

# Climate Clubs in Context

*Different Concepts and International Legal Framework*

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# Agenda

- ▶ Different (theoretical) rationales and considerations
- ▶ (WTO) Legal Framework
- ▶ Climate Club Concepts
- ▶ Conclusion

# Different (theoretical) rationales and considerations

Based on literature review

## Minilateralism as a means to address climate change

- ▶ **Idea of „Climate Clubs“ is not new:** Origins in the 2000s/2010s, as response to „international gridlock“.
- ▶ **„Minilateralism“ as a means to address climate change:**
  - E.g. “a flawed obsession with multilateralism as the panacea for all the world’s ills” to be cured by “a smarter, more targeted approach” (Naim, 2009);
  - Studies on Climate Clubs comprising a small number find potential benefits (effectiveness and efficiency) in addressing climate change (Nordhaus et al. 2014).
- ▶ **At the same time: Minilateralism controversial in global politics:**
  - “Fear of being left out” (developing nations); and
  - Various different (legal) arguments against formation of minilateral solutions.
- ▶ **Thus: The question of Climate Clubs touches both effectiveness and legitimacy of the international climate process (Falkner, 2015) .**

## Different models for minilateral solutions

- ▶ **Different club-size models:** from „about 20“ to 2 (US and China),
  - No single answer, but club-size seems to depend on the rationale.
- ▶ **Different rationales for Climate Clubs:**
  - **Bargaining efficiency:** small-group forum aiming at improving the efficiency of the bargaining situation, thereby facilitating agreement on climate mitigation among a small group of major emitters without necessarily altering their interest calculation (**club stays small but better coordinated in international climate process**) .
  - **Club benefits:** excludable club benefits or sanctions on noncompliant members or non-members to reduce interest diversity and create incentives for countries to join the club and abide by its rules (**minilateral becomes multilateral – club becomes treaty**).
  - **International legitimacy:** strengthening the international legitimacy of the climate regime by acknowledging the desire of great powers for special power prerogatives while tying the club-based cooperation to the multilateral framework (**club members as “front-runners” or in international climate process, “class-system”** ).

# (WTO) Legal Framework

## WTO-Basics: Most-favored nation and national treatment principles

- ▶ Art. I:1 GATT: „Most-favored nation principle“
  - „Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded **immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties**” (no discrimination between products from other WTO states).
- ▶ Art. III:1 GATT: „National treatment principle“
  - „Internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, **should not be applied to imported or domestic products so as to afford protection to domestic production**” (no discrimination against products from other WTO states).

## WTO-Basics: Border Adjustment Taxes

- ▶ Art. III:2 GATT: „National treatment“ continued
  - “Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies **to an imported product and to the like domestic product** and is collected or enforced in the case of the imported product at the **time or point of importation** shall not be less favourable than that applied to like domestic products. No justification possible under Art. XX GATT (i.e. **environment**) provided that not as “a means of **arbitrary or unjustifiable discrimination** between countries where the same conditions prevail, or a **disguised restriction on international trade**”.
- ▶ Art. II: 2 lit a GATT: Border Adjustment Taxes
  - “A charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part” (i.e. see above: BAT cannot be designed in a manner that protects national production).



## US-Shrimp-Turtle Dispute (WTO DS58/R 1998) „Arbitrary or unjustifiable discrimination“/“disguised restriction“

- ▶ „It is not acceptable to use an economic embargo to **require other Members to adopt essentially the same comprehensive regulatory program**, to achieve a certain policy goal **without taking into consideration different conditions which may occur in the territories of those other Members.**“
  - i.e. need to consider if/where other states have measures in place that are **„comparable in effectiveness“**.
  - Though: **not necessary „to anticipate and provide explicitly** for the specific conditions prevailing and evolving in **every individual Member**“.
  - Overall: states should **„engage in serious negotiations** with the objective of concluding **bilateral or multilateral agreements**“.

## WTO-Basics: Customs Unions (CU) and Free Trade Areas (FTA)

- ▶ Art. XXIV:4 (ff) GATT:
  - Recognition of „*desirability of increasing freedom of trade by the development, through **voluntary agreements**, of closer integration between the economies of the countries parties to such agreements*” and accordingly,
  - *The “purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and **not to raise barriers to the trade of other contracting parties with such territories**”.*
  
- ▶ THUS:
  - CU/FTA may **not** lead to duties or regulations for WTO parties not member to the CU/FTA that are “on the whole (...) **higher or more restrictive** than the general incidence of the duties and regulations of commerce **applicable in the constituent territories prior**” to the **CU/FTA**.
  
- ▶ ALSO:
  - **Plans for CU/FTA need to be consulted and approved** by WTO General Assembly.

# Climate Club Concepts

## EU CBAM (EU COM Proposal)

<b>Idea</b>	<p>EU introduces (<b>unilaterally</b>) CBAM (Carbon Border Adjustment Mechanism) = imposes a CO<sub>2</sub>-price on EU-imports that mirrors the price EU (like) products pay within EU EHS;</p> <p>Products from other (WTO) States may get the CO<sub>2</sub>-price they paid in the home state accredited (i.e. reduction in CBAM obligation to avoid that they overall pay more than EU (like) products).</p>
<b>(Perceived) Benefit</b>	<p><b>Lower global CO<sub>2</sub>-emissions</b> by imposing a CO<sub>2</sub>-price for products from states that don't have similar regulation (possibly: provide incentives for states to adopt regulation);</p> <p>Avoid <b>carbon leakage</b>.</p>
<b>Classification under WTO Law</b>	<p>Unilateral measure, unlikely to qualify as CU/FTA;</p> <p>Potential violation of national treatment and most-favored nation (CO<sub>2</sub>-emissions are unlikely to establish a relevant difference in product; but may <b>justify the measure</b>);</p> <p>Recognition of foreign CO<sub>2</sub>-prices has high discrimination potential (administrative effort could lead to problems with justification - <b>but see US-Shrimp-Turtle</b>).</p>
<b>AOB</b>	<p>Allegations of „<b>extraterritoriality</b>“ or <b>intrusive behavior by EU</b> (unilaterally trying/imposing a CO<sub>2</sub>-price on other countries);</p> <p>„Club-like“ behavior with regard to recognition of foreign CO<sub>2</sub>-prices can be seen as <b>political affront</b>.</p>

## The Classic „Climate Club“ (Nordhaus et al)

<b>Idea</b>	<p><b>International agreement</b> between participants in "carbon club" (in principle <b>everyone free to join</b>);          Among club members obligation to implement a certain price (free choice of instruments);          Penalty mechanisms for non-members.</p>
<b>(Perceived) Benefit</b>	<p>Lower global CO<sub>2</sub>-emissions by providing <b>incentive (negative) to join the club</b> and thus adopt their own CO<sub>2</sub>-pricing mechanism;  <b>Less impact on international trade</b> due to <b>uniform CO<sub>2</sub>-price</b>;          May in the long-term lead to <b>international (legal) initiative</b>.</p>
<b>Classification under WTO Law</b>	<p><b>CU/FTA</b>;          Would thus require a <b>plan and approval by WTO</b>;          (Approval depends on likelihood of other WTO states being interested in joining).</p>
<b>AOB</b>	<p>Question of the „right“ price for CO<sub>2</sub> – studies suggest different numbers – may cause issues in political negotiations.</p>

## Open and cooperative (German Eckpunktepapier/G7 proposal)

<b>Idea</b>	<p><b>Vague:</b> „club“ of certain ambitious states (with CO2-targets and policies) that coordinate their CO2-reporting and price-levels; Some (undefined) support for states that cannot yet join; <b>Unclear policies towards non-members</b> (likely: subject to the full CO2-price that has been coordinated within the „Club“).</p>
<b>(Perceived) Benefit</b>	<p><b>Lower global CO2-emissions</b> by imposing a CO2-price for products from states without similar regulation (possibly: provide incentives for states to adopt regulation)????; <b>Avoid carbon leakage.</b></p>
<b>Classification under WTO Law</b>	<p><b>Likely: CU/FTA</b> (coordination of prices); Likely: Problematic if the CO2-prices within club members are (relatively) new and thus result in higher duties for non-members than before; Would <b>require plan and approval by WTO.</b></p>
<b>AOB</b>	<p>Criteria for club membership are <b>not clear</b> – suggests membership is not an option for developing countries – and would be difficult to establish/get approve; Open how it addresses <b>principle of Common but Differentiated Responsibilities and Respective Capabilities</b> (CBDR-RC).</p>

## „Let’s not talk about it“

<b>Idea</b>	<b>“Gas Station approach”</b> = States follow their own national CO2-pricing (or other) policies; No official discussions on coordination, rather “observing and adjusting” (where appropriate).
<b>(Perceived) Benefit</b>	Lower global CO2-emissions without formalities and difficult political negotiations; Allows broadest participation („everyone is at the table, when the table is the ground“); May in the long-term lead to <b>international (legal) initiative</b> .
<b>Classification under WTO Law</b>	<b>None</b> (Though individual states would have to ensure WTO compliance of their national measures).
<b>AOB</b>	Depends <b>only on the willingness/decision of any individual state</b> to „participate“ by adjusting their own national policies.

# Conclusion



**“I refuse to join any club that would have me as a member.”  
Groucho Marx**

- There is **no „one“ Climate Club model** or even idea;
- **WTO law** may be problematic for the procedural requirements (Art. 26 GATT) as well as substantive requirements (Art. 20 GATT);
- But the „problem“ is not only a legal one, it is **political**.
  
- EU CBAM as an **attempt to push for a multilateral solution**, that may facilitate **minilateral – or even sectoral – progress**.

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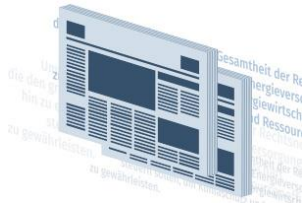
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