Border Measures: Legal Issues in International Trade

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Why Border Measures/Adjustments

• Greenhouse control legislations could increase costs of manufacturers. If other countries do not have similar emission control, producers in these countries will have competitive advantage. As a result the production may move to the these countries. Global emissions might not be reduced. And thus there is “carbon leakage.”

• There are also concerns about the disadvantageous competitive position of the producers in the countries having greenhouse control legislations

• Border measures/border adjustments proposed in the US and EU are said to equalize the costs arising from different emission policies, to address carbon leakage and to create an incentive for all countries to join the climate change regime.
Possible Forms of Border Measures

• Possibilities:
  – Additional Tariffs
  – Obligation to purchase emission allowances upon importation
  – Quotas
  – Technical standards or regulations
Example in the United States

• The Lieberman-Warner bill:
  – imports from major trading partners that fail to implement a comparable cap-and-trade program within a specified time may be subject, as a condition to gaining access to U.S. markets, to either a cap-and-trade program specifically for such imports or foreign regulation found to be “comparable” to the proposed program in scope and efficacy.
• Imports are exempt from the bill's emissions allowance requirements if they come from a country that
  • (1) has a comparable GHG reduction policy in place,
  • (2) is among the least developed developing countries, or
  • (3) emits a "de minimus" share of global GHG emissions.
Examples in EU

• The European Parliament resolutions: Suggesting the European Commission to consider imposing offsetting tariffs on imports from countries that are not parties to the Kyoto Protocol.

• The European Commission’s 2008 climate and energy package: contemplating to require importers to purchase emission allowances.
Relevant WTO Provisions

- Article II of the GATT 1994 (Tariffs)
- Article XI of the GATT 1994 (QR)
- Article I of the GATT 1994 (Most-favored-Nation treatment)
- Article III of the GATT 1994 (National Treatment)
- Article XX of the GATT 1994 (General Exceptions)
Article II of GATT (Tariffs)

• Text: “…(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates… be exempt from ordinary customs duties in excess of those set forth and provided therein.”

• Levying additional tariffs would be against the tariff binding obligation for the products included in the tariff schedules, unless
  – There is a justification under Article XX (to be explained in later slides); or
  – The lack of similar emission control in the exporting country can be considered a subsidy.
A Lack of Emission Control = Subsidy?

- Article 1 of the SCM Agreement defines subsidy as:
  - A financial contribution by a government in the form of
    - direct transfer of funds,
    - potential direct transfers of funds or liabilities;
    - government revenue foregone;
    - government provision of goods or services; or
    - government making payments to a funding mechanism; and
  - a benefit is thereby conferred.
- It is not easy to argue that a lack of emission control is a financial contribution so as to allow levying countervailing duties on the imported products from such country.
Article XI of GATT (QR)

• Text: “1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party…”

• Imposing import restriction would be against the prohibition of quantitative restriction, unless
  – There is a justification under Article XX (to be explained in later slides).
Article I of GATT (MFN)

- Text: “1. With respect to customs duties and charges of any kind imposed on or in connection with importation…, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities…, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in… the territories of all other contracting parties.”

- If the imported product from the country lacking emission control and the product from another country having emission control are “like product”, they have to be treated similarly.
The border measures are to target imports from countries with no or less emission control mechanism.

There could be different treatments between imported products from different WTO Members and thus a violation of MFN if the products are alike.
Article III of GATT (NT)

- Text: “2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”
“4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use….

• If the imported product from the country lacking emission control and the domestic product are “like product”, they have to be treated similarly.
The border measure is to target imports from countries with no or less emission control mechanism. Thus there could be different treatments between the imported product and the local product.

Also, the second sentence of Article III:2 requires that the internal tax or charge is not applied in a protective manner.

- Since the border measures are proposed to offset the competitive advantage of foreign products, they could be interpreted as the importing countries are applying the measures in a protective manner.
Article III of GATT (NT)-continued

• Under Article III:4, WTO Members have an obligation to require importers to purchase allowances imposed based on the same conditions as those for the obligation to purchase allowances imposed on the like domestic products.
  – But it would be difficult to have same or similar calculations of the basis of the carbon embedded in the imported product.
  – If it cannot be similarly calculated, there might be a violation of Article III:4.
Common Issue for Articles I & III of GATT - Like Product

- Under WTO jurisprudence, the criteria for analyzing likeness of different products include the following:
  - (1) the "properties, nature and quality of the products;"
  - (2) the use of the products;
  - (3) consumer perception of the products; and
  - (4) tariff classification of the products.
Common Issue for Articles I & III of GATT - Like Product (continued)

- Processes and Production Methods (PPMs) do not have a role in determining “likeness” of products under both Article I and Article III of the GATT.
- Thus, whether or not a product produced under emission control mechanism should not be a factor to be considered when deciding the treatment of products.
- The border measures containing discrimination between different products based on the greenhouse gas emissions could be a violation of Articles I & III because they treat like products differently.
Article XX General Exceptions

- Text: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
  - …
  - (b) necessary to protect human, animal or plant life or health;
  - (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
  - …”
Article XX General Exceptions paragraph (b)

• Requirements:
  – The trade restriction must be "necessary" to accomplish its legitimate goals.
  – “Necessary" does not mean indispensable
  – The necessity of a measure should be determined through ‘a process of weighing and balancing a series of factors’. The three-factor test for deciding whether a measure is necessary:
    • (1) its contribution to furthering the legitimate objective
      – the objective of the measure should be assessed to determine whether the policy underlying the measure is to reduce such a risk and thus falls within the range of policies covered by Article XX(b),
Article XX General Exceptions
paragraph (b)

• (2) the importance of the interests or values protected thereby
   – The more important the values protected by a measure, the more likely the measure will be considered necessary), and

• (3) the impact on trade
   – A measure must be the "least trade restrictive" alternative reasonably available to satisfy Article XX(b)'s necessity requirement.
   – The country adopting the measure should have pursued international cooperative arrangements, which would have been less trade restrictive than the embargo.
Article XX General Exceptions paragraph (b)

- Conclusion for border measures under paragraph (b):
  - (1) its contribution to furthering the legitimate objective:
    - Yes
  - (2) the importance of the interests or values protected thereby:
    - High
  - (3) the impact on trade
    - A measure must be the “least trade restrictive” alternative reasonably available to satisfy Article XX(b)‘s necessity requirement:
      - Not sure
    - The country adopting the measure should have pursued international cooperative arrangements:
      - Yet to see such international efforts
Article XX General Exceptions paragraph (g)

- Measures protecting "exhaustible natural resources":
  - "Exhaustible natural resources" include renewable and non-renewable as well as living and non-living natural resources, as interpreted by WTO jurisprudence.
  - The trade restriction is designed to be made effective in conjunction with domestic restrictions.
  - The requirement "relate to" the conservation of natural resources has been construed to require a loose means-ends test, where there exists a rational connection "between the measure at stake and the legitimate policy of conserving exhaustible natural resources."
Article XX General Exceptions
paragraph (g)

• Conclusion for border measures under paragraph (g):
  – “Exhaustible natural resources”:
    • Yes, border measures are to protect the atmosphere a livable climate, which should be exhaustible natural resources under paragraph (g).
  – Designed to be made effective in conjunction with domestic restrictions
    • Yes, border measures, such as US cap-and-trade program, are made effective in conjunction with domestic restrictions.
  – The requirement "relate to“:
    • Yes, border measures relate to the legitimate policy of conserving exhaustible natural resources.
Article XX General Exceptions

**Chapeau**

• Requirements:
  – Not to impose "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or constitute a "disguised restriction on international trade.

• The “chapeau” of Article XX is to prevent abusive use of the exceptions.

• “A measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in any exporting Member."

• The Member implementing a trade restriction must provide all exporting countries similar opportunities in good faith to negotiate an international agreement before restricting trade.
A measure's application must be transparent.

If the measure required that exporting countries adopt essentially the same regulatory regime as the importing country, without allowing for different conditions in the exporting country, it is not justified.
Article XX General Exceptions

**Chapeau**

- Conclusions under Chapeau
  - Sufficient flexibility to take into account the specific conditions prevailing in any exporting Member:
    - *No*
  - To provide all exporting countries similar opportunities to negotiate an international agreement in good faith before restricting trade
    - *Yet to see the situation*
Article XX General Exceptions

Chapeau

– Transparent.
  • Easier to meet the requirement
– Whether requiring exporting countries to adopt essentially the same regulatory regime as the importing country
  • US and EU are requiring other countries to adopt essentially the same regulator regime.
Conclusions

• Different kinds of border measures might have different status under WTO. The legitimacy of different border measures depends on its specific designs.

• Generally speaking, the border measures are inconsistent with MFN and NT provisions. Depending on the schemes, there may be breaches of the tariff binding obligation and prohibition of QRs.

• Whether the border measures can be justified under Article XX (b) and (g) depend on the specific designs. But there are legal obstacles for countries to adopt border measures. They include the following:
  – It might be difficult for the importing countries to claim that the border measure is the “least trade restrictive” alternative reasonably available.
Conclusions
Continued

– It is difficult to argue that these countries have pursued international cooperative arrangements.

– It is difficult to argue that sufficient flexibility to take into account the specific conditions prevailing in any exporting Member have been provided.

– It might be difficult to argue that all exporting countries have been provided with similar opportunities to negotiate an international agreement in good faith before restricting trade.

– It is difficult to argue that these importing countries do not require exporting countries to adopt essentially the same regulatory regime as the importing country.
Conclusions Continued

• Control of greenhouse gas emission is commonly desirable.
• However, unilateral decision of the types of border measures could be subject to challenge under the WTO and might be counterproductive.
• It is also desirable to have border measures negotiated at multilateral legal in food faith so as to ensure the consistence with the WTO.
• Such multilaterally negotiated border measures can also reduce concerns about protectionism.
• Thank you!