

SEMINAR ON CLIMATE CHANGE AND PPMs

Sponsored by the American Society of International Law, The World Food Law Institute and the International Food & Agricultural Trade Policy Council

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FEATURING :

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World Trade Organization; University of Geneva

MARK LINSOTT

Office of the United States Trade Representative

LORENZ FRANKEN

German Ministry of Agriculture

JANE EARLEY

Earley & White Consulting Group (former adviser to the World Wildlife Fund)

SUMMARY OF THE DISCUSSIONS:

With the IPCC (International Panel on Climate Change) reports signaling an international consensus on the need for international action to mitigate climate change, countries may increasingly resort to regulating trade of products based on the methods with which they were produced and processed (PPMs). In international trade law, standards setting forth PPMs, however, are more controversial than standards which simply describe product characteristics, although WTO jurisprudence has provided openings for the use of PPMs under certain conditions.

At a Washington, DC seminar on Climate Change and PPMs hosted by the American Society for International Law, the World Food Law Institute and the International Food & Agricultural Trade Policy Council on April 9, a group of trade experts discussed how the debate over PPMs may evolve in the future.

Examples of climate change motivated PPMs

Countries are establishing cap and trade mechanisms in order to reduce greenhouse gas emissions. The question of how to treat imports from countries which do not adhere to the same or similar mechanism, may lead to countries regulating such imports based on

their PPMs. Mr. Mark Linscott, Assistant USTR for Trade and Environment, explained the state of play of legislation pending in the US Congress, some of which foresees the imposition of carbon taxes and border tax adjustments for certain imports.

Concerns about climate change are also one motivation for countries adopting “sustainability criteria” for biofuels – a set of standards to ensure that biofuels, when assessed from production through end-use, do in fact lead to a reduction in greenhouse gases relative to fossil fuel and are otherwise “sustainable.” Mr. Lorenz Franken, legal advisor to the German Minister of Agriculture, provided an update on the EU, where Germany, as well as the Netherlands and the UK, have already taken measures outlining biofuels sustainability criteria. The European Commission has tabled an EU-wide proposal, which, when enacted in the course of 2008, is likely to supersede laws of individual member states. In particular, the criteria examine a particular biofuel’s greenhouse gas balance based on a lifecycle assessment; the use of good agricultural practices and the impact on biodiversity. Although the specifics for each of these criteria must still be agreed, they are in principle accepted, although a huge debate still remains on the question of social criteria (i.e. workers’ rights; child labor).

GATT/WTO rules and jurisprudence

GATT Article III on National Treatment requires that imported products receive the same treatment as “like” national products. The key question surrounding the legality of PPMs is whether products can be considered “unlike” on the basis of “criteria not related to the products themselves.” Ms Gabrielle Marceau, Legal Counselor in the WTO Director General’s Cabinet, indicated that the purpose behind this GATT prohibition was to avoid protectionism. While this is still the goal, she stressed, the “recipe” has evolved through jurisprudence established via panel findings. Newer case law indicates that “likeness” between imported and domestic products exists if they compete with each other; PPMs are relevant if they affect this competitive relationship. The new jurisprudence seems also to open the door to justifiable distinctions between like products (even between PPM and non-PPMs) so long as these do not lead to imported products being treated less favorably than domestic products. Most often, market determination will lead to the conclusion that PPM and non-PPM based products are competing and are thus “like” products which should not be the target of less favorable treatment. However, she emphasized, that what exactly constitutes less favorable treatment is not clear. WTO jurisprudence, i.e. shrimp/turtle, has shown that some PPMs can be accepted on the basis of Article XX exceptions.

All speakers agreed that the old, general prohibition of PPMs is no longer valid. The use of PPMs however, still has to be evaluated carefully, so as to avoid protectionism.

How to advance the debate on PPMs?

Speakers agreed that the fight against climate change is sure to lead to more PPMs enacted unilaterally, but that the best solutions are to be found in the multilateral realm – not just because this would make them more WTO consistent, but more importantly,

because climate change mitigation requires international consensus and action. Mr. Linscott warned that unilateral action could trigger not only litigation, but also retaliatory responses. Spurring other countries to act on climate change via such unilateral measures, he warned, would not necessarily bring them to the negotiating table.

Jane Earley, a consultant, formerly with USTR and the WorldWildlife Fund, expressed her view that PPMs – when properly crafted – would not be necessarily found non compliant with WTO obligations. In particular, she suggested, a PPM should meet some key tests, i.e. is it transparent, feasible and easily monitored; is it transparent and cost efficient?

Professor John Jackson, of Georgetown University, in contrast, argued that the PPM issue is far from settled. He expressed his view that there is a substantial risk of increased litigation on climate change motivated cases, with PPM issues at the core. Ideally, WTO members would agree on new language (i.e. amending Article XX or writing a new article altogether), but it would be difficult indeed to reach consensus. Alternatively, he suggested, WTO members could approach the need for clarification on this issue via a scheduling approach. He was cautious about using certain tests to determine whether PPMs are being legitimately used, indicating that it is difficult to define protectionist intent; consumers' perceptions about the likeness of products and using cultural or socioeconomic criteria to determine likeness.

Conclusion

Ms Hebebrand of IPC summarized the panelists' presentations and Q&A session: Concerns about climate change ensure that PPMs will be increasingly resorted to. It is not unthinkable that just as some are calling for sustainability criteria for biofuels, others may begin to ask that other products be regulated based on their embedded value of carbon or water. Multilateral consensus on what constitute the right PPMs in a given area will be crucial but hard to reach. In the meantime, overly simplistic criteria risk being meaningless whereas overly detailed criteria may be difficult to implement. She referred to the speakers' consensus that it is no longer appropriate to say that PPMs are prohibited in the WTO system, but to the considerable uncertainty about what kind of a test should be required for such PPMs to pass muster.