

Environment- and Climate-Related JSIs: Caveat Emptor

In the run-up to MC12, many developing countries are being invited to sign up to Joint Statement Initiatives (JSIs) that could then be highlighted as part of the outcomes of MC12. These JSIs are similar in terms of intent to the plethora of joint declarations and statements that were entered into by various States, international organizations, and private sector organizations in the run up to and during the recently concluded 26th session of the UNFCCC Conference of the Parties (COP26) in Glasgow which had been encouraged by the UK COP26 Presidency.¹ However, it should be stressed that these COP26 joint statements and declarations are non-binding, voluntary, and are not subject to the authority of nor are accountable to the UNFCCC Parties under the COP.

In the WTO context, these JSIs are being pushed by their proponents purportedly as the WTO Members' response to making trade and environment be mutually supportive or to serve as the WTO members' trade-related contributions to fighting climate change. Although there is no negotiating mandate in the current WTO work programme for these JSI, they are being raised by various WTO Members and the WTO Secretariat as a means to contribute to global climate change actions, with the Director-General and various WTO Members (particularly from developed countries) calling for a "trade and climate" outcome at MC12. These JSIs include the following:

- [Trade and environmental sustainability structured discussions \(TESSD\)](#) – 50 WTO Members [proposed](#) organizing informal structured discussions on trade and environmental sustainability, developing a work plan for the discussions prior to MC12; launched in Nov 2020 and aiming to have a joint ministerial statement at MC12 that would set out future work for the initiative in areas such as trade and climate change as well as fix a road map for advancing discussions in 2022
- [Informal dialogue on plastics pollution and environmentally sustainable plastics trade](#) – 14 participants to dialogue on supporting efforts to reduce plastics pollution and promote sustainable plastics trade, including through transparency and international cooperation, with a view to showing progress at MC12 (first meeting on 29 March 2021)
- Japan's [proposal on carbon neutrality](#) – introduced at Ottawa Group meeting in March 2021 pushing for discussions among interested WTO Members leading towards MC12 on [i] elimination of tariffs on products that contribute to reduction of greenhouse gas emissions, e.g., hydrogen-related products and storage batteries, [ii] rule-making on regulatory issues and on environmental services, and [iii] capacity building within developing countries,
- [Agreement on Climate Change, Trade, and Sustainability \(ACCTS\)](#) – 6 WTO Members as participants, launched in September 2019, aiming to lower trade barriers to EGS, address fossil fuel subsidies, establish guidelines for eco-labels, negotiations on-going (4th round in March 2021), with New Zealand calling for a joint ministerial statement on fossil fuel subsidy reform at MC12

The plurilateral negotiations for an [Environmental Goods Agreement](#), including 18 participants (46 WTO Members), launched in July 2014, has been suspended since 2017. It was intended to push forward a plurilateral agreement for the trade liberalization of environmental goods trade following the deadlock for over a decade in the multilaterally mandated negotiations on liberalization of environmental goods and services under paragraph 31(iii) of the Doha Ministerial Declaration.

Other WTO Members have also launched or are considering unilateral "climate-related" trade initiatives such as:

- The [EU Green Deal carbon border adjustment mechanism \(CBAM\)](#) – The EU updated WTO members in [November 2020](#) and [March 2021](#) on its plans to establish a CBAM as part of its Green Deal framework, and issued its [CBAM Regulation proposal](#) on 14 July 2021

¹ See <https://ukcop26.org/the-conference/cop26-outcomes/>

- The [United States](#), [Canada](#), [US-Canada](#), and [UK G-7 Presidency](#) have been discussing the potential use of CBAMs as part of “climate change action”

It is important to note that developed country initiatives with respect to the linkages between trade, environment, and climate change, usually focus on:

- (a) Securing and expanding their market access in environmental goods and services in developing countries
- (b) Restricting developing countries’ policy flexibility and space with respect to trade in environmental goods and services, with possible implications on constraining domestic environmental goods and services development
- (c) Solidifying developed country production and export dominance in most environmental goods and services.

These initiatives tend to highlight the role of commercial trade as the primary mode for technology transfer and acquisition, with little or no reference to any technology transfer commitments that developed countries may have under the WTO or the UNFCCC, and explicitly or implicitly assuming enforcement of intellectual property rights over the trade environmental goods. These characteristics are evident in one way or another, for example, in the JSIs with respect to the TESSD, Japan’s carbon neutrality proposal, and the ACCTS; and are very evident in the plurilateral and unilateral initiatives such as the EGA and the EU CBAM regulation.

There are existing inequalities between developed countries and the rest of the world with respect to the patent ownership of environment-related inventions and technologies (such as those on environmental management, water quality management, and climate change mitigation) and over technological innovations in general. A 2015 working paper from the OECD, for example, shows that around 85% of all patents issued globally between 2000 to 2011 for environmental management, water quality, and climate mitigation inventions were issued in developed countries; and the disparity increases when looking at the extent to which developed countries in the OECD account for the patenting of inventions globally (at least 88%) and for “high-value” inventions (more than 90%).² In the period between 2012 to 2017, based on OECD statistics, around 86% of patent applications in environment-related technologies were filed in OECD countries.³ This dominance in patenting environment-related technologies then gets translated into market dominance in the international trade of such technologies, with developed countries being the dominant exporters of such technologies (to each other and to developing countries).⁴

The accelerating pace and impacts of climate change and environmental degradation globally coupled with the push by developed countries in the UN climate change negotiations for stronger emission reduction targets, including by developing countries, could result in a rapid and substantial increase in global and developing country markets for environmental goods and services— a market that developed countries currently dominate. Their plurilateral and unilateral initiatives, if made into binding treaty obligations, could extend such dominance. Coupled with current systemic failures in terms of financing, technology transfer, terms of trade, debt, etc. that adversely affect developing countries, these current inequitable economic arrangements could be further solidified and deepened by these initiatives and increases the difficulty for developing countries to diversify and develop their economies in a sustainable and equitable manner.

² I Hascic, M Migotto, Measuring environmental innovation using patent data (OECD Environment Working Papers No. 89, 2015), Tables 4 and 5, pp. 27-28, at <https://www.oecd-ilibrary.org/docserver/5js009kf48xw-en.pdf?expires=1634211518&id=id&accname=guest&checksum=EDC08AEF7DF26C9E4CC03A9853655728>.

³ Based on the OECD Statistical Database at <https://stats.oecd.org/>, search for “patents in environment-related technologies”, between 2012 to 2017, 90,762 patents were filed by applicants in OECD countries out of 105,110 patent applications worldwide (86.35%).

⁴ See H Bucher, J Drake-Brockman, A Kasterine, M Sugathan, Trade in Environmental Goods and Services: Opportunities and Challenges (International Trade Centre Technical Paper, 2014), Figure 3, at <https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AssetPDF/EGS%20Ecosystems%20Brief%20040914%20-%20low%20res.pdf>

These concerns above apply in particular to the JSI on the TESSD, the Japanese carbon neutrality proposal, the ACCTS JSI, the plurilateral EGA negotiations, and the unilateral CBAM initiative of the EU.

In particular, developing countries have opposed the introduction of CBAMs (such as the one that the EU has made) as a climate-related trade measure. The Group of 77 and China in the UN climate negotiations as early as 2009 have said that “These measures could have distortive effects on international trade, restrict the exports of developing countries and negatively affect the workers of those sectors that would have response measures, and therefore hinder the social and economic development of our countries ... Developed country Parties should not adopt unilateral trade restrictive measures against developing countries in contravention of the provisions of the UNFCCC.”

The most-cited policy “rationale” for CBAMs is to address competitiveness by preventing “carbon leakage” that results when an emitting industry moves to other countries that have more flexible or “less strict” environmental / climate policy. In doing so, the industry’s production costs become lower because it will not have to comply with the more stringent environmental regulations of its former host country. However, the carbon leakage and competitiveness argument downplay and disregards the historical and current patterns of development in industrialized developed countries. Their shift from manufacturing to services over the 1980s to 2000s has “offshored” emissions, resulting in their narrative of reducing GHG emissions and “decoupling” of their economic growth from emissions but ignoring consumption-based embedded emissions arising from international trade of consumer goods and services especially from South to North.

If WTO Members, especially developing countries, were to push for a JSI that is truly reflective of equity and of WTO Members’ obligations under the UNFCCC and its Paris Agreement, such a JSI would instead have the following key elements:

- A call for more domestic mitigation to be undertaken within developed countries for them meet their fair share of the historical plus current mitigation budget up to 2050
- A waiver of TRIPS enforcement of corporate-owned IPRs over environmentally-sound technologies
- A declaration of a moratorium (“Peace Clause”) on WTO dispute settlement over cases involving domestic climate change-related measures by developing countries (such as subsidies to develop domestic green economic sectors) that might be inconsistent with WTO rules
- Agreement on the development of multilateral, regional or bilateral technical assistance, capacity building, and expertise sharing programmes from developed countries to support developing countries on mitigation, adaptation, loss and damage, response measures
- Real and effective technology transfer, as provided for in Art. 4.5 UNFCCC and Art. 10 Paris Agreement (including financing), of environmentally-sound technologies to developing countries using bilateral or other technology transfer and development cooperation programmes to help with technological retrofitting and jumpstart endogenous technology development in developing countries rather than through tariff and non-tariff liberalization
- Call to increase developed country financing support to developing countries for climate change action, including through Aid for Trade
- Support the integration of economic diversification into sustainable development and sustainable trade strategies and facilitate and support international cooperation efforts to achieve economic diversification and the expansion of clean and renewable energy-based energy access in developing countries, including through targeted investments, technical assistance, removal of policy and financial barriers to technology transfer, to support leapfrogging from fossil fuel-dependent development to low carbon development pathways. This would include the development and implementation of trade policies and measures that support nationally appropriate climate change mitigation strategies, plans, policies and programs, including NDCs and/or long-term low emissions development strategies that maximize the positive and minimize the negative impacts of response measures.