

The Next Generation of Trade and Environment Conflicts: The Rise Of Green Industrial Policy



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T&E Conflicts in 2012

- US, EU and Japan vs. China at WTO over rare earth export restrictions
- EU and Japan vs. Canada over feed-in tariffs for renewable energy
- US countervailing tariffs against China for solar panels
- EU case against China for solar panels
- China case against EU for feed-in tariffs

The T&E Conflict

- Removal of protectionist trade barriers

versus

- Measures to protect national and international environment that have trade impacts

Argument

- Classic T&E cases remain dominant paradigm
- New generation of trade conflicts driven by use of industrial policy measures to promote renewables
- These Next Gen cases change the T&E landscape
 - More complex geopolitical dynamic
 - More complex domestic political economy
 - Expansion of applicable trade law
 - Expansion of different fora for conflicts

Classic T&E cases of the 1990s

- Tuna/Dolphin
- Shrimp/Turtle
- Reformulated Gasoline

Classic T&E cases of the 1990s

- Developed country uses unilateral trade restrictions to improve enviro behavior of developing country exporters
 - Changed actions in exchange for market access
- Alliance between domestic industry & labor with enviro & anti-globalization groups
- GATT focus on PPM's and like product analysis
- Reliance on GATT Article XX as defense

Classic Approach lives on

- Similar strategy in climate change debate
- Level playing field between importer with GHG controls and exporters that do not
- Waxman-Markey requirement for imports to purchase carbon credits
- EU ETS requirements for aviation GHG emissions

Rise of Green Industrial Policy

- Large-scale efforts around the globe to promote domestic renewable industries
 - “green-collar jobs”
- China’s 12th Five Year Plan
 - 3 of 7 strategic industries include renewables
- America, Germany, India, Canada, etc.
- Reliance on traditional industrial policies in renewables sector

Industrial Policies in Use

- Sector-targeted Subsidies
 - R&D subsidies, Tax credits, Feed-in tariffs, etc.
 - Globally \$39 billion in 2007 to \$66 billion in 2010
- Conditional Local-Content Subsidies and Policies
 - Requirement or support for parts and facilities located within country
 - Found in Brazil, China, Croatia, France, Greece, India, Italy, Spain, Turkey, Ukraine, U.S. and Canada
- Export Restrictions
 - Rare earth minerals

Green Industrial Policy is Global

- China now leads world in renewable energy investments, spending 53% more than second-ranked United States
- China, India and others not doing so out of altruistic concern or a sense of global responsibility
 - Using industrial policies to benefit their economic competitiveness
- Other developed and developing countries following lead
 - In 2010, Turkey revised renewable energy law to include a local-content premium in its FIT scheme
 - Ukraine did same in 2011
 - Malaysia's Renewable Energy Act, passed in 2011, includes a sophisticated schedule with bonuses for use of local components

Green Industrial Policies and Trade Law

- Sector-targeted Subsidies
 - Agreement on Subsidies and Countervailing Measures
 - Must demonstrate that the subsidy has “adverse effects to the interests of other [WTO] Members.”
 - Or finds that “the effect of the [actionable subsidy] is such as to cause or threaten material injury to an established domestic industry, or is such as to prevent or materially retard the establishment of a domestic industry.”
 - Or Dumping

Industrial Policies in Use

- Conditional Local-Content Subsidies and Policies
 - a subsidy “contingent . . . upon the use of domestic over imported goods.”
 - Rebates, guaranteed purchase price, preferential grants, etc.
 - Subsidies and policies that generally require the use of a fixed volume or percentage of local content violate SCM and GATT

Key Themes

- Next Gen cases not only at WTO but increasingly in trade remedies proceedings before domestic administrative agencies
 - Faster resolution
 - Use of countervailing measures
 - Greater potential for political interference
 - Five major Next Gen conflicts being challenged domestically (solar panels, wind turbines, polysilicon)

Key Themes

- “Good” versus “Bad” now much more complicated
 - Simple drama of Classic Cases now more complex
 - Developing country measures are pro-environment but challenged by developed countries

Key Themes

- Shattering of key alliances
 - Classic coalition of Labor, Industry, Enviro, Anti-globalization has split as economic competitors use industry policy for pro-environmental policies
 - Next Gen cases led by Labor and Industry
 - Enviro groups silent on the side
 - Concerned over climate change alliances

Key Themes

- Loss of Balance
 - GATT Article XX featured in Classic case
 - Balance between trade and enviro interests
 - Necessary to protect human, animal or plant life or health
 - Relating to conservation of exhaustible natural resources
 - SCM and Antidumping Agreement have no balancing test
 - No environmental exceptions
 - Same for domestic trade remedies cases
 - China negotiated away Article XX defenses in Protocol of Accession to WTO

Does the Environment Lose?

- Surprisingly, not necessarily for WTO challenges
 - In Classic cases, protectionist element was basis for the trade restriction
 - Not so in Next Gen cases
 - protectionist element of the policy is not integral to implementation of the pro-environmental policy
 - Canada, Greece, Italy, or India could implement feed-in-tariff regime without local-content requirements
 - as Germany and others have done.
 - China or US could restructure and scale back solar subsidies to minimize the adverse effect on foreign producers.
- *In Next Generation cases, one can preserve enviro benefits of a policy while discarding its protectionist harms.*

Options for a WTO Member Following a Ruling Declaring a Green Industrial Policy Measure Illegal	Does the Environment Still Benefit?
1) Sever the industrial policy element but retain the overall environmental policy	Yes
2) Find a (second-best) alternative that retains both the industrial policy and the environmental objectives	Yes
3) Drop the entire policy, including both the industrial policy and the environmental elements	No

Real Danger is in Unilateral Trade Remedy Cases

- Unilateral sanctions
- Unlike WTO, losing party must pay
 - Not enough to bring policies into compliance
 - High tariff rates can stay in place for long period of time
- Prices rise for enviro goods through cost of sanctions or stopping supports
 - and less choice for enviro-conscious consumers

Conclusions

- Nature of T&E cases has changed dramatically
- Green industrial policies now drive most conflicts
- Number of conflicts sharply on rise around globe
- For WTO cases, fewer legal defenses but may not lead to anti-enviro results
- Different dynamic in domestic trade remedy cases
- Reform should focus on trade remedy rules

Conclusions

- With climate change negotiations faltering
- Green industrial policy has emerged as one of the most important areas for real progress.
- Next Generation T&E conflicts are shaping the race toward a renewable energy future
 - important part of the global climate regime
- *How these rules are determined will play an important role in charting the path toward a sustainable future*