

Can trade and investment policy support ambitious climate action?

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a study by



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Executive Summary

Since the 1990s, international climate agreements have largely taken a country by country approach to mitigating climate change. However, in recent years, the conclusion of numerous bilateral or regional trade and investment agreements has led to an exponential growth in the global flows of goods and capital across borders. This growth has translated into a significant increase in emissions that cannot be bound to a single country. Thus, actions designed to tackle climate change require a new set of tools and strategies. The following joint-report offers a set of complementary options that could be implemented to tackle climate impacts.

Huge investments in oil, coal and gas extraction continue to flow across borders, with capital originating in countries like the Netherlands, UK, France and Norway. These countries, also position themselves as climate leaders, driving carbon intense development overseas. This contradicts commitments made as part of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, to support low carbon development abroad. This report suggests carbon reporting on Foreign Direct Investment (FDI) and a carbon tax on FDI income derived from fossil fuel extraction, as a means to remedy this contradiction.

In line with the Paris Agreement countries must adopt domestic measures to avert climate change. However, there is a fear that ambitious climate measures could undermine the competitiveness of home industries compared to industries in other countries that do not deploy equivalent measures. To remedy this imbalance, this report suggests the use of a carbon border tax adjustment (CBTA), an import fee levied by carbon-taxing countries on goods manufactured in non-carbon-taxing countries. Such a tax could be applied by countries adhering to the Paris Agreement and could be in line with international trade rules.

Finances raised from a CBTA or tax on FDI income could be set aside to help properly resource existing climate funds, supporting adaptation and mitigation measures in low income countries.

At present, international trade and investment agreements carry more political and legal weight than multilateral environmental agreements (MEAs). This report explores measures that could be taken to redress this imbalance, from provisions in trade agreements that ensure they do not undermine MEA commitments, to provisions through which trade agreements could 'do good' with respect to the membership and implementation of MEAs.

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1. Introduction

From the 1997 Kyoto Protocol to the 2015 Paris Agreement, it has become established practice for countries to account for their greenhouse gas (GHG) emissions on a ‘territorial’ level, and, to some degree, accept responsibility for reducing these emissions. Territorial emissions are those released from activities that take place within a country’s border.

However, many of the economic forces driving these activities are rarely limited to one country’s borders. For example, coal mining in South Africa is financed in part through capital originating in the United Kingdom in the form of foreign direct investment. South Africa then ships coal to China which is used, in part, to produce goods consumed in the United Kingdom. In this scenario, investors in the United Kingdom are the financial beneficiary of coal extraction, and consumers in the United Kingdom are the material beneficiary of the goods produced. But under territorial accounting, the United Kingdom neither accounts for, nor accepts responsibility for reducing the GHG emissions released.

This raises issues of climate equity. But it also highlights the limitations of national mitigation efforts focussed exclusively on territorial GHG emissions in a globalised economy, where capital and production can be rerouted through jurisdictions that do not have equivalent measures in place. This is made possible by trade and investment agreements that, by facilitating the global flow of goods and capital, increase emissions that cannot be bound to a single territory or tackled with a narrow, territorial approach to emissions accounting. As such, policymakers serious about tackling dangerous climate change should look to trade and investment policy for solutions that are both more equitable, and economically efficient.

In this note, we explore how the movement of capital (section 1) and goods (section 2) across borders presents a challenge to exclusively territorial efforts to tackle climate change. We also explore the unequal relationship between the trade and investment rules that regulate the movement of capital and goods, and the environmental agreements designed to regulate pollution (section 3). In each section, we propose policy options for addressing these challenges.

The purpose of this note is not to push for any particular option, but to make the case that options are available and provoke a debate about the links between trade and investment policy on the one hand and climate policy on the other, which are too often designed in isolation.

2. Emissions beyond the border: international investment

2.1. What’s the issue?

Every year, huge outward investments flow from developed countries to oil, coal and gas production overseas. Yet it is the stated position of almost every developed country Party to the UNFCCC to support low carbon development internationally. Indeed, as part of the Paris Agreement, developed countries have committed to support developing countries to reduce their emissions.¹ This is the rationale behind mitigation climate finance, technology transfer and capacity building commitments.²

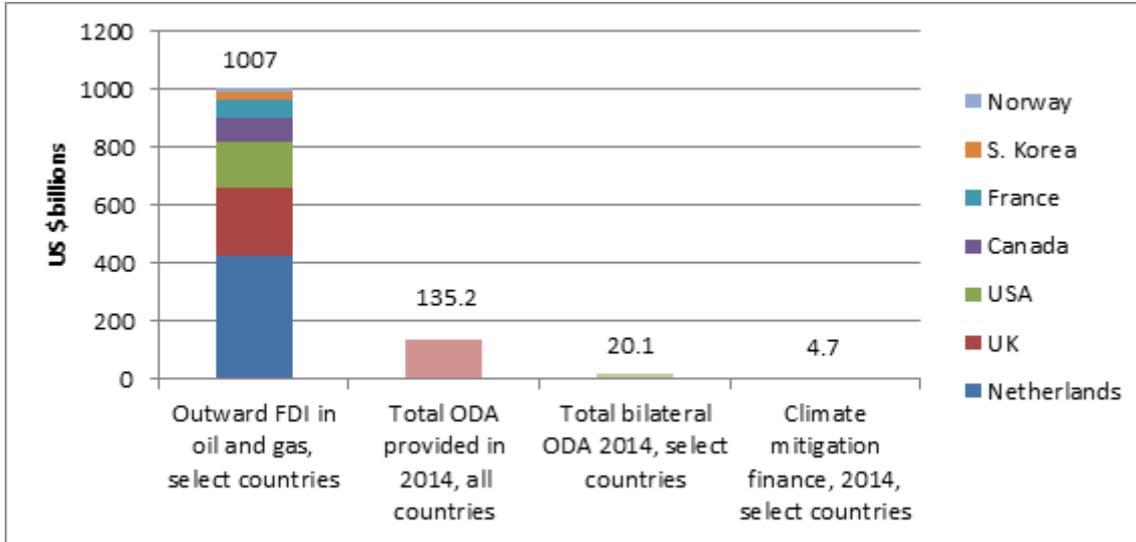
Developed country governments are yet to acknowledge this contradiction, let alone introduce policies to address it.

2.2. The scale of the problem

In 2014, companies in the Netherlands, UK, France and Norway were sat on investments in the extraction of oil and gas, outside of the EU worth over half a trillion Euros.³ This constituted 20% of those countries’ foreign direct investment, and ten percent of all EU Foreign Direct Investment. Investors in the US, Canada and South Korea also held large investments in oil and gas extraction overseas, as indicated in the chart

below. For a sense of scale, this is almost ten times greater than the total annual aid for Overseas Development Assistance (ODA). Climate mitigation finance provided by these countries is so low in comparison to oil and gas investments that it is difficult to represent on a bar chart.

Figure 1: Outward FDI positions in oil and gas extraction in 2014 from selected OECD countries, compared with ODA levels⁴



Companies in these countries are also sat on large overseas investments related to the manufacture of coal fuel and refined petroleum products (e.g., €146 billion for Dutch companies, \$37 billion for US companies).⁵ While there has been a slight reduction in annual outward FDI flows since 2014 due to the lower oil prices, companies in a number of countries (the Netherlands and Norway) are still increasing their dollar value investment positions in oil and gas extraction overseas. It is also worth noting that these figures, though enormous, likely understate the true extent of overseas interests.⁶

Much commentary has characterised fossil fuel investments as ‘stranded assets’. These are reserves which cannot be burned if we are to avoid dangerous climate change, the value of which will be reduced by regulatory action.⁷ This analysis focuses on financial risk. However, the greater risk is that far from being stranded, these assets will be realised precisely because of the value they represent to investors and the wider economies of their home countries. In 2014, US companies earned income of \$15 billion on outward FDI in from oil and gas.⁸ Dutch, British and Norwegian companies earned €28 billion, €18 billion and €2 billion respectively.⁹

Calculating the climate change impact of these investments is not straightforward, but the scale of the problem is clear. UK listed companies control an estimated 6.6 billion barrels of oil in Africa alone.¹⁰ If combusted, this would emit almost three billion tonnes of carbon dioxide.¹¹ This is five times the UK’s annual reported emissions.¹² If UK listed interests in African coal deposits were realised, this would result in 9 billion tonnes of carbon dioxide emissions, some 16 times the UK’s annual emissions.¹³

Dutch company overseas investments in oil and gas, as presented in Figure 1, if realised, would result in carbon dioxide emissions between 6.7 and 9.1 billion tonnes¹⁴ – up to fifty times the Netherlands’ annual emissions.

2.3. Potential solutions

a) Company and national reporting

Companies could be obliged to record and disclose their outward FDI positions, flows and incomes in coal, oil and gas extraction, and report carbon dioxide equivalent emissions associated with FDI income, as well as carbon dioxide potential emissions in FDI positions and flows.¹⁵

As a next step, governments could then commit to compile and report on GHG emissions associated with outward FDI. Governments could adopt targets to reduce these GHG emissions over time as part of their 'Nationally Determined Contributions' under the Paris Agreement.

b) A carbon tax on FDI income

Home states could levy a carbon tax on FDI income derived from coal, oil and gas extraction. This carbon tax could be set at a dollar per tonne of CO₂ emissions level equivalent to carbon pricing for home state activities. The carbon tax could be increased overtime to encourage early divestment.

For example, assume a company has a \$20 million investment in an oil reserve overseas, from which it earns an annual income of \$1 million producing 50,000 barrels of oil with associated emissions of 21500tCO₂. A carbon tax of \$10tCO₂e would deduct \$215,000 from the \$1million income.

A carbon tax on FDI income would define a new tax base (i.e. the carbon content of an asset from which income is derived) and so would not require implementing countries to renegotiate existing tax treaties to avoid double taxation.¹⁶

3. Carbon border tax adjustment

3.1. What's the issue?

It is incumbent on countries with resources and technical capacity to adopt domestic measures necessary to avert dangerous climate change. However, a commonly voiced fear is that by undertaking stringent domestic measures, home industries will be at a disadvantage to producers in countries that do not take such actions. While there is little evidence to date of 'carbon leakage' and 'loss of competitiveness' from measures like the EU Emissions Trading System¹⁷, it is probable that this would change were more ambitious measures in place.

The carbon border tax adjustment (CBTA) is one much discussed proposal to level the playing field between entities inside and outside jurisdictions taking action on climate change.

3.2. What is a carbon border tax?

Carbon border tax adjustments are import fees levied by countries that put a price on carbon on goods manufactured in countries that do not put an equivalent price on carbon. The adjustment is designed to level the playing field in international trade while internalising the cost of climate damage into the prices of goods and services. As explained by Joseph Stiglitz, "Not paying the cost of damage to the environment is a subsidy, just as not paying the full costs of workers would be."¹⁸

However, in light of the Trump Administration's calls for the USA to pull out of the Paris Agreement, economists, climate experts and politicians have begun to revisit the feasibility of a carbon border tax,

exploring whether it would be possible for the countries who remain part of the Paris Agreement to impose carbon border tax adjustment on products and services stemming from countries that do not.

Political support for this mechanism was confirmed at the 2017 World Trade Organisation (WTO) Public Forum¹⁹, where Christine Lagarde, Managing Director, International Monetary Fund stated that the IMF supported a mechanism of internalising external costs and a carbon tax²⁰; this was further developed by Nobel Prize winning economist Paul Krugman, who confirmed that such a tax was both legal and economically sound.^{21,22} The same day, French President Emmanuel Macron called for “a carbon tax at [EU] borders” to ensure a level playing field for the EU’s industry, in addition to suggesting for “a significant minimum price” for carbon emitted in the bloc, as well as a carbon tax to cover goods from outside the bloc.^{23,24}

3.3. Potential solutions

a) Working within the framework of the WTO

Is a carbon border tax on goods from countries outside of the Paris Agreement compatible with WTO rules on trade restrictive measures?

Jennifer Hillman, former WTO appellate officer has argued that it is. “Provided that policymakers carefully design a (carbon) tax, keeping in mind the basic requirements of the WTO not to discriminate in favor of domestic producers or to favor imports from certain countries over others...the threat of WTO challenges should not present a barrier to policy makers wishing to adopt a carbon tax systems now.”²⁵

It is highly likely that the question of carbon border tax adjustment may end up as a dispute before the WTO.²⁶ However, the WTO has previously sustained²⁷ the important principle that global environmental concerns trump narrow commercial interest.²⁸

Countries are allowed to consider a carbon related tax, as long as it does not exceed the amount of tax imposed on similar domestic products. GATT Article II, does not allow countries to impose customs duties that exceed the amount they agreed to charge in their tariff schedule.

It is key that the tax must be based on the produced good to be an indirect tax and be applied to both domestic and imported products. Furthermore, in order to create a CBTA that is WTO compliant, a method that does not discriminate against domestic and foreign producers must be established. This could, for example, consist of a life-cycle assessment (LCA) to assess the carbon footprint during the production. On that basis, the tax can be levied. If foreign producers have products that are less carbon intensive than the ones in the country into which they import, then the CBTA should be less. This can ultimately be an incentive for cleaner production methods, start a race for cleaner technologies and avoid carbon leakage.

CBTA should be designed so far as is possible to avoid adverse effects on export dependent low income countries. Policy makers should consider how revenue raised could be used to remedy unintended consequences and support low income countries transition to low carbon production. For example, wealthy countries could set aside the revenue raised to help low income countries reduce their carbon footprint and/or adapt to climate change.²⁹ Beyond increasing the political and legal viability of CBTA, channelling revenue raised into climate funds could help address some of the question marks over long term financing of structures like the Adaptation Fund.

b) Working within the framework of the Paris Agreement

A CBTA would be designed to meet four key objectives:

1. Enable ratcheting up of carbon reduction measures without leakage or loss of competitiveness
2. Provide an incentive for countries to remain within the Paris Agreement
3. Raise finance for international climate mitigation and adaptation funds
4. Persuade non-state actors in countries that are not party to the Paris Agreement to remain engaged in the process

The Paris Agreement foresees that some parties may work together with regards to the implementation of carbon emissions targets to allow for higher ambition, adaptation actions, the promotion of sustainable development, and environmental integrity (Article 6.1).³⁰ It also mandates the creation of a mechanism to contribute to GHG emissions mitigation and support sustainable development (Article 6.4).³¹ The CBTA would have to distinguish between parties and non-parties to the Paris Agreement. The scheme could:

1. Exempt parties from CBTA, if they have committed to undertake efforts to reduce GHG emissions within the UNFCCC framework (by submitting carbon emissions targets known as INDCs);
2. Permit participating countries to impose CBTA on non-parties that have not committed to undertake efforts to reduce GHG emissions, subject to the principle of common but differentiated responsibilities and respective capabilities;
3. Create a rule enabling sub-national entities or non-state actors to apply for exemptions if they participate in equivalent carbon pricing initiatives.³²

Ideally CBTA countries would agree on common measures, given the diversity in carbon pricing initiatives and WTO law (Art II.2 and III.2) on measures that unduly disadvantage imports against domestic products. Though participating countries may find it difficult to develop a common methodology, they should aim to impose measures that are designed to ensure equivalent carbon pricing on their domestic production and imports from non-participating countries. Such a scheme would also require exporters from non-parties to either comply with the national carbon pricing regimes of all participating countries that they export to, imposing a regulatory burden on them, or to voluntarily participate in equivalent carbon pricing schemes.³³

An additional design option would be for participating countries to transfer most - if not all- financial proceeds to a climate change mitigation or adaptation fund for affected countries. This would strengthen the evidence of non-economically protectionist intention (internalising the cost of carbon, avoiding leakage, and so on) should it be investigated by the WTO.³⁴

4. Redressing the balance between trade and climate agreements

4.1. What's the issue?

Hierarchies are not supposed to exist in international law between different types of treaty. However, trade and investment agreements enjoy de facto supremacy over multilateral environment agreements (MEAs) – the collection of treaties dealing with environmental protection. This is because, unlike MEAs, trade and investment agreements:

- Create specific rights and obligations that states can and do invoke in fora like the WTO³⁵
- Create rights and obligations that private actors can invoke in private tribunals³⁶, the decisions of which are enforceable in domestic courts almost anywhere in the world.³⁷

In case of conflict between an FTA and an MEA, FTAs often prevail because they carry more political and legal weight.³⁸

In tacit recognition of the capacity of FTAs to undermine MEAs both directly and indirectly, commitments to MEAs are now a routine feature of free trade agreements, required as part of the US' 'fast track' ratification procedure³⁹, and called for in the EU's 'Trade for All' strategy.⁴⁰

However, current approaches have not gone far enough. Where MEAs are name-checked in trade agreements, it is too often with non-specific or non-binding language, or as part of trade and sustainable development chapters that are difficult to enforce or simply not enforceable. Further, trade agreements should not be judged a success because they avoid undermining environmental agreements which in many instances lack the normative force to address environmental challenges on an adequate scale.

The measures set out below provide options to redress the structural imbalance between FTAs and MEAs. Section 3.2 sets out measures according to which FTAs should 'do no harm' with respect to commitments in MEAs. Section 3.3 sets out measures according to which FTAs should 'do good', reinforcing commitments in MEAs.

4.2. FTAs should 'do no harm'

a) Environmental Impact Assessments (EIAs) for FTAs, with required mitigation measures

Free trade agreements could be subject to environmental impact assessments that, inter alia, evaluate the likely impact of the FTA on specific goals and broader objectives of MEAs to which the country is a party.

The EU Commission already subjects new proposed trade agreements to a trade sustainability impact assessment, which contains an environmental component⁴¹, and the US Trade Representative conducts 'Environmental Reviews' of new trade and investment agreements.⁴² The following criteria would ensure the effectiveness of EIAs:

- EIAs and the process according to which they are conducted would have to be mandatory, with the legality of the FTA reviewable to the extent that requirements have not been satisfied.
- The scope of the EIA with respect to MEAs should include the domestic and international impact of the FTA.
- EIAs should be conducted or commissioned by environmental protection departments of government, not trade officials, to prevent conflicts of interest in those conducting the EIAs, whether consultants or government officials.
- Where EIAs identify the risk of a significant impact on an MEA goal or objective, FTAs would have to be amended to reduce the likelihood and severity of impact, with governments required to take additional measures to mitigate impacts to the extent they are likely to arise.
- Beyond ex-ante EIAs, EIAs should be conducted periodically throughout the duration of the FTA to take account of and address unanticipated impacts.

b) MEA supremacy clause

A supremacy clause would establish that in the case of conflict between the terms of an MEA and the terms of the FTA, the terms of the MEA would prevail.⁴³ A 'conflict' is understood to be a provision in the FTA that requires or encourages either party to take action that would violate the terms of the MEA, or pose an obstacle to the implementation of the MEA. A supremacy clause could cover conflict with hortatory measures within MEAs, as well conflict with mandatory elements of MEAs.

A supremacy clause could apply to only those MEAs that all parties to the FTA have ratified, or more broadly, to MEAs that any party has ratified to the extent that the conflict involves the ratifying party.

4.3. FTAs should ‘do good’

a) Ratification of MEAs as prerequisite to concluding an FTA

Countries could adopt a policy of only entering into FTAs with counterparts that have ratified a set of MEAs. At a minimum this would have to include the core MEAs around the five clusters of biodiversity, land, seas, chemicals and hazardous wastes, and atmosphere, though countries may wish to negotiate an expanded set.

b) Implementation of MEAs as condition for continued effect of FTA

FTAs could include a suspension clause so that the FTA remains in effect only insofar as both parties continue to implement the set of MEAs to which they have committed. To ensure proper invocation of a ‘suspension clause’ when it may be in the interests of neither party to do so, the FTA would have to establish an independent body with the powers to suspend application of the FTA that can consider submissions from third parties.

c) Financial and technical resources and cooperation to implement MEAs

Where FTAs are agreed between developed and developing countries, developed countries could make concrete, specific and time bound commitments of financial and technical resources to enable developing country parties to implement MEAs. This should be in addition to existing support committed through the MEA itself, and would be channelled through the institutions established by the MEA to avoid undermining the MEA.

d) Extraterritorial regulation of private actors

Countries could commit within FTAs to control measures and/or the creation of liabilities for ‘home’ companies operating in ‘host’ partner countries, to avoid company activities jeopardising the observance of MEAs. An example of this could be a carbon tax on FDI income (see Section 1) to limit carbon intense activities that would otherwise undermine a country’s capacity to meet its NDC targets under the Paris Agreement.

e) Strengthening MEAs

FTAs could be a vehicle through which countries arrange bilateral or plurilateral commitments with respect to MEAs that could not be negotiated multilaterally within MEA negotiations. For example, under the terms of the Paris Agreement a country’s greenhouse gas emissions targets (expressed as Nationally Determined Contributions or NDCs) are non-binding. Countries could make implementation of their NDCs internationally binding through commitments in FTAs.

5. Conclusion

This report has set out a few of the ways in which existing policy frameworks to promote international trade and investment drive carbon intense development while undermining climate protections. We also present a number of responses available to policy makers to redress this imbalance.

The measures in this report are put forward as neither prescriptive nor exhaustive, but are designed to move the conversation forward from the fragmentary approaches adopted to date, which have focussed on the liberalisation of ‘low carbon’ goods⁴⁴ and adoption of non-binding statements of intent.⁴⁵ As noted in the introduction, this requires mitigation efforts to go beyond territorial approaches and for policy makers to acknowledge that measures with an international reach are required to tackle emissions driven by a globalised economy.

We would underline that this does not equate to ‘protectionism’, and that policy makers in wealthy countries should design policies subject to the principle of common but differentiated responsibilities, that avoid economic harm to vulnerable, low income countries and that go hand in hand with measures to properly finance adaptation and low carbon development internationally.

One aim of this report is to demonstrate that trade and investment policy is inseparable from climate policy. This should come as no surprise in a globalised economy where supply chains and investments flow across borders. What is surprising however is the absence of measures of any real substance that have been taken to date, at the national or international level, to ensure trade and investment policy is compatible with avoiding dangerous climate change. This is something that will have to change if the goals of the Paris Agreement are to become reality.

Endnotes

¹ PA Art. 4.5

² PA Arts 9, 10, 11

³ EU country data from Eurostat, EU direct investment positions, breakdown by country and economic activity (BPM6)

⁴ 2014 selected as most recent year for which all data available. EU country data from Eurostat, EU direct investment positions, breakdown by country and economic activity (BPM6), converted to \$US at 2014 average. Data for USA, Canada and S. Korea from OECD Stat, FDI positions by industry BMD4. ODA data from OECD Stat, Aid (ODA) by sector and donor [DAC5], and Aid activities targeting Global Environmental Objectives

⁵ Ibid.

⁶ This is due to the way in which FDI is measured. If, for example, an EU based company acquires a large or total share of an overseas company, the EU company can be defined as a domestic agent in the host country, and the asset not reported as outward FDI from the EU

⁷ Bank of England. Staff Working Document No. 603. Let's talk about the weather: the impact of climate change on central banks. May 2016. <http://www.bankofengland.co.uk/research/Documents/workingpapers/2016/swp603.pdf>

⁸ OECD Stat, FDI income by industry BMD4

⁹ Eurostat, EU direct investment income, breakdown by partner country and economic activity (BPM6)

¹⁰ War on Want. The new colonialism. <http://www.waronwant.org/sites/default/files/TheNewColonialism.pdf>

¹¹ Assuming a conversion ratio of 0.43 metric tons CO₂/boe, as per

<https://www.epa.gov/energy/greenhouse-gases-equivalencies-calculator-calculations-and-references>

¹² UK annual emissions as reported by WRI CAIT for 2013

[http://cait.wri.org/historical/Country%20GHG%20Emissions?indicator\[\]=Total%20GHG%20Emissions%20Excluding%20Land-Use%20Change%20and%20Forestry&indicator\[\]=Total%20GHG%20Emissions%20Including%20Land-Use%20Change%20and%20Forestry&year\[\]=2014&sortIdx=NaN&chartType=geo](http://cait.wri.org/historical/Country%20GHG%20Emissions?indicator[]=Total%20GHG%20Emissions%20Excluding%20Land-Use%20Change%20and%20Forestry&indicator[]=Total%20GHG%20Emissions%20Including%20Land-Use%20Change%20and%20Forestry&year[]=2014&sortIdx=NaN&chartType=geo)

¹³ Assuming 3.6 billion tonnes of coal as per <http://www.waronwant.org/sites/default/files/TheNewColonialism.pdf> and a conversion ratio of 2.86 metric tonnes of CO₂ per metric tonne of coal, as per https://www.eia.gov/coal/production/quarterly/co2_article/co2.html#N_5

¹⁴ Low end assumes all gas, with production costs of \$0.3 per therm and emissions factor of 0.00548 tCO₂/therm. High end assumes all oil, production costs of \$20 per barrel of oil and emissions factor of 0.43tCO₂/barrel of oil. Dutch annual emissions as reported by WRI CAIT for 2013

¹⁵ Some countries already require companies to report on their annual carbon dioxide emissions. See for example, the UK's Companies Act 2006 (Strategic and Directors' Reports) Regulations 2013

¹⁶ The UK's 'Diverted Profits Tax', introduced to counter the use of aggressive tax planning techniques used by multinational enterprises to divert profits from the UK, is an example of a new tax that, distinct from income tax, capital gains tax or corporation tax, is not described in any tax treaty and hence was introduced without the need to renegotiate measures to prevent double taxation in existing tax treaties. See

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480318/Diverted_Profits_Tax.pdf

¹⁷ Joint report for the European Commission: Carbon Leakage Evidence Project: Factsheets for selected sectors. Sept 2013 https://ec.europa.eu/clima/sites/clima/files/ets/allowances/leakage/docs/cl_evidence_factsheets_en.pdf

¹⁸ Joseph E. Stiglitz. A New Agenda for Global Warming. July 2006

<http://carbon-price.com/wp-content/uploads/2006-07-stiglitz-a-new-agenda-for-global-warming.pdf>

¹⁹ World Trade Organisation. Public Forum 2017 — "Trade: Behind the Headlines"

https://www.wto.org/english/forums_e/public_forum17_e/public_forum17_e.htm

²⁰ Video: 1:13:33 / 1:54:36 "We certainly at the IMF recommend that those ways be explored and if possible adopted which is to actually price in the externalities and our suggestion very strongly is that carbon tax would actually be a smart way to deal with it and to deal with it efficiently." <https://www.youtube.com/watch?v=eqRDqETuMCs>

²¹ Video: 1:14:01 / 1:54:36 "Essentially a border adjustment for countries that do not adhere to a carbon tax or carbon pricing regime, the answer should be...that trade policy should take that into account but in terms of the legality but also in terms of the economics." <https://www.youtube.com/watch?v=eqRDqETuMCs>

²² Carbon pricing does not necessarily mean a carbon border tax but can certainly preempt it

²³ Le plan de Macron pour l'Europe résumé en dix points.

<http://www.lefigaro.fr/politique/le-scan/2017/09/26/25001-20170926ARTFIG00105-ce-que-macron-va-proposer-pour-l-europe-dans-son-discours-a-la-sorbonne.php>

²⁴ On 10 October 2017 the Economic and Financial Affairs Council (ECOFIN) declared that carbon pricing is an important step in the fight against climate change.

http://www.consilium.europa.eu/en/press/press-releases/2017/10/10-conclusions-climate-change/?utm_source=POLITICO.EU&utm_campaign=c884862154-EMAIL_CAMPAIGN_2017_10_10&utm_medium=email&utm_term=0_10959edeb5-c884862154-189774485

²⁵ The German Marshal Fund: Changing Climate for Carbon Taxes: Who's Afraid of the WTO?

<http://www.gmfus.org/publications/changing-climate-carbon-taxes-whos-afraid-wto>

²⁶ <https://www.iisd.org/blog/carbon-without-borders-can-trade-policy-support-ambitious-climate-action>

²⁷ This statement is further supported by the interpretation of the WTO Appellate Body in the US-Shrimp report and US-Shrimp decision (US- Shrimp WT/DS58/AB/RW) where the US imposed restriction due to 'turtle unfriendly' nets used in Thai fishing practices.

²⁸ The WTO allows members to block goods that fail to meet domestic environmental, public health or safety standards. Import restrictions can be placed on goods that do not meet energy efficiency standards, as long domestic goods are treated the same way. The WTO General Agreement on Tariffs and Trade (GATT) multilateral agreement which promotes the reduction of tariffs and quotas globally - permits certain border tax policies to even out differences in fiscal rates, subsidies and allows for redressing trade remedies in both Article II: Schedules of Concessions & Article III: National Treatment on Internal Taxation and Regulation.

²⁹ On this point see: Changing Climate for Carbon Border Taxes: Who is afraid of the WTO? Available at <http://www.gmfus.org/publications/changing-climate-carbon-taxes-whos-afraid-wto> retrieved 2.10.2017

³⁰ United Nations: UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE. 1992 http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf#page=17

³¹ Ibid.

³² International Centre for Trade and Sustainable Development. A proposal for a multilateral border carbon adjustment scheme that is consistent with international trade law

<https://www.ictsd.org/opinion/a-proposal-for-a-multilateral-border-carbon-adjustment-scheme-that-is-consistent>

³³ Ibid.

³⁴ Ibid.

³⁵ Excepting UNCLOS and the Fish Stocks Agreement, MEAs tend not to include compulsory binding procedures. See Compliance Mechanisms Under Selected Multilateral Environmental Agreements, UNEP http://www.acpmeas.info/publications/Compliance_mechanisms_under_selected_MEAs.pdf Compare for example the binding state-to-state dispute settlement process under the WTO, with the 'non-adversarial and non-punitive' mechanism established by the Paris Agreement to 'promote' compliance and 'facilitate' implementation

³⁶ Bilateral investments treaties (BITs) and investment chapters in free trade agreements create a set of obligations on states, for example, the obligation to accord investors of another Party 'fair and equitable treatment' and 'full protection and security' (see e.g., NAFTA Chapter 11, 1101-1113). In addition, BITs and investment chapters commonly establish a mechanism (known as investor-state dispute settlement or ISDS) through which investors can bring a claim on their own behalf against a state for breaching these obligations before ad hoc arbitral panels. (see e.g., NAFTA Chapter 11, 1115-1138)

³⁷ Article 3 of the 1957 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention", obliges states to recognise arbitral awards as binding, and to enforce them. One hundred and fifty seven countries, including all major economies, have ratified the New York Convention.

³⁸ See for example, India - Certain Measures relating to Solar Cells and Solar Modules - Report of the Panel, WT/DS456/R, paras. 7.285 - 7.301, in which a WTO panel ruled that the UNFCCC, the Rio Declaration and Rio+20 could not be considered "laws and measures" in India, and hence India's domestic solar programme did not come under GATT's Article XX General Exceptions. It is instructive to note that the literature on potential conflicts between trade and environmental law focuses on the extent to which trade measures leave room for environmental measures (that is, the interpretation of the environmental exceptions in GATT Article XX), and not vice versa.

³⁹ See Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Sec. 2(b)(10)(A)(i).

⁴⁰ European Commission. Trade for All http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf 4.22

⁴¹ European Commission. Handbook for trade sustainability impact assessment. 2nd edition http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF

⁴² Office of the United States Trade Representative. Environmental Review <https://ustr.gov/issue-areas/environment/environmental-reviews>

⁴³ Based on Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights

⁴⁴ World Trade Organisation. Environmental Goods Agreement. https://www.wto.org/english/tratop_e/envir_e/ega_e.htm

⁴⁵ European Commission. Trade for All http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf