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The Rise of 'Climate Protectionism'

Martin Khor

A new and dangerous form of trade and technology protectionism is fast emerging in the name of Climate Change, and it is poisoning North-South relations in the two negotiating arenas on climate change and on trade.

There are clear signs that some developed countries, especially the United States, are preparing to use unilateral trade measures, such as imposing tariffs, taxes or charges on the products of developing countries, on the grounds of combating climate change.

A bill passed recently by the U.S. House of Representatives gives the US President authority to impose financial charges (or taxes) on some imports coming from developing countries that in the US view are not taking enough action to curb their Greenhouse Gas emissions.

The US House of Representatives has also sought protectionism against technology transfer through three bills it has adopted that prevent US negotiators in the UN climate change convention from agreeing to any relaxation in the rules or enforcement of intellectual property.

There are signs that other developed countries, including in Europe, are also preparing the grounds for climate-linked protectionism.

The developing countries are starting to oppose these moves. Indian political leaders protested to Hilary Clinton about the threat of US carbon tariffs during her visit. China's Commerce Ministry has also criticized the protection element in the US climate bill.

Most importantly, the developing countries have taken up the issue at the climate talks leading up to Copenhagen. On 13 August, the G77 and China made a statement at the Bonn climate talks, warning developed countries not to adopt unilateral trade-restrictive measures, as these would contravene the Climate Change Convention's provisions.

India also proposed text for the Copenhagen outcome, that developed countries "shall not resort to any form of unilateral measures including countervailing border measures, against goods and services imported from developing countries on grounds of protection and stabilization of climate."

The text listed many provisions of the Convention that would be violated if such measures are taken. This was supported by many countries, including China, Argentina, Brazil, Singapore, South Africa, Saudi Arabia, and by the G77 and China's statement.

In Geneva, many developing country diplomats are increasingly concerned about the likelihood of the US and other developed countries making use of either tariffs or financial charges on imports of developing countries.

Imposing extra tariffs or financial charges on imports on the basis of how the products are produced ("process and production methods" or PPMs in technical jargon) is very controversial. It has been rejected by developing countries at the WTO since 1996 as a form of protectionism, which they say will unfairly curb developing countries' exports. They also argue that it is against the rules of the WTO.

Many developed countries however have wanted to make use of trade measures on environmental grounds. They are preparing the case that trade measures linked to PPMs are legitimate, or else climate-linked trade measures are allowed under the GATT's general exception for the environment.

Developing countries claim that linking trade measures to climate and the environment are unjust because

Continued on page 2

Inside this issue:

Recent US Congress bills contain trade and IPR measures against developing countries' interests

Threat to Block South's Exports on Climate Grounds

By Martin Khor

Can and should developed countries impose extra charges on the imports of developing countries based on the level of carbon dioxide and other greenhouse gases that are linked to producing the imports?

This has become a burning issue, especially since the US House of Representatives passed a bill on climate change in June.

The American Clean Energy and Security Act of 2009 (also known as the Waxman-Markey bill) obliges the US President to place a charge on importers of certain products that come from developing countries by 2020.

The importers will have to buy "allowances" for the emissions of the products they bring into the country. In effect, this is like putting an extra tax or duty on the developing countries' goods, and the rate may depend on how much carbon dioxide is emitted during the making of these products.

The bill's advocates say this is needed so that US domestic firms, which will also have to pay for emissions allowances, can maintain their competitiveness vis-à-vis imports.

The law will limit the total level of emissions for the country. Importers of goods from countries that have not undertaken emission reduction commitments as stringent as the US in an international agreement (or that do not meet two other criteria) will have to purchase "international reserve allowances".

Since other developed countries are obliged to cap their emissions at a level still to be negotiated, the US-proposed import measure will apply only or mainly to developing countries. Least developed countries are exempted, as are also those developing countries accounting for a small share of the total emissions.

The middle-income developing countries and those with large populations will be affected. Importers of their heavily-traded energy-intensive products will have to buy emissions allowances, a measure that will raise the prices of the imports, which could affect their sales in the US.

The products to be subjected to this new import charge are expected to include chemicals, iron and steel, cement, glass, lime, some pulp and paper products, and non-ferrous metals such as aluminium and cper.

The two biggest developing countries – India and China – have already attacked this part of the Waxman-Markey Bill as constituting disguised protectionism and flouting the rules of the World Trade Organisation (WTO).

The Indian Environment Minister Mr. Jairam Ramesh described carbon tariffs as "pernicious." He said that climate change should not be negotiated at the WTO.

Mr. Yao Jian, a spokesperson of China's Ministry of Commerce, on 3 July criticised developed countries for proposing to impose carbon tariffs. "China has consistently advocated that the international community faces climate change together, but some developed countries have advocated using carbon tariffs against imports," he said. "This violates basic WTO rules. It only pretends to protect the environment, but really it protects trade…To put out carbon tariff policies during the economic crisis and ahead of the annual climate change conference this year is not timely. It doesn't strengthen faith in the international community's cooperation against the crisis."

static.guim (uk)

The Waxman-Markey bill was passed by a small majority of the US House of Representatives in the last week of June. The US Senate will produce its own version of a climate bill, and this is expected to be even more protectionist. A joint Congress bill will then be sent to President Obama for his approval.

Under the Waxman-Markey bill, the import measures will be automatically applied, unless the President declares that the measures are against the national economic interests, and Congress approves this declaration.

The use of trade measures with the effect of blocking out developing countries' goods on climate grounds is beginning to generate great controversy and may result in a severe blow to the WTO and the multilateral trading system, as well as sour the atmosphere in the negotiations taking place in the UN's climate convention.

Many developing countries will read the bill as an attempt by the US to evade its commitment to assist developing countries, and instead shift the

'Climate Protectionism'

Continued from page 1

they have lower technological capacity and thus cannot match the developed countries. Developing countries should instead be assisted through technology transfer, but the IPR regime (especially the TRIPS agreement) is an obstacle, and now the US Congress is proclaiming that the US administration cannot allow relaxation of the IP rules.

If climate protection is allowed, it will also open the floodgates to all kinds of protection by blocking developing country products on the basis of how they are made.

This "mother of new trade protection" is coming at a time of economic recession when world leaders have piously proclaimed they will not resort to trade protection.

The climate-trade issue is thus explosive, and is opening a Pandora's Box which threatens to contaminate the negotiations in the UNFCCC as well as the WTO.

Before the situation deteriorates, developed countries should re-consider their moves on this issue, restrain the climate-protection forces in their society and commit instead to a "fair game".

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Developing countries are worried their exports will be curbed by climate related trade measures

burden of adjustment onto these developing countries.

Under the climate convention, only developed countries have to undertake legally binding commitments to cut emissions, in recognition that they are responsible for much of the emissions in the past.

Under the convention, the developed countries also committed to pay for the costs incurred by developing countries when they take actions on climate change. The convention also says that the extent to which the developing countries act against climate change depends on the extent to which developed countries provide them with finance and technology transfer.

The import measures proposed in the US Bill will be seen as an attempt to escape these provisions of the convention, and instead to push the costs of adjusting to a climate-friendly world onto the developing countries. The developing countries have already attacked such a trade measure during the UNFCCC talks in Bonn in August.

Allowed under WTO?

Controversy is also brewing as to whether the proposed US measures are allowed in the WTO. For a measure to be legal under the WTO, it must meet two tests.

Firstly, there must be "national treatment", in that the local product is subjected to the same charges as the imported product.

Secondly, products that are like one another should be treated the same way. But the term "like product" is taken to mean an imported good that has the same physical characteristics as the local good. Both should be charged the same rate.

In considering import taxes or charges, it is the physical characteristics of the imported product that should be considered, and not the processes and production methods (PPMs) that are used in making the product.

Many argue that since the climate-related charges to be imposed are based on processes and production methods (that is, on how much emissions were generated by the production), and not on the physical characteristics of the product, this is not compatible with the rules or spirit of the WTO.

However, others point out that there have been a number of panel cases in the WTO on the processes and production methods issue, and that the decisions of the panels have not been conclusive as to whether an import measure based on PPMs is allowed by the WTO.

If the measure does not clear these two tests, its advocates could try another argument, which is to rely on Article XX of the GATT agreement, which allows for an exemption (from following the GATT rules) on environmental grounds, provided certain conditions are met.

Making use of this environmental exception to impose an extra tax on developing countries' imports based on their emission or pollution levels is unfair to developing countries, because their levels of development, financial resources and technology are much lower than those of developed countries.

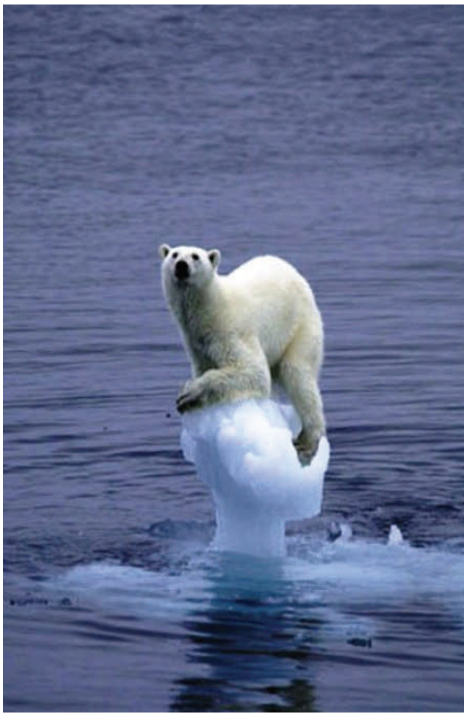
Unfair to the South

As the trade expert Chakravarthi Raghavan remarked in 1996, when the trade and environment issue first emerged at the WTO, it is an imbalance and unfair to developing countries to have a general environment exception to the GATT/WTO rules (which favour developed countries since they control environmental technology) while the WTO does not have a general development exception to the GATT/WTO rules (which would enable developing countries to exempt certain rules on development grounds).

To make use of trade measures on climate change grounds would in effect be to punish developing countries for being less developed. They face barriers such as IPRs (owned mainly by rich countries' companies), lack of technology cooperation and little funds, that prevent them from having low-emission industrial production.

The developing countries thus become double victims – of the effects of climate change, and of the developed countries' measures that push the adjustment burden onto them.

This issue has already been brought up at the UNFCCC talks, and is likely to figure prominently as well in the WTO, as the developing countries object to trade measures being used unilaterally that block their exports. It is an issue that will be hotly debated for years to come.



Source: parkhowell.com

Climate change is already having a dramatic impact on the environment and will also complicate countries' trade relations

India, G77 Propose Text Against Trade Protection in Copenhagen Draft

UNFCCC Session in Bonn in August

The Copenhagen conference on climate change in December should make clear that developed countries shall not make use of climate change to introduce unilateral trade measures against goods and services imported from developing countries.

This demand was made by the G77 and China in Bonn in August, during a preparatory meeting for the Copenhagen conference under the UN Framework Convention on Climate Change (UNFCCC).

Trade protection in the name of climate change has become one of the most heatedly discussed issues in the climate talks. This was catalysed by the climate-related bill (known as the Waxman-Markey bill) passed by the US House of Representatives in June.

At the Bonn session (3-14 August 2009), India proposed explicit language to be included in the Copenhagen outcome, that developed countries shall not to resort to any form of unilateral measures against goods and services imported from developing countries on grounds of protecting the climate as such measures violate the provisions of the United Nations Framework Convention on Climate Change.

At the same session, the Group of 77 and China also called on developed countries not to adopt unilateral trade-restrictive measures against developing countries. The group said that if they adopt these trade measures, the developed countries would be passing on their mitigation burden onto developing countries, and this would contravene the principles and provisions of the Climate Change Convention.

The G77 and China stated that the measures would in particular be contravening the Convention's principles of equity, common but differentiated responsibility and respective capabilities, and the principle enshrined in article 3.5 that 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.

[Article 3.5 also states 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"].

The G77 and China made these points on 13 August in a statement presented by Brazil at the sub group on "economic and social consequences of response measures".

The G77 and China also proposed to establish a mechanism, such as a Forum, to identify and minimize the adverse economic consequences of response measures. It also provided the terms of reference of this mechanism.

The statement of G77 and China commented that developed countries are in the process of designing and implementing trade-distorting measures to combat climate change, such carbon border adjustment measures, carbon tariffs, carbon footprint labeling.

"These measures could have distortive effects on international trade, restrict the exports of developing countries and negatively affect the workers of those sectors that would have response measures, and therefore hinder the social and economic development of our countries," said the group. "Developed country Parties should not adopt unilateral trade restrictive measures against developing countries in

India's Proposed Copenhagen Text Opposing Unilateral Trade Measures

At a meeting of the Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA) of the UNFCCC in Bonn on 12 August, India proposed the inclusion of the following paragraph for inclusion in the negotiating text for the Copenhagen conference:

"Developed country Parties shall not resort to any form of unilateral measures including countervailing border measures, against goods and services imported from developing countries on grounds of protection and stabilisation of climate. Such unilateral measures would violate the principles and provisions of the Convention, including, in particular, those related to the principle of common but differentiated responsibilities (Article 3, Paragraph 1); trade and climate change (Article 3 paragraph 5); and the relationship between mitigation actions of developing countries and provision of financial resources and technology by developed country Parties (Article 4, Paragraphs 3 and 7)."

contravention of the provisions of the UNFCCC."

India had proposed that its text be incorporated into the mitigation section of the text that deals with response measures. However other countries including China, Singapore and Saudi Arabia also wanted the text to be in the section on "shared vision.", which has more prominence.

The G77 and China statement presented to the sub-group also dealt with other matters. It said that "all developing countries will suffer economic and social consequences of response measures. Policies and measures to mitigate emissions should take into account the potential negative environmental, social and economic consequences of response measures on developing countries and consideration must be given to concrete remedies and effective actions to minimize any such consequences."

It added: "There is a need for concrete action related to funding, and the transfer of technology for developing country parties, and to establish a mechanism, such as a Forum, to identify and minimize the adverse economic consequences of response measures as follows:

• Identifying, quantifying and considering means to address the adverse impacts of measures taken to mitigate climate change on developing country Parties.

• Providing support for the integration of economic diversification into sustainable development strategies and for facilitating efforts to achieve economic diversification in developing countries.

• Encouraging direct investment, in particular through technology transfer from developed countries to assist and promote the economic diversification of developing countries.

• Addressing the extent to which measures taken to mitigate climate change that constitute restrictions to trade raise concerns for developing country Parties with respect to their impact on social and economic development in developing countries.

• Removing the barriers to effective technology transfer and of financial resources necessary to respond to mitigation measures."

By Martin Khor and Hira Jhamtani

New Climate Protectionism: Analysis of the trade measures in the US climate bill

Vicente Paolo Yu

In making national policies on climate change, developed countries should ensure that these do not penalize developing countries.

However, governments in some developed countries are now proposing to impose carbon-based taxes, including border tax adjustment measures, on products imported from developing countries. These are based on the argument that because developing country producers are able to utilize less costly but higher carbon emitting production methods for such products, developing countries' products are hence cheaper and more competitive than similar products produced by developed countries.

Europe

In November 2006, then-French Prime Minister Dominique de Villepin suggested that countries "do not sign up to a post-2012 international treaty on climate change could potentially face extra tariffs on their industrial exports." This suggestion was opposed by the European Commission, citing potential conflicts with WTO rules.

But his idea was reiterated by then-French President Jacques Chirac in January 2007 and by current French President Nicolas Sarkozy in November 2007. In early 2008, the European Commission discussed proposals that would impose a de facto carbon tax on imports by requiring companies importing goods into the European Union from countries that do not similarly restrict greenhouse gas emissions to first buy EU emissions permits. To date, however, there is as yet no EU-wide carbon-based border tax.

United States

In the United States, a bill was passed on 26 June 2009 by the House of Representatives that contains carbon-based border adjustment measures to address competitiveness and carbon leakage concerns. These concerns are in Sec. 401 of House Resolution No. 2454 entitled the "American Clean Energy and Security Act of 2009" authored by US Representatives Henry Waxman (D-CA) and Edward Markey (D-MA).

This section would insert a new "Part F" to Title VII of the US Clean Air Act, which part would be entitled "Ensuring Real Reductions in Industrial Emissions." This new Part F has two subparts:

Source: JasoReed/Reuters

US President Barack Obama supported the US climate bill at a news conference in June

• Subpart 1 – establishing an Emission Allowance Rebate Program commencing no later than 30 June 2011 for eligible industrial sectors that would allow the US EPA to distribute emission allowances to greenhouse gas-emitting entities in US domestic eligible industrial sectors in order to "rebate the owners and operations [of these entities] for their greenhouse gas emission costs incurred under this title, but not for costs associated with other related or unrelated market dynamics'; and

• Subpart 2 – authorizing the US President that if, by 1 January 2018, a multilateral agreement that meets the negotiating objectives set out in Sec. 766 of the Clean Air Act has not entered into force with respect to the US, to establish an International Reserve Allowance Program no later than 30 June 2018, which would require US importers to purchase and submit international reserve allowances as a condition for being able to import into and sell in the US goods produced outside the US (subject to certain qualifications). However, the International Reserve Allowance Program may not apply to imports into the US before 1 January 2020.

Photo: triplepundit

The world is caught in a bind of climate and trade linkages and potential conflict

US Emission Allowance Rebate Program

Under this program, owners or operators of a GHG-emitting "covered entity" (e.g. an iron or steel factory or chemical plant) that are under industrial or manufacturing sectors that are energy-intensive – i.e. they meet certain energy or GHG intensity thresholds ("at least 5 percent") – and are trade-exposed – i.e. they meet a trade intensity threshold ("at least 15 percent"), or which meet a "very high energy or greenhouse gas intensity" threshold of "at least 20 percent", can obtain rebates from the US government for their greenhouse gas emission costs.

These emission allowance rebates that can be distributed as rebates to offset greenhouse gas mitigation costs can be availed of by entities in the US manufacturing sector, in particular those that are deemed to be "trade-vulnerable" – i.e. energy-intensive, trade-exposed – industries under Sec. 782(e) of the US Clean Air Act. These would include, for example, the US metal and phosphate producers and US manufacturers of items for consumption.

The rebate program is designed in such a way that it would effectively subsidize US energy-intensive and trade-exposed industrial sectors' costs of compliance with more strict greenhouse gas emission regulations by offsetting such costs with more emission allowance rights which the rebate recipient would then be able to sell or transfer to other emitters or to bank the rebate allowances which it can then use for purposes of complying with the law.

US International Reserve Allowance Program

The International Reserve Allowance Program is intended to address the competitiveness issues that may arise vis-à-vis US producers or manufacturers if "85 percent or less of United States imports" of the "covered goods" with respect to specific industrial sectors are produced or manufactured in countries that meet one or more of the criteria in Sec. 767(c) of the Clean Air Act.

The criteria are as follows:

(1) The country is a party to an international agreement to which the United States is a party that includes a nationally enforceable and economy-wide greenhouse gas emissions reduction commitment for that country that is at least as stringent as that of the United States;

(2) The country is a party to a multilateral or bilateral emission reduction agreement for that sector to which the United States is a party;

(3) The country has an annual energy or greenhouse gas intensity, as described in section 763(b)(2)(A)(ii), for the sector that is equal to or less than the energy or greenhouse gas intensity for such industrial sector in the United States in the most recent calendar year for which data are available.

What this basically means is that if 15 percent or more of US imports of the covered goods for that sector are produced or manufactured in countries that do not meet at least one of such criteria, then the President of the US will be required, no later than 30 June 2018 and every four years thereafter to refine, put in place and implement an International Reserve Allowance Program with respect to such goods.

Many goods imported from developing countries will be affected by this provision. For example:

• In 2004-2007, the share of US imports of cement (hydraulic cement) of just three non-Annex I UNFCCC Parties (China, Thailand, and Korea) already exceeded 15 percent of total US imports – e.g. China, 19%; Thailand, 9%; Republic of Korea, 8%.

• In May 2009, almost 43% of US imports of steel products came from just six developing countries (i.e. Mexico, 10.8%; China, 14.5%; Brazil, 1.7%; Venezuela, 1.5%; India, 2.8%; Korea, 11.5%).

Under this program, goods may be imported into the US only if "international reserve allowances" are first purchased by the US importer from the US government. Then the appropriate amounts of such purchased allowances to cover the imported goods being imported are submitted to the US government.

The purchase of the international

reserve allowances for imported products would not be required in the following instances:

• the product is from a country that is "determined to meet" any of the greenhouse gas mitigation commitment-related criteria set out in Sec. 767(c);

• the product is produced in a least-developed country as identified by the UN;

• the product is produced in a foreign country responsible for less than 0.5 percent of total greenhouse gas emissions and less than 5 percent of US imports of covered goods with respect to the eligible industrial sector.

The purchase price for the international reserve allowances to be paid by a US importer to the US government is to be equivalent to the auction clearing price for emission allowances obtained for the most recent emission allowance auction. The general methodology for determining the amount of purchased international reserve allowances to be submitted by a US importer is left to the US EPA with the concurrence of US Customs to determine.

This is essentially a carbon-based border adjustment measure. It would effectively increase the transaction cost of countries, especially developing countries (since they are not obliged to sign on to binding emission targets in the UNFCCC) in exporting their products to the US. As a result, the application of the International Reserve Allowance Program to various goods from developing countries would reduce the trade competitiveness of the affected exporters from developing countries.

Conclusion

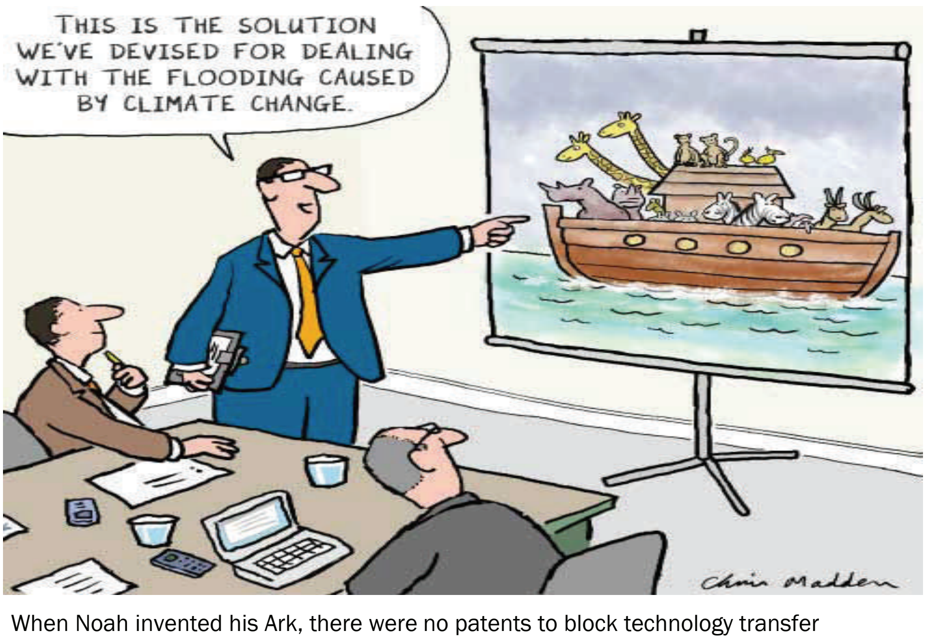
In short, under the Waxman-Markey bill, to address the carbon leakage and competitiveness concerns of US industry, the US government would:

• Compensate – i.e. subsidize – the costs incurred by these industries (in particular the energy-intensive and trade-vulnerable ones) for complying with more stringent US GHG emission targets; and

• Raise trade barriers (in the form of the requirement to purchase and submit international reserve allowances as a condition for importation into in the US) to products from other countries, especially developing countries, that would compete with the goods produced by these US industries.

It should be noted, however, that the Obama administration has stated in a 14 April 2009, letter by the US Trade Representative, Ron Kirk, to a senior member of the House Committee on Energy and Commerce, that it believes that "the best approach to address carbon leakage concerns is to negotiate a new international climate change agreement in the United Nations that ensures that all major emitters take long term, significant action to reduce their greenhouse gas emissions" and that it "does not support any specific measures, including border measures, at this time."

Should these provisions in the Waxman-Markey HR No. 2454 pass the US Senate and are signed into law by President Obama, the consistency of these provisions in relation to WTO rules and disciplines (especially on non-discrimination and prohibited subsidies) need to be carefully assessed.



Source: chrismadden (UK)

When Noah invented his Ark, there were no patents to block technology transfer

The border adjustment measures raise deep concerns among developing countries. Their access to developed country markets is a major component in their development strategy. Hence these are likely to be seen as disguised protectionist measures that would arguably be contrary to UNFCCC Art. 3.5 and relevant WTO rules.

These measures will have an adverse effect on the UNFCCC negotiations on the Bali Action Plan. They are likely to be seen:

• as an attempt to protect domestic US greenhouse gas-emitting industries from the alleged adverse international competitiveness impacts that may arise as a result of the imposition domestic US greenhouse gas mitigation requirements;

• as an attempt to extra-territorially enforce developed countries' carbon emission standards onto developing countries' products and production processes even when the latter do not have the finance nor technology to effectively adopt and comply with such standards;

• as an attempt to penalize developing countries, through making their exports less competitive, for not undertaking GHG emission reduction commitments or targets;

• as an attempt to prevent developing countries from their achieving development objectives (resulting in a "lock-in" of poverty) in part by limiting export opportunities; and

• as non-compliance by developed countries with their treaty commitments under both the UNFCCC (Art. 3.5) and the WTO not to engage in arbitrary or unjustifiable discrimination or disguised restrictions on the trade of developing countries.

Such measures do not, therefore, send a positive political signal on the part of developed countries to engage and negotiate with developing countries in good faith in both the UNFCCC and WTO negotiations. These could have detrimental effects on the ability of UNFCCC Parties to engage constructively with each other with arriving at an agreed outcome for the Bali Action Plan in the UNFCCC or the Doha negotiations in the WTO.

NOTE: This is a summary of a South Centre informal note on "The New Climate Protectionism in the North: Subsidies and Border Adjustment Measures in the Name of Climate Change."

Competitiveness, Trade and Climate Change Linkages: Developing Countries' Perspectives

Vicente Paolo Yu

Issues that link trade competitiveness and climate change policy reflect how developing countries view the policy regimes under the UN Framework Convention on Climate Change (UNFCCC) and the World Trade Organization (WTO).

For developing countries, the priority is how the issues affect their development prospects.

The relationship between trade and climate change measures in the climate regime is governed by, among others, Art. 3.5 of the UNFCCC which states 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."

This language, in fact, reflects Art. XX of the General Agreement on Tariffs and Trade (GATT), which allows WTO members to adopt measures that may be inconsistent with their WTO obligations if such measures are, inter alia, "necessary to protect human, animal or plant life or health" or are related "to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption", provided that these 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."

From the perspective of developing countries, trade measures are not the best nor the most appropriate means for addressing climate change. Rather, there is great concern that the use of trade measures by developed countries ostensibly to address climate change concerns may in fact have the effect of restricting the market access of developing country products in developed countries and enhancing the competitive edge that developed countries have in global trade, thereby "locking in" the current inequitable development gap between developed and developing countries.

Trade Liberalization in Environmental Goods and Services

Proposals in the WTO for market opening by developing countries to developed countries' environmental goods through precipitate tariff and non-tariff barrier elimination inconsistent with their development context could lead to a situation of technology-dependency in which developing countries depend on developed countries as the providers of such goods without developing the ability to manufacture such goods on their own.

A more appropriate approach requires the promotion of broader policy measures designed to support developing countries' ability to adopt, adapt, and innovate on such goods (such as flexibilities in IPR regimes, technology transfers, support to research) as well as develop their own environmental goods. This also requires funding support.

Technology Transfer and Intellectual Property Rights

An essential component of global action to address climate change is the continuous innovation and rapid diffusion of climate-related environmentally sound technologies (ESTs) under conditions that would allow all countries, especially developing countries, to eventually adopt, adapt, innovate and produce such technologies on their own. Although the transfer of ESTs from developed to developing countries is, under the UNFCCC and its Kyoto Protocol, a treaty commitment on the part of developed countries, actual transfers on a non-commercial basis have not really taken place.

IPR issues are important to consider since most ESTs are patented technologies owned by firms in developed countries, and there are an increasing number of patents on climate related technologies. Developing countries in the UNFCCC negotiations have pushed for a relaxation of existing IPR regimes.

Standards-Setting

Energy efficiency standards can be regulatory vehicles that can be used to promote energy efficiency and change energy producer and consumer behaviour. However, there are great variations in terms of the methodologies, technical bases, testing modalities and procedures, and enforcement processes in defining and implementing such standards. In this context, developing countries have generally stressed that the development of such standards must be consistent with the WTO Agreement on Technical Barriers to Trade. Furthermore, due consideration must be given for the specific national circumstances of developing countries when standards are to be applied. The UNFCCC recognizes the need to ensure that such standards-setting does not adversely impact developing countries. In shaping such international standards, developing country participation must be ensured. Also, standards must provide for flexibility to allow developing countries to reflect in such standards their own development context.

Border Adjustment Measures

Since the 1990s, energy-intensive industries in developed countries have become subject to carbon taxes and higher energy efficiency standards. Although the competitiveness impacts of domestic carbon-based taxation and regulation in developed countries on their energy-intensive industries may in most cases not be significant or are indirect and oftentimes mitigated by exemptions or subsidies, developed countries still seek to address perceived adverse competitiveness impacts arising from asymmetrical carbon-based taxation and regulation through carbon-based border adjustment measures.

A recent example is the "American Clean Energy and Security Act of 2009". Among others, it would authorize the US President to establish an International Reserve Allowance Program no later than 30 June 2018, if by 1 January 2018 a multilateral agreement that meets US negotiating objectives on climate change (e.g. objectives that essentially require that the agreement include binding mitigation commitments for "major emitters" including developing countries) has not entered into force with respect to the US.

This international reserve allowance program would be applied to imported goods where 15 percent or more of US imports of such goods are produced or manufactured in countries that do not essentially do not have the same level of GHG mitigation actions or commitments as the US.

It would require US importers to purchase and submit international reserve allowances as a condition for being able to import into the US foreign-produced goods. This international reserve allowance requirement is essentially a carbon-based trade-related border measure.

It would effectively increase the transaction cost of other countries – especially non-Annex I UNFCCC Parties – in exporting their products to the US. In consequence, the application of the International Reserve Allowance Program to various goods from developing countries would then reduce the trade competitiveness of exporters of the goods covered thereby.

However, studies have suggested that addressing carbon competitiveness concerns using a system of border adjustment measures may not necessarily be effective, especially in light of the "administrative requirements, costs and technical practicality" of border adjustments that serve as the "greatest barriers to their implementation," nor in terms of meeting any objective they might have of getting other countries to adopt more stringent carbon emission regulations – especially if the trade flows of the countries concerned with respect to the products covered by the measures are not large or significant to the exporting country.

The potential of having their exports be discriminated against as a result of such subsidies and border measures in the name of climate change raises deep concerns among developing countries. The ability to access developed country markets for their exported goods remains a major component in many developing countries' development strategies.

Hence, carbon-based border adjustment measures are likely to be seen as disguised protectionist measures that would arguably be contrary to UNFCCC Art. 3.5 and various WTO rules. Border barriers to their exports will have adverse implications on the extent to which developing countries will be able to generate trade-derived capital surpluses to invest domestically in building up improved development-oriented physical, human and financial infrastructures. Such measures would have detrimental effects on the ability of UNFCCC Parties to engage constructively with each other with arriving at an agreed outcome at the conclusion of the process under the Bali Action Plan. Border adjustment measures are likely to be highly politically divisive.

Carbon Competitiveness and Leakage

The issue of "carbon leakage" – i.e. a relocation of carbon-intensive industries from countries with stringent climate change-related rules (such as GHG emission restrictions leading to lower emissions) to countries with less stringent rules or without such rules (leading to increased emissions) – has been flagged by developed countries as a major issue.

But developing countries are suspicious that this issue has been raised because the developed countries want to ensure that they continue to maintain their trade competitive edge with respect to high-value-added and energy-intensive manufactured products. These industrial sectors – especially iron and steel, cement, chemicals – form the backbone for industrial diversification and the development of a manufacturing base for higher-value added products. Developing countries are concerned that developed countries want to use the "carbon leakage" argument to enact measures to prevent them from climbing up the manufacturing value chain.

Conclusion

As stressed in Art. 4.7 of the UNFCCC, in implementing climate change-related actions, the first and overriding priority of developing countries is economic and social development and poverty eradication. This priority underlines, shapes, and influences developing country perspectives, positions and actions on climate change. Initiatives, proposals, or suggestions that may adversely impact on the ability of developing countries to promote and achieve their development objectives would, hence, be reacted to negatively.

To unblock the negotiations and send positive negotiating signals, developed countries should refrain from adopting border adjustment measures, pushing for trade liberalization of climate-friendly products of export interest to developed countries, and adopting standards that may act as barriers to the exports of developing countries.

In the ultimate analysis, issues of trade competitiveness and climate change are about the sharing of the shrinking global emissions budget. These issues are therefore a reflection of a broader global policy debate over the developing countries' role and influence in global governance.

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Climate-technology Protectionism and IPRs

Three US Congress bills prevent the US administration from agreeing to relax IPR rules or enforcement in the global climate talks, thus posing barriers to technology transfer

Sangeeta Shashikant

The transfer of climate-related technology to developing countries is facing barriers in new United States policies with protectionist elements.

There is scientific consensus on the seriousness of climate change and recognition of the need for swift worldwide deployment of low greenhouse gas (GHG) emission technologies. Yet, the US, which is a major source of present and future climate-friendly technologies, is adopting policies that will strengthen barriers to access those technologies.

Of concern are three laws: the American Clean Energy and Security Act 1978 (amended 2009), the Foreign Operations and Related Programs Appropriations Act 2010, and the Foreign Relations Authorization Act for fiscal years 2010 and 2011, recently approved by the House of Representatives and pending in the Senate.

These contain provisions that condition US participation in any global climate deal and provision of funding (bilateral and multilateral assistance) for climate-related purposes to robust compliance and enforcement of existing international legal requirements for the protection of intellectual property rights (IPRs). The IPRs to be applied and enforced are those formulated in the World Trade Organisation Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) and bilateral trade agreements.

These developments are counter to the call by developing countries for an appropriately balanced IPR system to enable effective transfer of technologies to deal with climate change.

At the UN Framework Convention on Climate Change session in Bonn in August 2009, in preparation for the Copenhagen conference in December, the US representative called for IPR issues to be "taken off the table." These issues had been placed by developing countries, as barriers to technology transfer. The G77 and China has proposed that patents on climate-related technology be exempted for developing countries.

The US administration's position at the UNFCCC climate talks is reflecting the stand taken by the US House of Representatives. Since the IPR issue is such a critical component of the broader technology transfer issue in the climate negotiations, the extreme US position is posing a serious problem in the countries getting to a deal in Copenhagen.

The new US policies raise questions on whether developed countries are serious about fulfilling their UNFCCC commitments, in particular, that the "developed country Parties ... shall take

all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention" [Article 4(5) of the UNFCCC.]

Policies pertaining to intellectual property as well as other protectionist policies (e. g. subsidies and border adjustment measures) found in the recent ACES and other Acts being considered by the Congress are likely to have detrimental effects on the ability of UNFCCC Parties to engage constructively and to achieve an ambitious and equitable outcome to deal with the climate problem.

Dealing appropriately with the intellectual property barrier is central to any discussion on technology transfer as patents are monopolies that give the holder the right to exclude others from using the technology for at least 20 years.

There is clear evidence of an upward trend in the patenting of climate-related technologies since the mid-1990s. This trend will continue as climate concerns heighten, funding for research and development increases, and governments adopt frameworks for a greener economy.

In addition, entities of industrialized countries hold most of the technology, raising fundamental questions whether developing countries will be hampered from affordable access to latest mitigation and adaptation technologies as well as associated know-how.

Mark Weisbrot, Co-Director of the US-based Centre for Economic and Policy Research, recently noted that "international efforts to slow the pace of worldwide climate disruption could also run up against powerful interests who advocate a fundamentalist' conception of intellectual property".

He stated that the "US Chamber of Commerce is gearing up for a fight to limit the access of developing countries to Environmentally Sound Technologies (ESTs)" as they "fear that international climate change negotiations ... will erode the position of corporations holding patents on existing and future technologies".

Strong provisions on intellectual property in US policies under Congressional consideration, reflects a dogmatic protectionist agenda in favour of its corporations to the detriment of innovation and widespread dissemination of technologies that could potentially save the planet.

Foreign Relations Authorization Act

The House of Representatives voted on 10 June 2009 to establish a new US policy that will oppose any global climate change treaty that weakens the IPRs of American green technology. The measure is part of the Foreign Relations Authorization Act (H. R. 2410) that has been referred to the Senate Committee on Foreign Relations. An authorization bill is a proposed public law that permits the federal government to carry

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out various functions and programs.

Section 1120A of the Act states the policy regarding climate change: "To protect American jobs, spur economic growth and promote a `Green Economy', it shall be the policy of the United States that, with respect to the United Nations Framework Convention on Climate Change, the President, the Secretary of State and the Permanent Representative of the United States to the United Nations should prevent any weakening of, and ensure robust compliance with and enforcement of, existing international legal requirements as of the date of the enactment of this Act for the protection of intellectual property rights related to energy or environmental technology, including wind, solar, biomass, geothermal, hydro, landfill gas, natural gas, marine, trash combustion, fuel cell, hydrogen, micro-turbine, nuclear, clean coal, electric battery, alternative fuel, alternative refueling infrastructure, advanced vehicle, electric grid, or energy efficiency-related technologies".

This section is in addition to other general extensive provisions about the Secretary of State ensuring the protection of the IPRs of US persons in foreign countries as a significant component of US foreign policy and for this purpose ensuring the provision of adequate resources at diplomatic missions to support enforcement action and to assist countries to reform their IPR laws.

Amendment to ACES 1978

Another protectionist policy is the amendment of the American Clean Energy and Security Act (ACES) 1978 authored by US Representatives Henry Waxman and Edward Markey of the Democrat party and passed by the House of Representatives on 26 June 2009 (H. R. 2454). It is awaiting US Senate action and adoption before it becomes US law.

Extensive provisions on intellectual property are found in the Chapter on "Exporting Clean Technology". The stated purpose of the Chapter is to: (i) encourage countries to adopt policies and measures that substantially reduce, sequester or avoid GHG emissions; (ii) promote successful negotiation of a global agreement to reduce GHG emission under the UNFCCC; and (iii) promote robust compliance with and enforcement of existing international legal requirements for the protection of IPRs as formulated in the TRIPS Agreement and bilateral trade agreements.

It recognizes that developing countries are historically least responsible for the cumulative GHG emissions. It also acknowledges its commitment to transfer technology under the UNFCCC and the Bali Action Plan.

However, it also sees "Investments in clean technology in developing countries" as an opportunity to "open up new markets for United States companies" and stresses that "Any weakening of intellectual property rights protection poses a substantial competitive risk to US companies and the creation of high-quality US jobs, inhibiting the creation of new green' employment and the transformational shift to the Green Economy' of the 21st Century".

These provisions create a mechanism whereby allowances generated under a cap-and-trade system would be directed toward developing countries for "qualifying activities". [One allowance represents the permission to emit one ton of GHG emissions. The value of one allowance is not fixed and therefore the value of any assistance provided for under the Provisions is currently indeterminable.]

The Chapter essentially is about conditions that would govern provision of bilateral and multilateral assistance, through multilateral funds or institutions pursuant to the UNFCCC such as the Global Environment Facility or an agreement negotiated under the UNFCCC.

Assistance will only be provided to an "eligible" country for "qualifying" activities. An eligible country is a developing country that must have entered into an international agreement with the US to mitigate GHG emissions or have in force national policies that are capable of mitigating GHG emissions.

To qualify for assistance, the activities must contribute to "substantial, measurable, reportable and verifiable reductions, sequestration or avoidance of greenhouse gas emissions". The Act then provides a non-exclusive list of activities that would be considered as qualifying activities.

For distribution through an international fund or institution, one key condition is that the Secretary of State (or such other Federal Agency head as the President may designate) is required to ensure that the fund or institution contains adequate mechanisms to require that no funds are expended for the benefit of any activity that undermines the robust compliance with and enforcement of existing legal requirements for the protection of IPRs as formulated in the TRIPS Agreement.

Provision of bilateral assistance is conditioned on the activity not undermining the protection of IPRs for clean technology as formulated in the TRIPS Agreement and in bilateral trade agreements. The Act also gives the President the authority to exclude otherwise eligible countries based on the degree of IPR protection in that country.

The Act further contains elements on annual reporting. It states that not later than 1 March 2012 and annually thereafter, the President shall submit to the appropriate Congressional committees a report on the assistance provided under the chapter. One element to be included in the report is an assessment of whether any funds expended for the benefit of any qualifying activity undermined the protection of IPRs for clean technology as formulated in the

TRIPS Agreement and bilateral trade agreements.

Failure to protect IPRs sufficiently as required by the US could then result in the suspension and termination of assistance in whole or in part.

The Foreign Appropriations Act 2010

The House of Representatives also approved on 9 July 2009 the Foreign Operations, and Related Programs Appropriations Act, 2010 (H. R. 3081) that in Title V provides for funds appropriated to the President for multilateral assistance for the fiscal year ending September 30, 2010. An appropriation Act authorizes the government to spend money.

The Act makes available $225 million for contribution to a Clean Technology Fund and $75 million to a Strategic Climate Fund of the World Bank.

However, the Act conditions transfer of funds to the World Bank on the Secretary of State certifying to the Committees on Appropriations that all actions taken during the UNFCCC negotiations "ensure robust compliance with and enforcement of existing international legal requirements as of the date of the enactment of this Act that respect intellectual property rights and effective intellectual property rights protection and enforcement for energy and environment technology, including wind, solar, biomass, geothermal, hydro, landfill gas, natural gas, marine, trash combustion, fuel cell, hydrogen, micro-turbine, nuclear, clean coal, electric battery, alternative fuel, alternative refueling infrastructure, advanced vehicle, electric grid, or energy efficiency-related technologies".

Copenhagen Deal Threatened

The protectionist nature of the IPR policies and other policies (e. g. subsidies and border adjustment measures) contained in the recent spate of laws being considered by the Congress threatens a positive outcome in the climate change negotiations when UNFCCC Parties meet in Copenhagen in December this year.

These policies are essentially a response to recent proposals of developing countries on IPRs made in the context of the ongoing climate negotiations to enable effective transfer of technology, an obligation of developed countries under the UNFCCC.

This includes a proposal by the Group of 77 and China calling for climate-friendly technologies to be excluded from patenting as well as proposals by other developing countries in their individual capacity calling for: (i) adoption of a Declaration on IPRs and Environmentally Sound Technologies in relevant fora; (ii) using to the full, flexibilities contained in the TRIPS Agreement including compulsory licensing to access intellectual property protected technologies; (iii) steps to ensure sharing of publicly funded technologies and related know-how; (iv) creation of a "Global Technology Pool for Climate Change" that ensures access to technologies including on royalty-free terms.

A call to share technology has also been made by the US Energy Secretary Steven Chu. A New York Times article titled "Energy Chief Seeks Global Flow of Ideas" (March 2009) reported Chu as stating: "If countries actively helped each other, they would also reap the home benefits of using less energy. So any area like that I think is where we should work very hard in a very collaborative way - by very collaborative, I mean share all intellectual property as much as possible. And in my meetings with my counterparts in other countries, when we talk about this they say, yes, we really should do this. But there hasn't been a coordinated effort."


A climate for change

The South must have access to technology

Chu's proposal of letting ideas flow unprotected has made the industry uncomfortable and some experts view these recent policies of the US as an attempt to clarify the US position on intellectual property.

Such a position will not only result in severe consequences for the widespread dissemination of present and future green technologies and the ability of developing countries to reduce emissions without prejudicing their right to development.

It is also likely to have serious implications for development as well as areas ranging from medicines to arts and culture as countries are pressured to adopt higher and higher frameworks of intellectual property protection and enforcement to satisfy developed-country governments and their industry.

The current US policies could also become the basis to deny developing countries the right to use existing flexibilities such as compulsory licensing, exceptions to patents etc, that are embedded in the TRIPS Agreement.

Thus, it is crucial for developing countries to urgently take steps in all relevant multilateral fora but particularly under the UNFCCC to: (i) reaffirm the right to use the existing flexibilities that are available in the TRIPS Agreement to access climate-friendly technologies; (ii) reaffirm that nothing should prevent governments from taking steps to deal with the climate problem; and (iii) implement measures that would overcome barriers (including the intellectual property barrier) to effective transfer of technology for adaptation and mitigation technologies.

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