Chapter 9

International Emissions Trading and WTO Rules

9.1 Introduction

The Kyoto Protocol sets a ‘cap’ on emissions from Parties included in its Annex B. These States are allowed to sell or buy parts of the assigned amounts (assigned amount units). In addition, States can trade with tradable units derived from project mechanisms, such as Joint Implementation or the Clean Development Mechanism, i.e., Removal Units (RMUs), Emission Reduction Units (ERU), and Certified Emission Reductions (CERs). Emissions units can be traded at two different levels, at the level of sovereign States and at the level of private entities. Also a transaction from a State to a private entity or vice versa is possible.

The participation of private companies and other private entities in the emissions trading system is clearly desired although not explicitly mentioned. Despite missing reference in Article 17 of the Kyoto Protocol it is generally accepted among Annex B Parties countries that private entities may participate in such trading with the approval of the relevant Party.\(^1\) In this study, the focus will remain on the responsibilities of States, that is, the effect transnational emission trading by private and public entities has on the responsibility of a State Party under both the international trade regime and the climate regime.

An Annex B Party to the Kyoto Protocol might set up a domestic emission trading scheme and allocate allowances or tradable emission units to private domestic entities, who could use these rights for trading with other private entities within the same or foreign countries. The obligations under the Kyoto Protocol, however, remain sovereign obligations of the State Parties to the Protocol. States therefore would need to regulate private actors in a way that enables the State to comply with its international obligations.

It is thus useful to distinguish between private entities and States engaging in emissions trading.2

9.2 WTO Concerns of Sovereign Exchanges in Emission Units

The first question to consider is whether the exchange of AAUs and other emission units between Parties to the Kyoto Protocol as such is guided by WTO rules.

With the agreed cap on GHG emission committed to by State Parties to the Kyoto Protocol in its Annex B, states have imposed sovereign obligations on themselves. Below this committed cap, they have the respective rights to emit greenhouse gases. Under an Emission Trading scheme, the State Parties may engage in the acquisition and transfer of these sovereign rights to emit within the agreed cap. Articles 3.10 and 3.11 in accordance with the rules agreed under Article 17 (Marrakech rules), allow parts of these assigned amounts (Assigned Amount Units – AAUs) to be traded among Annex I countries of the UNFCCC. At this level of ‘international emission trading’ no trading in the understanding of participation in a market place occurs. The exchange of AAUs between sovereign States does not create a market in the context of the WTO Agreements as economic activities between sovereign States is in principal not guided by WTO rules.

The reasons for this argumentation lie within the WTO system itself. The WTO system is characterized by its overriding principle that barriers to trade imposed by governments need to be subjected to international discipline. Under WTO regular procedures were established looking to diminish or eliminate such barriers and to set up a regime of non-discrimination – i.e. a generally applicable regime of most-favoured-nation treatment, a prohibition of quantitative restrictions, and a commitment to reduction of trade barriers and opening markets. In short, the WTO system aims to delimit trade restrictions that nations impose on transboundary trade in goods and services, e.g., unilateral high tariff and discriminatory economic arrangements, import quotas and protection systems.3 The economic relations between States are in general not covered by the WTO Agreements.

Nor does the WTO – despite its name – govern trade itself. Even under the WTO Agreements trade is not considered a value, but a means to the end of, inter alia, higher living standards, full employment and a large and stead-

---
