

EU Unilateral Action?

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- EU wants to lead the way with its climate package: ETS, non-ETS, renewables. Goal of French EU-presidency is political agreement by December.
- However, question of ‘carbon leakage’ if not all major emitters are involved in international agreement.

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- Early on, French govt driver of discussion on ‘carbon leakage’. Calls for ‘tax on imports from countries not applying Kyoto’ (Villepin, Chirac)
- Now, European industry and more Member States have followed. Commission ETS proposal (January 2008): give free allowances or include importers in ETS.

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Arguments heard in Paris for inclusion of importers in ETS:

- prevent carbon leakage which would undermine climate goals
- Reassure European energy-intensive industry
- Provide incentive for non-EU states to join international agreement

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Unilateral action raises various questions:

- Environmental: will it reduce overall global emissions? Or have unintended perverse effects?
- Economic: will the costs outweigh the benefits? Is it the first best option under the circumstances?
- Legal: will it be compatible with WTO and other commitments?
- Political: prospect of such action an incentive for others to join? Lead to 'retaliatory' measures? Strain on WTO system?

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Legal questions: WTO-compatibility my focus today, but not to say legal aspects are more important than environmental, economic, political!

In order to discuss WTO-compatibility, need to look in some detail at what actually is proposed.

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EU Commission's January 2008 proposed new ETS directive refers to carbon leakage:

Energy-intensive industries exposed to significant risk of carbon leakage could receive up to 100% of allowances free of charge or an effective carbon equalisation system could be introduced [...]. Such a system could apply requirements to importers that would be no less favourable than those applicable to installations within the EU, for example by requiring the surrender of allowances.

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Commission envisaged following timetable:

- Mid-2010 determine sectors exposed to a significant risk of carbon leakage
- Mid-2011 analytical report and appropriate proposals, which may include
 - adjusting the proportion of allowances received free of charge by those sectors
 - inclusion in the Community scheme of importers of products produced by those sectors

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European Council March 2008:

the risk of carbon leakage [...] needs to be analysed and addressed urgently in the new ETS Directive, so that if international negotiations fail appropriate measures can be taken

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Earlier draft Commission ETS proposal included
FAIR: *'Future Allowance Import Requirement'*.

- FAIR would apply to goods posing significant risk of carbon leakage, to be determined by EU
- Importers of goods covered to surrender allowances equivalent to average level of emissions from production of those goods in EU

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- FAIR would not apply to countries (or administrative entities) taking binding and verifiable action to reduce emissions comparable to the action taken by the EU [to be determined by EU]. Subject to common but differentiated responsibility.
- Countries that ratify post-Kyoto agreement or are linked to ETS *may be* determined [by the EU] to be taking comparable action.

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- From perspective of WTO law, FAIR would breach MFN (Art I GATT) and possibly also National Treatment (Art III GATT). France thinks Art XI or II.
- FAIR would need to be justified under Article XX GATT:
 - Environmental objective (paragraph g or b),
 - causal link,
 - territorial nexus?

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- Ad causal link: seems relatively easy test since *Brazil-Tyres*. Quantifiable contribution to the objective was not needed there, measure assessed as part of larger package, and AB remarked: *the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, —can only be evaluated with the benefit of time* (AB in *Brazil-Tyres*, para 151)
- Most problematic aspect (Article XX Chapeau): importers' obligation depends on EU emissions, not own emissions (cf *US-Gasoline*: baseline requirement v individual requirement) and importers cannot prove they emit less (cf *US-Shrimp*: rigid and unbending standard)

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France recently issued internal paper elaborating on FAIR. First of all, France wishes earlier decision-making:

- Late 2008 criteria for leakage-sensitive sectors
- Mid-2009 identification of sectors concerned
- Mid-2010 on basis of Copenhagen outcome: decision on measures for sectors concerned: free allowances, importers' obligation, or combination

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Further, France proposes that importers

- Either surrender allowances up to amount of allowances corresponding to % of emissions for which EU industry has to buy them,
- Or surrender allowances equal to (average EU emissions per tonne x tonnes imported) minus average quantity of allowances granted free to EU producers of the goods concerned

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Thus, the French proposal builds upon FAIR, but enables importers to show their emissions are lower than EU-average and be treated accordingly.

Arguably, such measure might 'survive' National Treatment charges (*Asbestos*-group approach).
But not MFN charges.

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In both cases, France proposes that if importer can show it emits less CO₂ than EU average, he needs to surrender less allowances correspondingly. Would this approach solve the Article XX Chapeau-problem with FAIR? It might, on two conditions:

1. No unreasonable administrative burdens on importers
2. Discrimination between countries where same conditions prevail must be rationally connected to the objective under (b) or (g)

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However, a question arises: EU would draw up list of countries to which such a measure would apply as they would not have taken up comparable commitments (developed countries) or ‘new, appropriate, measurable, communicable and verifiable’ action (emerging countries).

That unilateral assessment and drawing up of country list by EU will raise issues in terms of Chapeau Article XX (discrimination between countries where same conditions prevail?).

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Even if such a measure were to be WTO-compatible legally speaking, the economic, environmental, and political questions remain: Is it really an incentive? Will it help curb emissions?

Moreover, will such a matter not be too heavy for WTO dispute settlement to handle? With dangers for WTO as organisation and aggravating North-South clash?