

Adapting to Climate Change Regulation

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Climate change is not a concern only for the future. Fifteen of the last sixteen years have been the hottest on record. This year has been hotter than last, which was hotter than the one before last. Scientists have begun to attribute unusual or severe weather to climate change. The new Paris Agreement, an agreement within the framework of the United Nations Framework Convention on Climate Change (UNFCCC), has signalled a new willingness to address climate change, as have recent statements of world leaders. Technological change is bringing clean energy sources into the mainstream. Nevertheless, it still appears that climate change mitigation will not occur quickly enough to avoid serious climate change and the subsequent need for adaptation measures. This is likely to prompt countries to take climate change measures outside the multilateral framework, whether unilaterally, bilaterally or regionally. Some of these measures could pose a challenge for the covered agreements of the WTO, which were not designed with climate change in mind.

WTO negotiations have been bogged down for some time, leaving the dispute settlement system to develop WTO law through judicial interpretation and de facto precedents. However, judicial interpretation is limited regarding the extent to which it can adapt WTO law to the regulatory and policy measures related to climate change. Moreover, regional trade negotiations have picked up some of the slack from stalled WTO negotiations, but not always in a manner conducive to regulatory autonomy regarding climate change measures. This brief article explores some of the issues in WTO law that may affect climate change measures.

Regarding intellectual property rights (IPRs), negotiation failure at the WTO has been a potentially positive phenomenon, at least as far as IPRs for climate-ready crops are concerned. TRIPS Article 27.3(b) gives WTO Members the flexibility to provide IPRs for new plant varieties using patents, a sui generis type of IPR, or some combination thereof. Negotiations to provide clearer obligations in this regard have made no progress, given the differences of opinion among WTO Members on what the appropriate policy should be. However, regional trade agreements like the Trans-Pacific Partnership have begun to erode the flexibility of TRIPS, by requiring parties to accede to the 1991 UPOV Convention. This Convention is more favourable to owners of IPRs than the 1978 UPOV Convention and limits regulatory autonomy to a greater degree. This leaves countries with less flexibility to facilitate access to climate ready crops that will be more resistant to the increased droughts and floods that climate change will bring. This is particularly of concern to developing

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countries, because they have more subsistence farmers who are highly vulnerable to crop failures and they are primarily located in the tropics, where climate change is expected to have more severe consequences.

Clean energy subsidies are another challenge for trade regulation. On the supply side, the cost of solar energy generation recently fell below 3 cents; the Dubai Electricity and Water Authority received a bid for the third phase of the Mohammed bin Rashid Al Maktoum Solar Park for US 2.99 cents per kilowatt hour. This is half the cost of fossil fuel energy generation and this is with unsubsidized solar power. On the demand side, a group of U.S. companies, including Walmart, General Motors, Google, Facebook and Microsoft, is creating the Renewable Energy Buyers Alliance, which plans to use its purchasing power and capacity to enter long-term contracts to develop 60 GW of renewable energy by 2025. This is enough capacity to replace all the coal-fired power plants in the U.S. that are expected to retire within the next four years. The demand for clean energy has prompted some U.S. utilities to allow big private sector customers to contract to purchase of renewables-generated power at the standard retail rate over a three to fifteen-year term.

As the cost of clean energy technologies continues to decline, clean energy subsidies are likely to be motivated more by competitive concerns than by environmental goals, as governments try to position their industries in the global market. That kind of subsidy would reduce economic efficiencies in renewable energy generation and delay the transition from fossil fuels to clean energy. The WTO Agreement on Subsidies and Countervailing Measures will be useful to avoid such market distortions, because it restricts the use of subsidies. Therefore, these WTO rules could help to reduce emissions more quickly. However, these rules are likely to be criticized as anti-environmental by those who think green subsidies are always a good thing. It is important to communicate effectively with the public regarding this very technical trade law area to promote understanding regarding the potential role of subsidies law in combatting climate change.

Environmental goods and services will play a crucial role in climate change mitigation and adaptation. Here, the failure of WTO negotiations are unfortunate, since multilateral trade liberalization in these goods and services would enhance efficiencies and lower the cost of addressing climate change. Trade liberalization in regional trade agreements is a second-best alternative to multilateral trade liberalization. This is an area where trade law issues cannot be resolved so easily via judicial interpretation.

The future of trade regulation will be shaped by the capacity of countries to make progress in multilateral negotiations, the extent to which the evolution of trade law takes place in regional trade agreements, and the evolution of trade law through judicial interpretation. The ability of trade law to adapt to and support climate regulation cannot be separated from public perceptions of how environmentally friendly trade law is. Those public perceptions, whether accurate or not, affect the political viability of trade negotiations and the capacity for trade law to adapt to the

need for adequate regulatory autonomy to address climate change. Unfortunately, the political economy of trade regulation can allow special interest groups capture the regulatory process to further private profits at the expense of public goods. Those special interest groups may take steps to influence public perceptions and to engage in rent-seeking behaviour. Opposition to trade negotiations and climate change denial are examples of the former. Excessive IPRs and market-distorting subsidies are examples of the latter.

Further reading

Bradly J. Condon & Tapen Sinha, *The Role of Climate Change in Global Economic Governance* (Oxford: Oxford University Press, 2013).