

Cross-National Linkages In Cap- And-Trade Systems

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Linkage(s)

- California is undertaking a linkage with Quebec in its carbon cap-and-trade market
- In works for years, just beginning formally
- Future linkages are possible, according to CARB
- The EU ETS is planning linkage with Australia, looking forward to more (although the political situation in Australia could destabilize this)

The Benefits of Linkages

- “The EU expects the international carbon market to develop through ‘bottom-up’ linking of compatible emission trading systems. Linking enables participants in one system to use units from a linked system for compliance purposes.” EU Commission.
- May be more plausible means of achieving de facto international agreement
- Lowers costs, increases liquidity

Typology Of Linkages

- Sub-national state with Sub-national State:
e.g. if Oregon or Washington developed a cap and trade and California lined to it, RGGI
- Nation State with Nation State: EU member(s) with other members, EU with Australia
- Sub-national state with Nation State: no example right now
- Sub-national state with Sub-national state: California-Quebec

Sub-national with Sub-national Linkages

- Raise questions of national authority and sovereignty and whether the linkage interferes with the autonomy/policy choices of the national government
- Possibility that sub-national linkage could be deemed to violate national law as to intrusive on national authority
- Possibility could make linkage less effective if it discourages investments based on linkage

Sub-national with Sub-national Linkages

- Other possibility: Sub-national state linkage will be less effective because it must be structured so as not to violate authority or intrude upon sphere of Nation State
- More effective the harmonization across jurisdictions, and more effective compliance and enforcement across jurisdictions, greater the possibility is that the linkage will be deemed an intrusion on the national sphere

US legal context

- Building block is Supremacy Clause
- Congress has preemptive rights over state initiatives
- Executive Branch too, even if not acting with Congress necessarily
- Although Executive's ability to claim preemptive rights may be limited by Congressional action/statute, *Mass v. EPA*

Murkier Legal Context Than Domestic

- Restrictions and Linkages among or between states also raise legal issues but
- More Supreme Court case law
- More lower court case law
- Very few and even then opaque precedents regarding restrictions or linkages across national borders

US legal context

- A number of doctrinal labels
- Conflict, Obstacle and Field Preemption
- Foreign Affairs Power Preemption
- Foreign Dormant Commerce Clause Preemption
- Compact Clause
- Dormant Commerce Clause Preemption

Quartet Of Major Supreme Court Cases

- None exactly on point
- Zschering (1968)
- Barclays Bank (1994)
- Crosby (2000)
- Garamendi (2003)

Zschernig

- Oregon statute
- Cold-war inspired
- Foreign resident could not inherit if foreign jurisdiction engages in confiscation of property
- Court found this an unwarranted state intrusion into foreign affairs
- “the freezing or thawing of the ‘cold war’ . . . are matters for the federal government”

Crosby

- Court invalidates Massachusetts statute restricting state purchases from Burma/Myanmar
- Congress had given President flexible authority to impose sanctions, Mass statute preempted by federal law
- Statute impeded “President’s power to speak and bargain effectively with other nations”

Barclays

- Court upholds California franchise tax based on worldwide reporting of business operations
- Does not detract from federal government ability to speak with one voice
- Relied heavily on fact Congress knew states were using this method and that foreign countries objected but Congress refused to act
- Brushes aside Executive Branch objectives to such state taxes

Garamendi

- California statute required insurers to disclose Holocaust-era policies and practices
- Conflicted with Executive agreements/policies addressing Holocaust issues and claims by US residents
- Citing Crosby, if the law is “enforceable the President has less to offer and less economic and diplomatic leverage as a consequence”

Sum Up

- States Judging/Criticizing Foreign Sovereigns
- State Impeding Ability Of Federal Government To Speak With One Voice Re Foreign Issues
- State Reducing Bargaining Power, Bargaining Chips, Strategic Option, and Leverage Of Executive In Negotiating With Other Countries

California-Quebec Linkage

- Does it detract from ability of federal government to speak with one voice on climate change?
- - arguably not so far, Executive (Obama administration) has supported California's efforts, but what if we saw a shift to a uniformly anti-cap and trade government, including Congress and Executive?

Quebec-California Linkage

- Limiting bargaining leverage of Executive re climate change?
- Not much international bargaining going on, so perhaps not
- And Quebec emissions are comparatively tiny so not much effect one way or another on shape of broad multilateral agreement
- But what if California were trying to link with EU?

Quebec-California Linkage

- Sitting in judgment?
- On its face linkage does not do that, but if conflicts arise between California and Quebec, that could be a realistic scenario
- What conflicts?
- Conflict over differential levels of transparency/enforcement
- Conflicts over nature and integrity of offsets that are allowed (some already)

For example

- Quebec is more restrictive in offsets in some ways (excludes forest sinks) but seems less restrictive in other ways, has pushed back against stringency of California rules
- What if California companies acquire offsets in Quebec that California thinks are bogus, could that lead to California sitting in judgment on Quebec – or vice versa?

Political And Economic Change

- Politics underlying cap and trade can change, with or without economic changes
- What if California has slow growth and electricity price pressure, wants to loosen cap and trade, wants to reduce any upward credit price pressure from Quebec buyers?
- EU ETS Phase I and II experience highlight possibility for conflict among trading/linked partners
- Harmonization through WCI depends on political and economic conditions

Questions

- What can California do in designing and implementing Quebec linkage to minimize legal objections?
- Quebec is relatively unproblematic because of its emissions/economic size compared to California, but is it possible to create linkages with bigger foreign markets and avoid constitutional problems?
- Will Courts in US understand the importance for leeway for state experimentation even on the cross-national front?