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**Reflecting Trade Related Measures in a Post-2012 Agreement**

“Comparing the Incomparable?”

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1. How might TREMs be relevant to a Post-Kyoto Agreement?

- What has caused speculation in the abstract is now finding concrete form in domestic legislative proposals for unilateral TREMs
- Boxer-Liebermann-Warner, EU-ETS, Chinese research on embedded carbon
- The growing density of climate regulation at the domestic level heightens the likelihood that TREMs will be designed and deployed unilaterally
- Interest in TREMs driven by competitiveness concerns/search for leverage over governments and companies
- Environmentalism, protectionism and geo-politics leading to some strange bedfellows (Turtles and Teamsters; Multilateralists and Free Traders)
- Have they become price of passage? Will reference to them become essential in Copenhagen?
- Two manifestations of TREMs in domestic legislation so far:
  - Border Adjustment Measures (BAMs) (actions comparable in effect)
  - Restrictions on “imports” of offsets/allowances (equivalence in environmental or regulatory quality)[caveat on whether these are properly considered as trade or investment-related environmental measures]
- Other measures of interest: government procurement rules, export taxes on carbon intensive products, food miles/carbon footprint labelling

2. How do MEAs typically incorporate, accommodate or discipline TREMs?

Rationale for their use:

- Object of the regime (CITES, PIC, CPB, Basel)
- Promote ratification by denying trade benefits to non-Parties (CITES, MP)
- Promote compliance by denying trade benefits to non-compliant Parties (CITES, MP, fisheries agreements)

Manner of use:

- Mandate vis a vis Parties/non-Parties/non-compliance Parties (MP, CITES)
- Authorizes vis a vis Parties/non-Parties (PIC)
- Provides justification for (e.g., CITES/Shrimp Turtle)

Discriminatory dimensions

- Product specific TREMs v. country specific TREMs

Disciplining principles/practices

- Mutual supportiveness, regime coherence
- Non-discrimination and least trade restrictiveness
- Jurisdictional savings clauses
- Science-based risk assessments

3. How does the KP, and how do KP parties currently deploy these approaches?

- UNFCCC Article 3.5: 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.
- KP compliance mechanism can suspend a Parties' eligibility to trade (Greece)
- EU-ETS currently excludes on grounds of environmental integrity, the use of certain categories of CDM CERs

4. What might or should a Copenhagen Agreement say about TREMs

Political context:

- Growing support for action on climate change across major economies; significant gulf in expectations between parties
- Comparability, differentiation and equivalence at the heart of the post-Kyoto negotiations on effort sharing – both transatlantic and north-south. Likelihood of reaching a negotiated outcome that is fully accepted by domestic policymakers in different trading parties is slim.
- Parties struggling towards incentive unilateral mechanisms (carrots and sticks, incentives and disincentives) including TREMs, to bridge the gulf
- Emergence of conventional wisdom and strange bedfellows around TREMs as the “price of passage” in the US and the EU
- China mustering arguments on embedded carbon, raising questions as to who should have the authority to impose and collect any border revenues
- BAP provides little guidance on multilateral outcomes
- Chances for DDA to deliver on positive trade agenda dim
- A deeply engrained reluctance of climate negotiators to take up what they have been convinced is a WTO concern (See G-5 Declaration)
- Confusion, incoherence and cognitive dissonance over the use of the term “comparable.”

The BAP uses the term comparable as a means of ensuring that rich countries that are not party to the KP (US) undertake commitments that are comparable to rich countries that are KP parties (EU). There is no equivalent language in the BAP to ensure that developing country actions that might be agreed at Copenhagen must also be “comparable” to those of rich countries. Developing country climate negotiators see this distinction as one of several important “firewalls” in the negotiations designed to prevent rich countries from demanding from developing countries (particularly the major emitters) actions that are comparable to rich country commitments.

However, the plain meaning of the word comparable, as well as the use of that word in other contexts – two, in particular: WTO jurisprudence, and recent US legislative practice, have used the term as a means of determining which countries might legitimately be targeted with TREMs. In these circumstances it would seem to be in the developing countries’ interests to have the UNFCCC process formally recognize that what they sign up to do in Copenhagen is, given the circumstances, comparable.

As the US Congress has been developing climate change legislation it has used the term “comparable” as the standard by which it will assess the efforts being made by its trading partners to limit their GHG emissions. In an effort to address “competitiveness concerns”, the US will require importers of these products from countries found by the US to have failed to take comparable action, to purchase carbon offsets equivalent to those that were required of US producers.

The relevant language from the latest version of this Bill is:

The term “comparable action” means any greenhouse gas regulatory programs, requirements, and other measures adopted by a foreign country that, in combination, are comparable in effect to actions carried out by the United States to limit greenhouse gas emissions pursuant to this Act, as determined by the President, taking into consideration the level of economic development of the foreign country.

While this legislation died on the floor of the Senate, similar language was included in every Bill introduced in the last flurry of congressional activity, and many observers consider the inclusion of this or stronger trade measures essential to the “price of passage” of and US climate policy.

The term “comparable” in the US draft legislation is not drawn from the BAP, but from WTO jurisprudence. Several Asian countries challenged a US import ban on shrimp imported from countries the US had unilaterally determined were failing to protect sea turtles from drowning in shrimping nets in a manner essentially the same as required of US shrimpers. The US trade measures were eventually upheld by the WTO AB when the US adjusted its regulation to allow greater flexibility to shrimp importers. The AB found that when the US shifted its standard from requiring measures essentially the same as US measures to “the adoption of a program *comparable* in effectiveness” this new standard would comply with WTO disciplines. Many – though not all – trade lawyers that have evaluated the draft US climate legislation have expressed the view that the Shrimp Turtle case opens the door for US climate legislation that bases trade measures on an evaluation of the “comparability” of climate policies taken by other exporters.

If such a case were to come before a WTO panel, the panel would likely look to the practice of the climate parties to assess whether the US had followed an international standard when determining comparability. I am concerned that if the climate parties have said nothing more about the concept of comparability, and have made not an effort to discipline the use of unilateral trade measures by parties, the panel will have no choice but to fall back on the Shrimp Turtle jurisprudence, and would be influenced by the fear of the political fall out from overturning US climate policy. Indeed, the G-5 language, which suggests that the climate negotiations are not a legitimate forum to discuss trade-related issues, could act to further shield US measures.

I appreciate that it may be ironic to suggest that the UNFCCC might play a stronger role in protecting developing countries from arbitrary US trade measures than the WTO – but I think this is a distinct possibility.

Aspiration:

- Maintain a degree of multilateral discipline over the use of unilateral trade measures
- Avoid the potential WTO chilling effect on environmentally justifiable unilateral trade measures; deploy WTO and climate principles to discourage protectionism that would undermine the politics and the practice of progressive climate outcomes, both domestically and unilaterally
- In particular, avoid implicit deference to the WTO DSU as the arbiter of comparability and equivalence of climate policy, and of the legality of climate-related TREMs

Possible way forward:

- Reiterate and expand upon principles of fairness and effectiveness shared by the climate and trade regimes that are relevant to disciplining unilateral TREMs as a means of clarifying that the UNFCCC cannot be argued to require, authorize or justify TREMs in circumstances that don't comport with these principles.
  - Preference for multilateralism
  - Transparency of measures
  - Non-discrimination and non-arbitrariness
  - Differentiation/relevance based on national circumstances
  - Proportionality of trade restrictiveness to legitimate policy objective
  - Environmental effectiveness
- Secure the express acknowledgment of all Parties to the Copenhagen agreement that whatever commitments or actions that are reflected in that agreement reflect the international standard for what is an appropriate and “comparable” level of efforts
- Consider the authorization by the COP of the use of unilateral TREMs vis a vis non-Parties and Parties in non-compliance