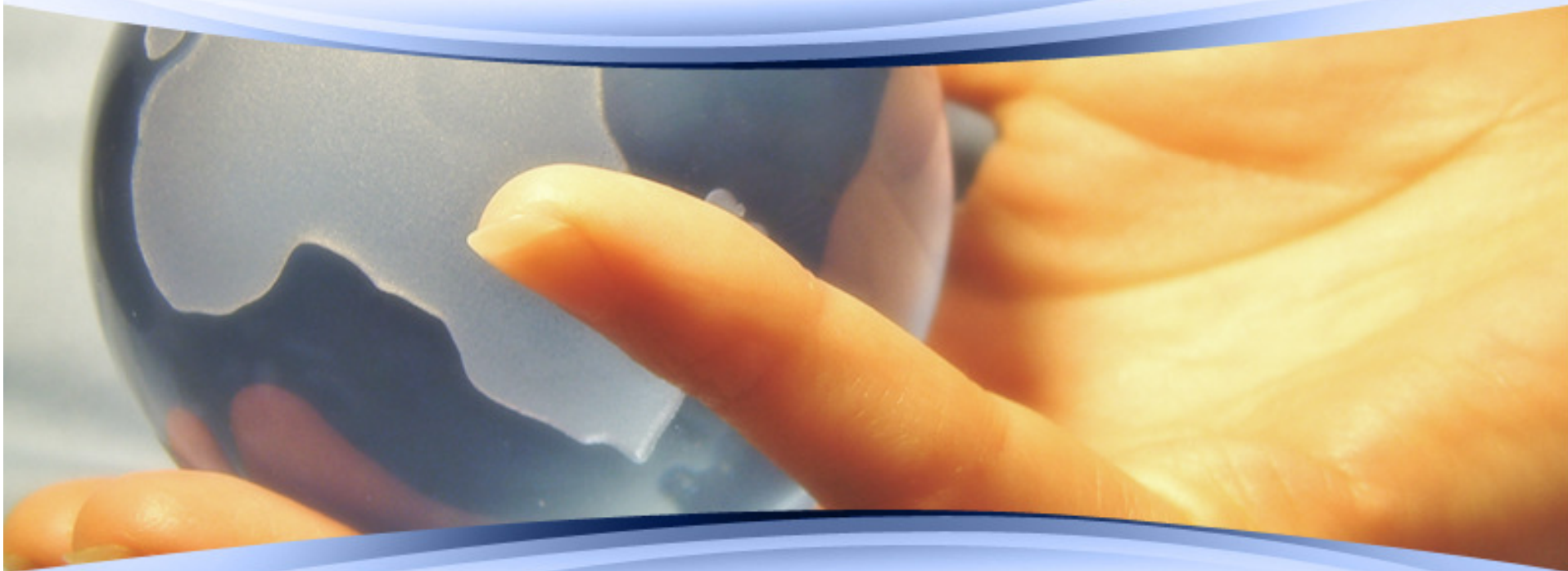


MULTILATERAL TRADE POLICIES AND MEASURES IN POST-KYOTO STRUCTURES



SAIIA Conference – Climate Change &
Trade (26 & 27 Oct 2009)

Overview



1. Trade impacts of CC on African continent

2. Climate change measures and trade

- a. Trade and environment relationship
- b. Emissions trading under Kyoto
- c. Domestic measures pursuant to Kyoto

Counselling
required?

3. Scope for reconciliation

- a. Let the system prevail
- b. A negotiated approach

What would the counsellor
prescribe?

Trade impacts of CC



- Projected impacts on primary commodities
 - Agriculture – 50% reduction in yield by 2020
 - Fisheries – severe decline in stock

- Impacts on service sector

Imperative for
adaptation

But – also imperative
for mitigation

- Impacts on primary sector
 - Decline in biomass
 - droughts



TRADE-ENVIRONMENT RELATIONSHIP

What are the issues?



- Trade undoubtedly has a negative impact on the environment:
 - Over-exploitation of natural resources
 - Pollution and waste generation stemming from manufacturing
 - Vast amounts of energy usage in transportation

The debate



Curb
trade

Trade more
sustainably

Free trade improve
environment - increasing
real income/standard of
living – thus more
resources available for
environmental protection



THE KYOTO PROTOCOL AND THE MULTILATERAL TRADE REGIME

Kyoto Protocol as Forum for Intersecting Objectives



- Kyoto Protocol like WTO seeks to facilitate efficiently functioning international markets:
 - “progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors”
 - Promotes sustainable development and seeks to create a competitive market in greenhouse gas minimising technology
- However: **manner** in which states implement Kyoto could raise issues of substantive and institutional compatibility between Kyoto and the WTO



KYOTO AND THE WTO – SCOPE FOR CONFLICT?

Emissions trading



- Kyoto – binding obligations to mitigate only for Annex I countries through joint implementation and emissions trading
 - Creation of Emissions Reduction Units (ERUs)
- Non-Annex I countries no binding obligation to mitigate – but Annex I countries may off-set emissions through CDM projects
 - Certified Emissions Reduction Units (CERs)

Emissions trading – Products?



- ERUs/CERs - are they products?
 - GATT – no definition of “product”
 - Establish on case by case basis
 - Broad interpretation of “product”
or
 - WTO = trade in tangible goods

Possible violation of WTO rules



- Discrimination against products produced in carbon-intensive manner = illegal PPMs
- If credits/allowances limited = quantitative restriction on trade

Emissions trading – Services?



- ERUs – is it a service?
 - Using accounting tools (GDP) to identify economically significant services
 - Using UN Stat Office Central Product Classification Scheme
 - None has emission credits/allowances as service
- But: EU proposal –
 - Core environmental services:
 - Ambient air and climate

Violation of GATS?



- CDM projects and resulting Certified Emission Reductions may create tradable services
 - May lead to MFN or NT claims, e.g. if different project rules for different countries or domestic and non-domestic producers

From African perspective



- Would prefer:
 - Narrow definition of products
 - Exclusion of climate from GATS

Domestic response measures to CC



- Annex I countries have option of designing measures to meet their emissions targets
 - i.e. energy efficiency measures, promotion of sustainable agriculture, subsidies for new technologies, new and renewable forms of energy, domestic taxes, etc.
 - the way in which these measures are designed could lead to potential conflict with WTO rules
 - UNFCCC: ‘ Parties should cooperate to promote a supportive and open international economic system’ and that ‘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’
 - Kyoto Protocol: ‘Annex I parties ‘shall strive to implement policies and measures under this Article in such a way as to minimise adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties, especially country Parties’

Domestic Measures Implementing Kyoto



- Carbon taxes and border-tax adjustments
- National standards (and labeling) favouring domestic companies at the expense of foreign companies
- Domestic subsidies to encourage renewable energy generation/use

Conundrum – mitigating measures by Annex I countries may have negative trade effects for African countries

Carbon taxes and BTAs



- Carbon tax levied against products that emit carbon during the production process
- Accompanied by border-tax adjustments (BTAs) on imported goods
 - application of a charge or tax on a carbon intensive product which is being imported into the country where a carbon tax is already levied against the like domestically produced product and/or its inputs
 - Require foreign exporters to purchase emission rights for the carbon content of their goods
- Possible violation of NT or MFN
- Possible non-product related PPM

Africa & BTA



- BTA levied against African products
- Exclusion of African goods (principle of common but differentiated responsibilities) – may violate MFN
 - May, however be saved by Art XX(g) exception

Standards



- Use of national standards – e.g. energy efficiency standards, fuel economy standards or some form of climate labelling
- Non-discrimination
- Label based on how produced – illegal PPM

Standards & Africa



- Standards = notorious for creating insidious non-tariff barriers
- Concern from African producers facing major barriers to developed country markets
- Cost of modification, testing and approval of products often cancels the benefit of reduced tariffs
- Thus:
 - Exempting African goods?
 - Financing NB

WTO Prohibited Subsidies



- Agreement on Subsidies and Countervailing Measures:
 - Financial contribution that confers a benefit & that causes adverse effects
- Possible conflict
 - Specific subsidies, e.g. afforestation, grant to automobile industry to develop new technologies
 - Establishment of emission allocation systems –emission rights to specific enterprises/economic sectors which might be prohibited financial contribution – (*Lumber decision* – financial contribution not ltd to money-transfer. Include in-kind transfer of resources, i.e. right to harvest trees)
 - Allocation of credits/allowances discriminating against foreign competitors
 - Persistent failure to enforce national legislation limiting GHG= actionable subsidy

Africa & subsidies



- African goods cannot compete
- Solution?
 - Negotiating favourable terms for competing goods



POSSIBLE SYNERGIES

Let the system run its course



- Dispute settlement

- Leave the dispute to the DSU of the WTO
- DSU rules disproportionately in favour of trade, but

“In reaching these conclusions, we wish to underscore what we have *not* decided in this Appeal. We have *not* decided that the protection and preservation of the environment is of no significance to Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly they can and they should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally, or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly they should and do.”

- But rather avoid dispute settlement

Let the system run its course



- Vienna Convention on the Law of Treaties
 - In event of conflict between two international agreements: *Lex posterior*: subsequent agreement prevails
 - But what is a “subsequent agreement”?
 - Gatt 1947 and GATT 1994
 - UNFCCC 1994 & Kyoto 1997 & Post-Kyoto agreement?

A negotiated approach



- Waiver under Article IX of GATT
 - Approval of $\frac{3}{4}$ of members
 - Time limited
- Amend AXX – insert an exception for MEAs with certain requirements
- Plurilateral Code: “Code of Good Practice on GHG Emissions Control”
 - Policy space for climate measures imposed broadly consistent with WTO rules even if technically in violation of WTO rules

Conclusion



- Most hope lie in negotiated approach

But:

- Pascal Lamy: “an international agreement that embraces all polluters should come first, i.e. Before the WTO addresses the issue of WTO compatibility with trade measures related to climate change”



THANK YOU

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