

Unpacking the Complexity of Regulatory
Governance in a Globalizing World

**CLIMATE CHANGE REGULATION, SHIPPING AND
THE WTO: CONFLICTING OBLIGATIONS?**

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OUTLINE OF PRESENTATION

- Trade and the environment
- Climate change and GHG emissions
- IMO Strategy
- MBMs at the IMO
- IMO MBMs and the WTO

PART 1

TRADE AND THE ENVIRONMENT

TRADE AND THE ENVIRONMENT

- Sustainable development and protection and preservation of the environment are fundamental goals of the WTO
- Should complement WTO objective to reduce trade barriers and eliminate discriminatory treatment in international trade
- Historic tension between trade and environmental regulation
- No WTO environmental agreement

TRADE AND THE ENVIRONMENT

- Famous cases:

Shrimp/Turtle

Tuna/Dolphin

EC – Biotech

- Committee on Trade and the Environment
- Doha Round and the environment

PART 2

CLIMATE CHANGE AND GHG EMISSIONS

CLIMATE CHANGE AND GHG EMISSIONS

- GHG emissions from shipping fall within broader context of law of the sea and climate change regulation
- Importance of UNCLOS, UNFCCC, Paris Agreement but IMO plays central role for ‘development, adoption and assistance in implementation of environmental regulations applicable to international shipping’

CLIMATE CHANGE AND GHG EMISSIONS

- GHG emissions from international shipping in 2012 accounted for some 2.2% of anthropogenic CO₂ emissions and that such emissions could grow by between 50% and 250% by 2050
(Third IMO GHG Study 2014)
- Now revised to c. 2.7% by some
- To stay within 1.5°C increase threshold, necessary that all sectors reach net-zero emissions by 2050

PART 3

IMO STRATEGY

IMO STRATEGY

- IMO is the UN specialized agency responsible for safe, secure and efficient shipping and the prevention of pollution from ships
- 2018 IMO Strategy on Reduction of GHG Emissions from Ships – continuation of work of IMO by Marine Environmental Protection Committee (MEPC)
- Strategy is the first milestone set out in the Roadmap for developing a comprehensive IMO Strategy on reduction of GHG emissions from ships
- Revised Strategy is to be adopted 2023

IMO STRATEGY

- Vision: Aims at phasing out GHG emissions as soon as possible this century
- Ambition: Reduce CO₂ emissions per transport work by at least 40% by 2030, pursuing efforts toward 70% by 2050, compared to 2008. Reduce total annual GHG emissions by at least 50% by 2050 compared to 2008, pursuing efforts to phase them out as called for in Vision
- Measures: Short, mid, long-term measures. Mid-term measures include developing a market-based measure

PART 4

MBMS AT THE IMO

MBMS AT THE IMO

- Mid-term: 2023-2030 possible measures to include an MBM
- Series of MBMs proposed by governments and observer organisations to MEPC 60 in 2010
- Feasibility study undertaken by expert group
- Intersessional Meeting of the Working Group on GHG Emissions from Ships – report considered at MEPC 63.
- At MEPC 65 discussions on MBMs suspended

MBMS AT THE IMO

Two basic types: Carbon Tax and Emission Trading Scheme:

- International GHG Fund (MEPC 60/4/8) – GHG contributions from bunker fuel suppliers or ship owners
- Leveraged Incentive Scheme (MEPC 60/4/37) to improve the energy efficiency of ships based on the International GHG Fund
- Port State Levy (MEPC 60/4/40) targets the ship itself with an emission charge as it arrives in port (amount of CO₂ produced by ship in voyage as basis for levy)
- Global Emission Trading System (MEPC 60/4/22, MEPC 60/4/26, MEPC 60/4/41, MEPC 60/4/54)

PART 4

MBMS AND THE WTO

MBMS AND THE WTO

- Difficult to attribute emissions from shipping to one state (flag, crew, owner, charter, route?) but if burden moved on to cargo (products) this is WTO relevant
- Several possible ways an MBM could run contrary to WTO rules – tax and ETS
- If the MBM adopted takes the form of a tax or charge, this cost may be displaced from the service provider and function as an indirect tax on the products themselves
- Difficult to quantify in theory

MBMS AND THE WTO

Tax

- Indirect tax could be seen to violate the Art. II:1(a) obligation to accord to the commerce of WTO members treatment **no less favourable than that provided for in the schedule of tariff concessions**
- Uneven application could **distort competition and afford domestic products an advantage**
- The application of the ‘environmental exceptions’ (Art. XX (b) and (g)) will then be assessed for their applicability in such cases

MBMS AND THE WTO

ETS

- Legal status of emissions allowances ‘disputable’
- ETS design features also have potential to affect trade indirectly and conflict with GATT/GATS
- Free allocation could constitute a subsidy/dumping
- No ETS-related issues have been raised in WTO dispute settlement system
- Hard to predict the outcome of scrutiny by DSS
- Availability of environmental exceptions?

MBMS AND THE WTO

- Environmental and health exceptions – but no climate exception
- Art XX (b) allows ‘necessary to protect human, animal or plant life or health’
- Art XX (g) allows measures ‘relating to the conservation of exhaustible natural resources’
- Chapeau: measure cannot constitute ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’

MBMS AND THE WTO

- Burden on exporting states – What about non-IMO members?
- LL(-LDS), Federated States of Micronesia
- Is this aligned with Common But Differentiated Responsibilities and Respective Capabilities under UNFCCC?
- Potential conflicting norms and principles – trade law aspects must be taken into consideration in drawing up MBM

THANK YOU

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