided with the rise to prominence of the new global discourse of sustainable development.

The Brundtland Report (WCED 1987) challenged the old ‘limits-to-growth’ discourse of the early 1970s by fundamentally challenging the idea that environmental protection and economic development stand in a simple zero-sum relationship. It is now accepted that there is room for the development of virtuous synergies between economic growth (nationally and globally, via expanding world trade) and environmental protection. Of course, exactly how much room remains a matter of real contention, which has given rise to a spectrum of discourses of sustainable development and ecological modernization, ranging from ‘weak’ (and merely technical) to ‘strong’ (and comprehensive and reflexive) in terms of their likely efficacy in promoting lasting ecological sustainability (Christoff 1996).⁹ The discourse of sustainable development according to the Brundtland Report sits mid-way along this spectrum.¹⁰ Although the Brundtland Report stressed the win-win linkages between economic growth and environmental protection, it also sought to arrest the skewed distribution of global wealth and income and ensure the satisfaction of human needs, now and in the future. The Brundtland Report had offered a new synthesis of environment and development considerations that reflected a Keynesian-like compromise of ‘managed sustainable growth’ (Bernstein 2001, 7)

However, by 1992, the Brundtland Report’s discourse of sustainable development had been reinterpreted in more market-friendly terms to embrace the liberalisation of trade and finance and the promotion of market policy tools over so-called ‘command-and-control’ regulation (Bernstein 2001). This provided the overarching ‘norm-complex’ that was legitimated at the 1992 Earth Summit, encapsulated in the Rio Declaration, Agenda 21, the Convention on Biological Diversity and the UNFCCC. According to Stephen Bernstein (2001), this more market-friendly discourse of liberal environmentalism only became institutionalized after the consolidation of neoliberalism and was therefore adapted to fit the new neoliberal frame. This explanation helps to shed light on the selective appropriation of the principles of the Rio Declaration by the parties to the UNFCCC, including their conspicuous ‘deselection’ of the polluter pays principle (PPP) (Principle 16 of the Rio Declaration). Yet the PPP could have served as a useful integrating principle or linchpin between the climate and trade regimes. It is conceptually consistent with the WTO’s objective of removing unjustifiable subsidies in production, and could have provided a clear justification for BTAs. The PPP is also central to ensuring that energy prices reflect their full environmental and climate costs, consistent with the objectives of the climate regime.

The Marrakesh Agreement Establishing the World Trade Organization was concluded after the Earth Summit, but apart from a general endorsement of sustainable development in the preamble, there has been no fundamental changes to the basic principles of the GATT to bring them into alignment with the Rio Declaration's principles of sustainable development. This suggests that the pivotal moment that set the shape of the relationship between the climate and trade regimes occurred not in 1994, when the Marrakesh Agreement was signed, but rather 1992 when the UNFCCC was concluded and signed. Rather than push for the recalibration of the international trade rules to conform with the requirements of climate protection, or push for the use of trade measures to enforce compliance and ensure fairness to 'first movers' in the climate regime, the parties to the climate regime have ensured that liberalised trade and an expanding global economy have been protected against trade restrictive climate policies.

8. Conclusion

The foregoing analysis suggests that the concern by environmentalists that the WTO is undermining the climate regime is misleading. While many environmentalists might regard Pascal Lamy's speech at Bali as evidence of lack of resolve on the part of the trade community to tackle climate change, such a charge fails to acknowledge the willing adoption of the trade liberalization agenda by the climate community. This posture was legitimated at Rio by a transnational discourse of neoliberal environmentalism (or weak ecological modernization) that transcended the WTO and the Kyoto Protocol and now frames the pattern of accommodation between the regimes in ways that have prevented the outbreak of any direct collision of rules (or any conflicts involving the implementation of the rules). This discourse had become established prior to the conclusion of the Uruguay round and the establishment of the WTO and it provides a minimalist or default approach to trade-environment integration in the absence of international consensus about whether and how the objectives of the trade and climate regimes can be made more mutually supportive.

While conflict between the two regimes has so far been avoided, the persistence of the free rider and carbon leakage problems suggest that the relatively harmonious history between the two regimes may not endure. There are signs that the general taboo against unilateral border taxes or countervailing duties may be challenged in the light of the growing push within the European Union and elsewhere for carbon equalization measures of some kind.

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Notes

¹ Discourses in this context refer to the ensemble of assumptions, beliefs, goals, and forms of knowledge enlisted by actors to interpret and order the realm of action covered by the regime, including the recognized actors, the appropriate realm of action, the principles, rules, decision-making practices and management techniques that shape and control behaviour.

² Likewise, the rules on compliance that were subsequently negotiated under the Marrakesh accords do not authorize the use of trade sanctions. Marrakesh Accords, Decision 24/CP.7, Sec. XV, Articles 102; reproduced FCCC/CP.2001.13/Add.3. For a discussion, see Stokke 2004.

³ The GATT (Article III: 2) allows the imposition of indirect taxes on imports provided they are not in excess of those applied domestically to like domestic products. This extends to articles 'from which the imported product has been manufactured in whole or in part' GATT Article II: 2(a). Legal opinion is divided over whether this might extend to the embodied energy or carbon in imported products, or whether taxes may be imposed on processes and production methods (PPMs) rather than 'like products'. In the *Superfund Tax* case, the GATT panel found that taxes on chemicals used in the manufacturer of imported products might be taken into account in border tax adjustments. Likewise, the US has imposed a border tax on imported ozone depleting chemicals (ODCs) or products containing ODCs as a means of protecting the US industry during the course of the phase-out. The Appellate Board's decision in *Shrimp Turtle* has allowed restrictive trade measures based on the process standards rather than product under certain circumstances. GATT Article XVI: 4 prohibits export subsidies but Article VI: 2 allows countervailing duties to address subsidies on imported products to compensate for subsidies granted to the exporter. However, export rebates are permissible under paragraph (h) of the Illustrative List of Export Subsidies in Annex I of the 1994 Agreement on Subsidies and Countervailing Measures, which permits the exemption or remission of indirect taxes imposed on 'inputs that are consumed in the production of the exported product'. This extends to fuels (oil, coal) used in the production of goods for export (footnote 61 to Annex II). See Hoerner and Muller 1996; Zhang 1998; Bracks, Grubb and Windram 2000; Brewer 2004a; Goh 2004; and Biermann and Brohm 2005. Parties who seek to impose countervailing duties on imported 'like products' from jurisdictions with weak climate regulation face methodological challenges in calculating the embodied carbon in the imported products.

⁴ For a more detailed discussion, see (Stokke 2004, 349). Biermann and Brohm argued that border tax adjustments should be avoided against developing countries, in line with the principle of CBDR. They suggest that the problem of carbon leakage to developing countries should be addressed through other means, such as through financial and technological assistance to developing countries (2005, 291).

⁵ This is also consistent with the views of the EU Trade Commissioner (Mandelson, 2006). As I argue below, the parties to the climate regime have built the regime in the context of an open trading system and this has formed part of the 'background consensus'. As far as I am aware, no party to the climate regime has taken issue with Lamy's speech at Bali, and given the significant overlap in membership between the climate regime and the trade regime, Kyoto parties may also be taken as a tacitly supporting the official WTO discourse on the synergies between an open trading regime and climate protection.

⁶ It has also been pointed out that trade measures are asymmetrical because their success depends on the size of a country's domestic market and therefore only economically powerful countries are able to utilize such measures effectively (Bhagwati 2002; Stokke 2004).

⁷ For example, Friends of the Earth, the Wuppertal Institute (e.g. Bringezu and Schütz (2001), and global political ecologists such as Wolfgang Sachs (1998), Robert Timmons and Bradley Parks (2007) and ecological economists such as Jan Ott Andersson and Mattias Lindroth (2001).

⁸ However, this discourse continues to stress open economies, and trade as an engine of growth and poverty reduction (Maxwell 2005).

⁹ According to Christoff (1996, 490) weak ecological modernization is economic, technological (narrow), instrumental, technocratic/neocorporatist/closed, national and unitary (hegemonic) while strong ecological modernization is ecological, institutional/systemic (broad), communicative, deliberative/democratic (open), international, diversifying.

¹⁰ The Report argued that economic growth and environmental degradation could be 'decoupled' through the pursuit of growth that uses less energy and natural resources, and produces less waste and it redefined limits in more flexible terms to encompass only the restrictions arising from 'the state of technology and social

organization on the environment's ability to meet present and future needs' (WCED and Commission for the Future (Australian edition) 1990, 87).

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