



Climate Change and International Economic Law

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■ International economic law has an important role to play in the regulation of climate change, in particular with respect to technology diffusion and unilateral responses to multilateral negotiation failure. It has not been possible to reach multilateral agreements with respect to climate change finance, intellectual property rights for plant varieties, a multilateral investment agreement, or international trade in environmental goods and services. Multilateral progress in all of these areas would facilitate technology diffusion and diminish the need for unilateral action.

In the case of the international trade law, deadlock at the multilateral level has led to unilateral, bilateral and regional policy responses. The same may happen with respect to climate change negotiations. Unilateral measures may be taken to address local or global concerns and may be used to create incentives for multilateral action. They may be consistent with international obligations or not, depending on the circumstances of each case. Unilateral measures can serve as catalysts for multilateral action on climate change, by prompting the affected economic actors to pressure their governments to seek a solution, through litigation or negotiation. Climate change agreements should either comply with or prompt modifications to international economic law and global models of economic governance.

Existing international economic law places limitations on the right of national and sub-national governments to regulate to address climate change. Given the current difficulty in reaching multilateral agreements, for the most part countries will have to develop climate change policy and law within the constraints of the existing legal, economic and financial framework. The shifting fortunes of developed and emerging economies have altered the dynamics of global governance. The ensuing multilateral negotiation paralysis means that unilateral action will be necessary to create incentives to address climate change. However, the risk of regulatory capture needs to be addressed to ensure that these unilateral measures are consistent with international law and are economically viable.

It is important to identify policy issues and options and ways to overcome negotiation obstacles. One proposal, with respect to WTO negotiations, is to make negotiations less ambitious, by abandoning the rule that 'nothing is agreed until everything is agreed', and to abandon decision-making by consensus. There are precedents for this approach at the WTO, in which a limited number of Members agreed to liberalize specific sectors once enough Members were on board to cover ninety percent of trade in the sector. The most-favoured-nation rule extends concessions to all WTO Members and the resulting agreement is left open for other Members to join. The same

approach to environmental goods and services would reduce barriers to technology diffusion for climate change. A similar approach could be taken with respect to GHG emissions, by seeking agreement among the countries that account for the overwhelming majority of emissions, and by leaving it open for other countries to join. However, even this approach may be difficult to achieve in a reasonable period of time.

In the current political and economic context, multilateralism is not working in the UNFCCC and WTO systems. This requires unilateralism, but in a well-considered approach that creates economic incentives to engage the private sector and to push governments into effective multilateral agreements. For example, funding for adaptation and technology transfer should be made conditional on recipients implementing PPP-based mitigation measures, in order to channel funding and technology to combat climate change. This can be accompanied by unilateral trade measures on goods and services to create political will in developing countries; the private industry that opposes climate change action based on competitive concerns might change their stance if unilateral trade measures begin to affect market access and competitiveness. However, unilateral measures to combat climate change need to be taken in a manner that is consistent with existing obligations and principles of international environmental and economic law, as far as possible, in order to more effectively address this urgent global issue.

One country or one region cannot reduce the greenhouse gas emissions of other regions or countries. In theory, it may be possible to create incentives for other countries, for example with unilateral trade restrictions or foreign aid that is conditional upon emissions reductions. However, trade restrictions do not just impose costs on the exporting country. They also impose costs on the importing country, where importers are affected by the increased cost of inputs. In addition, few domestic markets are large enough for trade barriers to have an economic impact that would be sufficient to create an adequate incentive to reduce emissions. Foreign aid that is conditioned upon the use of inputs from the donor country also may violate WTO law. Moreover, foreign aid costs money for donor countries, too. Even if we resolve the problems of cost and WTO consistency of trade barriers and foreign aid, they remain partial solutions only because they will not achieve the desired level of emissions reductions.

We can estimate the future concentrations of greenhouse gases and we can estimate the probability of a range of temperature increases, but we cannot say precisely what the temperature increase will be, how that temperature increase will vary from one part of the planet to another, and what the ecological and economic effects will be. What we do know is that the risks are grave. Debating whether we have underestimated or overestimated the proximity and severity of those risks misses the point. We need to address those risks through mitigation and adaptation. To do so effectively will require creating incentives for multilateral action and removing obstacles to financing the dissemination of the technologies needed for mitigation and adaptation.

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