

Compete or Harmonise? On regulatory divergence in linking emissions trading schemes

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In the 21st Century, regulatory jurisdictions use Non-tariff Measures (NTMs) in order to distort trade so as to meet various economic, social and occasionally diplomatic goals. This is not new. What is new, however, is that this behaviour is no longer primarily related to the stand-alone goal of protecting domestic industry. Rather, the use of NTMs is now regarded by regulatory jurisdictions as an integral component of attaining broader public policy goals; goals related to the environment or climate change for example. For this reason NTMs are receiving increased attention.

On 28 August 2012, a full two-way link between the Australian and European Union (EU) emissions trading schemes was announced. Both Australia and the EU, as part of their respective emissions trading schemes, have implemented regulations providing assistance to emissions-intensive trade-exposed sectors (EITES). In other words, both jurisdictions have integrated NTMs into the umbrella of broader environmental public policy attainment, arguing that such measures are necessary to ensure competitiveness and “save” jobs.

All sovereign jurisdictions have, to some extent, unique political and legal systems and thus regulations created through these systems, even if they are addressing identical policy issues, are naturally different. This disparity of regulations between respective jurisdictions is referred to as regulatory divergence. Regulatory divergence between co-operating jurisdictions creates costs. Sometimes these costs are minimal; however, it is becoming increasingly evident that regulatory divergences can act as serious barriers to trade. In light of this, the questions that this thesis attempts to answer are firstly, whether regulatory divergence exists between Australia and the EU in the way they respectively treat EITES; secondly, whether such divergence is substantial enough to warrant government intervention; and finally, whether the divergence can or should be addressed using the current theoretical frameworks of regulatory competition or regulatory harmonisation.

To address these questions, this thesis explores the theory of regulatory divergence and outlines how Australia and the EU respectively understand and treat EITES. In doing so it argues that there is divergence between the regulations in their current form and that this regulatory divergence is substantial. This thesis further argues that due to the regulations being substantially divergent and including NTMs intended to distort trade, the highlighted divergence should be addressed in some form. In addition, a critical analysis of addressing regulatory divergences through regulatory competition and harmonisation is undertaken. It is argued that when regulatory competition creates “sensible” divergent regulation between co-operating jurisdictions, there can be little argument against it. Finally this theoretical framework is applied to the case study, finding that an approach by the Australian Government and EU where a mix of mutual recognition and essential requirements are used to “manage”, rather than overcome, the divergence that exists, would be optimal looking towards the proposed 2018 link of the Australian and EU emissions trading schemes. In conclusion, future hypothetical implications are also discussed.