

Clean Energy and Free Trade: Redefining 'Like Products' to Account for Climate Change

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Abstract : This paper argues that current jurisprudence under the Dormant Commerce Clause of the United States Constitution and the WTO should be altered to allow states to more freely foster clean energy production. In particular, free trade regimes typically prevent states from discriminating against 'like' products, and whether these products are considered 'like' is typically measured by how they appear to the consumer. This makes it challenging for states to discriminate in favor of clean energy, such as low-carbon fuels. However, this paper points out that certain courts in the US—and decisions of the WTO—have already begun taking into account how a product is manufactured in order to determine whether a state may discriminate against it. There are also compelling reasons for states to discriminate against energy sources with high carbon footprints in order to allow those states to protect themselves against climate change. In other words, fuel sources with high and low carbon footprints are not, in fact, 'like' products, and courts should more freely recognize this in order to foster clean energy production.

Keywords : clean energy, climate change, discrimination, free trade

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