

# 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 12<sup>th</sup> 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*