1 **Trade Law Constraints on BTAs and Carbon Tax Credits**

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2 **Three Possible Internationally-Oriented Measures in Connection with a National Carbon Tax**

◉Import BTA

◉Carbon Tax Credit

◉Export BTA

3 **Design principles derived from WTO law . . .**

4 **Import BTA Analysis**

◉GATT Article II import charge or Article III internal tax?

◉If Article III internal tax,

  • Like products

  • Taxed in excess?

◉Article I MFN

◉Article XX exception

  • XX(b): necessary to protect human life

  • XX(g): related to conservation of exhaustible natural resources and made effective in conjunction with domestic limits

  • Plus chapeau: not arbitrary or unjustifiable discrimination

5 **Is Article II Applicable?**

◉Applies to charges on or in connection with importation

  • Art. II:2(a) exception for "charge equivalent to an internal tax" consistent with Art. III "in respect of the like domestic product"

  • Fact of application at the border not determinative

  • China—Auto Parts: is obligation to pay "triggered" by importation, or by internal factor

   ‣Factual question—

   ‣Control by structuring to be triggered by internal factor, such as sale or consumption

   ‣Would tribunal look through this at PPM (prior to importation) basis for tax?

   ‣Lore: direct taxes not adjustable

6 **Import BTA—GATT Art. II**

◉Structure an import BTA so that it is triggered by an internal factor or action, even if it is enforced at the border.

  • Consider characterizing the domestic tax as a consumption tax—consumption is internal

◉Structure the import BTA as a tax on a product, rather than on the production process

◉Import BTA must be qualitatively and quantitatively equivalent to the domestic carbon tax

7 **Import BTA—GATT Art. III**

◉Calibration of carbon tax and import BTA to actual carbon intensity <u>may</u> violate Art. III: PPM like products issue

◉Setting the carbon tax and import BTA as a product-based tax (e.g., steel), without calibrating for carbon, <u>would not</u> violate Art. III

8 Import BTA—GATT Art. I MFN

◉Calibration of carbon tax and import BTA to actual carbon intensity <u>may</u> violate   Art. I

◉Making the import BTA conditional on the exporting state's carbon regime <u>may</u> violate Art. I

◉Setting the carbon tax and import BTA as a product-based tax (e.g., steel), without calibrating for carbon, <u>would not</u> violate Art. I

◉

9 Violations Excepted Under GATT Art. XX

◉Possible applicable subsections: XX(b), XX(g)

◉Must also satisfy "chapeau" (preamble): no arbitrary or unjustifiable discrimination between countries where the same conditions prevail

10 Art. XX(b) Exception?

◉Necessity to protect human life

◉Necessity balancing: importance, contribution, trade restrictiveness

◉Evidence to suggest import BTA will contribute to public health in US

◉Least restrictive alternative—make efforts to negotiate a cooperative international arrangement

11 Art. XX(g) Exception

◉Relating to conservation of exhaustible natural resources, made effective in conjunction with domestic restrictions

◉Climate as natural resource (clean air, turtles precedents)

◉Evidence that import BTA will conserve stable climate

◉Make effective in conjunction with domestic carbon tax

12 Art. XX Chapeau

◉Import BTA must treat imports no worse than domestic products

◉Import BTA must treat imports from different countries equally

◉But, must be reduced if
  • Exporting country has carbon reduction mechanism, or
  • Low-carbon producer

◉Prior good faith negotiations required

13 Art. XX Chapeau, cont'd

◉Differences in treatment should not be based on trade exposure

◉Export BTA—rebating carbon tax on exports—may be inconsistent with defense for import BTA

◉Domestic carbon tax credit should be reflected in reduced import BTA

14 Art. XX Chapeau, cont'd

◉Recall that a product-based tax targeting specific products, but not carbon content, would not violate Arts. I, II, or III, and so would not need justification under Art. XX

◉If import BTA set by reference to carbon content,

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- May use a reasonable default benchmark
- But must give foreign producers equivalent chance to show lower carbon content
- May need to cooperate with exporting states to audit

15 ☐ UNFCCC/Kyoto/Paris

◉Setting the chapeau "line of equilibrium" as to what is arbitrary or unjustifiable

◉Nairobi Ministerial—MEAs and WTO

◉

16 ☐ Carbon Tax Credits

◉Possible substitute for export BTA

◉If structured for limited Pigouvian application of tax rather than credit, no subsidy—not "tax otherwise due"

- Or structure as consumption tax
- Recall that a consumption tax might limit the need for import BTA, because it would apply to domestic consumption of imported goods. Importer as withholding agent.

17 ☐ Carbon Tax Credits, cont'd

◉Avoid export contingency

◉Export targeting is OK

◉Avoid specificity: use objective, verifiable standards for availability

- E.g., carbon intensity
- Avoid allocation based on trade exposure

◉If not export contingent, and not specific, not actionable

◉

18 ☐ Export BTA

◉Recall concerns regarding Art. XX chapeau

◉Possible exception from definition of "subsidy" if viewed as "borne by a product" (Footnote 1 of SCM)

◉Excluded from definition of "export subsidy"

◉If vary by reference to destination, could violate GATT Art. I

19 ☐ Compliance Strategy

◉Even if violation, no retaliation until authorized—litigation takes 3+ years

◉Then, except for export subsidies, retaliation limited to that equivalent to nullification or impairment

◉Possibility of "efficient breach" or civil disobedience

◉Can compensate targets of retaliation

20 ☐ Conclusion

◉Tax and BTA *on* products that tend to have high carbon content raises no WTO law problem

◉If differentiate by carbon content, may violate Arts. I or III

◉Structure as consumption tax reduces WTO risk

◉Art. XX defense may be available for even-handed domestic tax/import BTA combination

21 ☐ Conclusion, cont'd

◉Carbon tax credits should avoid export contingency; should be allocated based on objective criteria

◉Export BTAs can be structured to comply with WTO law, but may make Art. XX exception for import BTAs unavailable

◉Existence of FCCC rule authorizing/requiring carbon taxes with BTAs would support Art. XX exception

◉

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