

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Fighting Climate Change: the case for a renewed discussion on Processes and Production Methods (PPMs) at the WTO – Part 2

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2. The implications of the status quo for non-product related PPMs measures

The issue of the assessment of non-product-related PPMs measures under the GATT is critical for climate policies and trade.

As noted in [Part 1](#), WTO Members wishing to implement non-product related PPMs measures will likely be blamed for infringing WTO law, regardless of the protectionist intent of the measure. This may deter WTO Members from adopting unilateral measures. In order to avoid this, they may try to shape their regulations in a way that they think will make them more susceptible to be considered WTO-compatible, relying on assumptions. For example, they may want to weigh taxation measures against regulatory measures, or design their regulations so as to mitigate the detrimental effect on competitive opportunities for imported products (in order to comply with GATT Article III, as interpreted so far by case-law). This requires a considerable amount of time and entails significant administrative costs. Most importantly, this may result in a loss of national competitiveness and undermine the effectiveness of these measures, compromising thereby their adoption.

Governments wishing to implement PPMs related measures may just decide to go ahead, regardless of the GATT compatibility. Which will certainly spill over in trade disputes. And relying on dispute settlement and Article XX alone is not a panacea, for either regulating or exporting countries.

At the outset, it must be reminded that Article XX sets out a closed list of justifications. And it is not self-evident whether measures for the preservation of climate at the global level falls within one of them. I won't discuss this in detail here. I believe though that panels and the Appellate Body would accept that these measures could potentially be justified under Article XX(b) which covers measures “necessary to protect human, animal or plant life or health” and/or Article XX(g) which covers measures “relating to the conservation of exhaustible natural resources”.

But are WTO judges well enough equipped to rule on whether a measure relating to PPMs sufficiently relates to the conservation of biodiversity or the atmosphere under Article XX(g), or whether it is effective enough in fulfilling its objective of mitigating global warming under Article

XX(b)? In trying to answer this question, one needs to consider the followings:

There is no internationally agreed way of measuring GHG emissions released in connection with the production of different goods. Therefore, a panel would have no reference against which it could assess whether a measure discriminating products based the alleged amount of such emissions is fit for purpose and effective (except that provided by the regulating country).

Regardless, it would still be difficult for judges to assess the effect of a measure at the global level. In theory, measures impairing market access for goods whose production results in higher GHG emissions contribute to curbing such emissions, and making sure that the positive impact of national climate measures is not offset by an increase in imports of lower-priced/higher GHG emissions products. In practice though, the effectiveness of the measure at doing so is hard to evaluate. Especially since such unilateral measures may have other unintended consequences, like the diversion of such products to other markets where the same conditions don't prevail.

For all the reasons outlined above, it would be tricky for WTO judges to distinguish between measures aimed at levelling the playing field in a manner necessary to fulfil the objective of net GHG emissions savings and measures that are too trade-restrictive.

As regards measures implementing border adjustments, they have a "competitiveness" component. Not only because "levelling the playing field" is presented as a necessary condition for national climate measures to be effective. But because it makes them politically acceptable. However, Article XX exceptions are "purely" environmental/health related. If it appears that one of the objectives of the measure at issue is to offset the loss of national competitiveness due to compliance with stricter environmental requirements, this measure may not be eligible for a defence under Article XX.

WTO judges may show sympathy for the environmental cause and great deference towards governments and their policy space. But delineation between what is justifiable and what is not, without being grounded on internationally agreed guidelines, would likely raise concerns about WTO judges legitimizing unjustifiably restrictive/protectionist measures under "green" cover.

In any event, the WTO case-law will develop only incrementally and, on a case-by-case basis, such that uncertainty and the lack of predictability will prevail for a long time to come, with the risk of trade disputes and retaliations.

3. Avenues for reflection

The issue of non-product-related PPMs measures is at the heart of climate policies. Yet, a discussion on the treatment of these measures in the WTO framework has been avoided so far by WTO Members, proponents of PPMs measures as well as their opponents, for the very same reasons: engaging a discussion on PPMs would weaken their case by suggesting existing WTO rules do not support their stances.

It may be time to put the relationship between trade and climate change on the WTO agenda, and enhance the relationships between the WTO and institutions and fora dealing with climate change.

WTO Members could engage discussions on the interpretation of GATT Article III with respect to:

- i) whether a tax on carbon emissions (with a border adjustment) constitutes an internal tax

measure and as such falls within the scope of Article III:2;

ii) the meaning that should be given to the term “treatment no less favourable” in Article III:4, specifically whether it should be read in light of a legitimate regulatory purpose (revisiting the criteria for “likeness” determination to differentiate between products based on their non-product related production processes may be too far-reaching).

It would also help to aim for harmonization and consensus in the framework of the United Nations Framework Convention on Climate Change (UNFCCC) and agree on guidelines on the measurement of GHG emissions, and to the extent possible on acceptable unilateral measures to tackle carbon leakage. WTO judges could rely on these internationally agreed guidelines, or the WTO legal corpus could incorporate them by reference.

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