

# UNILATERAL CARBON BORDER MEASURES: LEGAL ISSUES

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# Outline

- Unilateral Trade Measures under the UNFCCC
- Copenhagen Accord, Cancun & After
- WTO related issues

# Background

- Current balance of rights & obligations under the UNFCCC:
  - Emphasis on Common But Differentiated Responsibilities
  - 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 only on Developed countries
  - Developing country obligations- made contingent on financial resources and transfer of technology from Developed countries
  - Recognition that within developing countries, several are especially more vulnerable- LDCs, small island countries, & those prone to environmental disadvantages.

# Reference to ‘Unilateral Measures’

## 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.*

# Copenhagen & Cancun

- Dilution on Developed country ER responsibilities
- Recognition that Developing countries cannot be left beyond scrutiny
  - Move towards some form of measurable action of commitments notified
- Cancun Agreements on Developing Countries:  
*Undertake nationally appropriate mitigation actions (NAMA) aimed at achieving a deviation in emissions relative to 'business as usual emissions' in 2020.*

# Cancun & Developing Countries

- Voluntarily provide information on NAMA which are required to be “measured, reported and verified” (**MRV**) at the national level.
- Identify NAMA for which country would require international support and costs for the same. All internationally supported action will be subject to “international MRV”.
- Ensure periodic national communications based on the format to be notified. There will be “international consultation and analysis” (**ICA**) of reports made to the technical body of the UNFCCC, which would involve “*analysis by technical experts in consultation with the Party concerned*”, and “*result in a summary report.*”

# Cancun - Open Issues for Resolution

- Framework and Guidelines for MRV and ICA
- Is this only aimed at ‘transparency’?
- Who would the ‘technical experts’ be? Their mandate?
- Role of ‘Summary Report’?
- Words used: ‘Non-intrusive’, ‘Non-punitive’; ‘Full respect for national sovereignty’
- Would depend on ‘outcome’ and balance sought to be achieved.

# Risks of any Unilateral Action

- *Unilateral action inevitable in the absence of a multilateral agreement*
- *Even more of a Vexing Issue: Within the multilateral context, what is the role for any Unilateral action? How would Art. 3.5 operate?*
- Any unilateral action would undermine the multilateral context
- WTO related issues as well
- Trade disputes- do not hold any clear 'solutions'
- Any Negotiating Text therefore needs to address unilateral action as a key component



# Current Threats

- US legislation:
  - ACESA passed by US House of Representatives in 2009- “International Allowance Program”
  - Senate version not passed
  - Not outcome likely in near future
- EU-ETS:
  - Carbon equalization designed as a requirement “in the event other developed countries/ major emitters fail to participate in an international agreement to curb emissions.”

# US Legislation- Key features on Border Adjustment

- “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

# EU-ETS: Key issues on Border Adjustment

- Obligation on “economically advanced countries” to undertake action and contribute *adequately*
- *Comparability of action*: When failure of an international agreement could result in industry in third countries not being subject to *comparable* carbon restraints
- Main concern: Economic disadvantage to EU based industry

# Form of 'Border measures'

## *What type of measures are being contemplated?*

- Measures that seek to impose costs on a foreign producer through the obligation to purchase emission allowances (as in the case of the U.S.) or some sort of 'carbon equalization' in the case of the EU.
- At the heart of these allowances/ equalization program, is a charge/ tax being imposed on imports based on the process of production, in this case, in respect of the energy used in the production process.

## WTO related concerns

- Any Unilateral Trade measure- WTO concerns are inevitable
- Several WTO-compatibility related concerns
- WTO Provisions likely to be attracted:
  - **Article II.2(a)**, which deals with the nature of charges that may be imposed at the border, in order to create parity between like domestic products and imported products.
  - **Article III.2** and **Article III.4**, which deal with the principle of National Treatment in respect of internal taxes and regulations as applicable to imported products.
  - **Article XX**, which deals with General Exceptions to GATT obligations, especially the exceptions in respect of environmental grounds under Article XX(b) and Article XX(g).

## Article II: Border Tax Adjustment

- GATT Article II.2 (a) allows WTO members to impose on the importation of any product a charge equivalent to an internal tax (e.g., a border tax adjustment or a BTA).
- The conceptual challenge to extending a BTA to imports based on the energy consumed in the process of production, is whether BTA can be extended to components of energy (such as coal or oil) involved in the production process of an imported item, *but which are not physically embodied in the product.*
- Any tax or charge on energy consumption would target the process or production method of the product in a foreign country.

## Article III:2- Internal Tax

- Whether the obligation for a domestic industry to participate in a scheme for undertaking emission reduction obligations (as provided under the proposed U.S. law or in the EU under the ETS), could be understood as equivalent to the requirement to pay an internal tax?
- Conflicting views are conflicting in this regard: can an *emission trading scheme* be equivalent to an *internal carbon tax*?
- If the measures are designed in a manner such that the focus is on *auctioning* allowances, there would be a payment to the government-
  - This could support an argument that such a measure is *equivalent* to a tax
  - But, treatment of *free allowances* is unclear.

## Article III:4- Internal Regulations

- Question: Whether imposition of carbon emission norms and requirements for purchase of allowances, can be characterized as laws, regulations and requirements *affecting* a product which is *like* a domestic product, and whether such regulations *affect* the product in a manner so as to treat imported products *less favourably* than domestic products.
- Are CBMs measures which *affect* the product, or relate to measures affecting process of manufacture?
- Jurisprudence: Measures which *modify the conditions of competition* in the relevant market to the detriment of domestic products, can be tested under Article III:4
- EU-ETS- emphasis that it will apply *treatment no less favourable* to imported products.
  - *The design and application of this measure will be critical*



# Principles for Assessment

- **EC-Asbestos, and US-Shrimp Turtle:** Appellate Body appears to have left the door open for the possibility that non-discriminatory process-based measures are consistent with Article III:4
- Both US and EU laws- highlight *competitiveness* principles as the basis for their legislation: Are these not by their very nature *protectionist*? Can they be defensible?

## Article XX Exceptions

- WTO members may adopt policy measures that are inconsistent with GATT disciplines, but which are:
  - Art. XX(b): “necessary to protect human, animal or plant life or health”; or
  - Article XX(g): “relating to the conservation of exhaustible natural resources.”
- Chapeau to Art. XX: *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*

# WTO Jurisprudence: Principles

- WTO law does not exist in clinical isolation of international law and developments.
- Multilateral solutions to environmental issues are the preference; a WTO Member should therefore make *serious efforts to negotiate* such solutions. If despite such efforts, an agreement cannot be concluded, then unilateral measures for protection of environment may be taken.
- Lack of flexibility in taking into account the different situations in different countries amounts to unjustifiable discrimination.
- Environmental measures to restrict trade can be adopted only under certain strict conditions.
- Tests of *necessity* and availability of *less trade restrictive measures* need to be applied prior to application of any trade restriction on environmental grounds.

## WTO Jurisprudence: Extra-territorial action?

- **Shrimp-Turtle Case:** Appellate Body found “arbitrary and discriminatory” the requirements under U.S. law which required the exporting country to have the *same* legal requirements as that of the U.S. Instead it stated that would be acceptable to require exporting countries to have regulations that are “comparable in effectiveness” to that of the U.S.
- BUT, in the implementation of this ruling, it held: Article XX did not require the *conclusion* of an international agreement; but that this test would be satisfied if the U.S. could demonstrate that it had made ‘serious efforts’ to negotiate.

## Unilateral measures

- *Can the lack of an international consensus on “comparable and equitable commitments”, be a justification on environmental grounds for unilateral action by either the U.S. or the EU?*
- *Whether the WTO Appellate Body would consider this justifiable under Article XX?*

The answer to this aspect is not entirely clear.

# Negotiating Proposals on Unilateral Measures

- 4 different Alternatives were considered in the negotiating text for Cancun.
- Cancun Texts: Silent on Trade Measures
- None of the 4 Alternatives:
  - Highlight the circumstances under which unilateral measures under Article 3.5 can actually be exercised; or
  - Clearly state that unilateral action against parties adhering to their obligations, would undermine the concept of multilateralism itself.



# When can Unilateral Measures be allowed

- The space for any unilateral action against parties to a multilateral agreement would need to be highly limited to only specific established circumstances of non-adherence by the parties to their obligations.
- Examples from Montreal Protocol & CITES



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# Principles for Exercise of Unilateral Measures

- Such action should be confined to non-parties to the UNFCCC or any of the protocols concluded under it;
- Unilateral action against a Party to the UNFCCC / protocols under it should be confined to circumstances wherein such Party has not complied with its commitments under the UNFCCC/or any protocol under it.

# Principles for Exercise of Unilateral Measures

- Need for a framework of principles and procedures whereby a Party proposing to take unilateral trade measures would need to report the non-compliance to a multilateral monitoring/implementing authority under the UNFCCC.
  - Such an authority should have adequate powers for assessing whether there has been non-compliance.
  - The procedures should also allow for the Party which is alleged to be guilty of non-compliance, to explain its position.
- Any proposed unilateral trade measure would need to be specifically authorized by the institutional mechanism outlined above.

**THANK YOU!**