

How does international law shape a BCA regime?

Aaron Cosbey

International Institute for Sustainable Development

What is the Value of Being First?

Climate Policy Forum, San Francisco, May 7, 2013

- Any strong unilateral climate measures will need to worry about impacts on competitiveness, leakage effects.
- Waxman-Markey dealt with this by means of a BCA (border carbon adjustment).
- How to design a BCA regime that respects international commitments (WTO, UNFCCC) *and* is effective?
- Background: MISTRA-funded exercise to define best practice in BCA

- We can't know *ex ante* what is legal under WTO – not until a specific measure is challenged and a ruling is delivered.
- But case law and textual analysis can give us a pretty good idea.
- Principles of international law are good guidance, but need to be applied to specific context to be meaningful

- **The fundamental WTO problem:** any border carbon adjustment will probably violate Article III of the GATT (national treatment):
- *“No internal tax applied to imports in excess of those applied to like domestic products. No measure applied so as to afford protection.”*
- **Key issue:** A ton of carbon-intensive steel is “like” a ton of low-carbon steel. So no discrimination based on carbon content.

- BCA may also violate GATT **Article I** (most-favoured nation treatment):
- *“Any advantage accorded to the products of a WTO member has to be equally extended to ‘like’ products of all WTO members.”*
- **Key issue:** No national exemptions from coverage, e.g., for having strong climate policies. And no benchmarks based on foreign national policies.

- Violating Art. III or I means a BCA regime would have to be excused by Article XX.
- Article XX is a carve-out for measures taken in pursuit of specified objectives, e.g.:
 - Measures necessary to protect human, animal or plant life or health (Art. XX(b))
 - Measures relating to the conservation of exhaustible natural resources (Art. XX(g))

- Violating Art. III or I means a BCA regime would have to be excused by Article XX.
- Article XX is a carve-out for measures taken in pursuit of specified objectives, e.g.:
 - Measures necessary to protect human, animal or plant life or health (Art. XX(b))
 - Measures relating to the conservation of exhaustible natural resources (Art. XX(g))

- **The key hurdle: Article XX's chapeau:**
 - No arbitrary or unjustifiable discrimination between countries where the same conditions prevail
 - No disguised restriction on international trade
- Designed to separate protectionist measures from measures taken to achieve the approved objectives.

- **The key hurdle: Article XX's chapeau:**
 - No arbitrary or unjustifiable discrimination between countries where the same conditions prevail
 - No disguised restriction on international trade
- Designed to separate protectionist measures from measures taken to achieve the approved objectives.

CBDR

- Common but differentiated responsibility is a principle of the UNFCCC, and of international environmental law
 - Demands a different burden of effort between countries: higher for large historical emitters, those with more financial capacity to act.
 - Is there a fundamental incongruence with BCA, which levels the playing field?
- 

Design Implications

- Cannot be about protecting competitiveness; has to be about preventing leakage.
- Would have to be preceded by attempts to negotiate a multilateral solution.
- Have to allow individual producers to challenge any assigned benchmarks with actual data.
- Have to allow allowances for countries that have effective climate policies.

Design Implications

- Have to make allowances for non-price based climate actions (?)
- Don't keep the revenue
- Administrative exemptions would be tough
- Need appellate mechanism, clear guidelines, input periods and venues, fair process as per GATT Art. X:3

Export adjustment

- Fundamental uncertainty: are BCA charges like VAT (in which case they can be rebated on export), or like social security charges on payroll (in which case a rebate is a subsidy).
 - We just don't know on this question. Safe option is to not rebate on export.
- 

Bottom line

- It seems to be possible to construct a BCA regime that has a reasonable chance of passing WTO law, and also is effective.
- That doesn't completely answer the question "should BCA be applied," but it's part of the answer.

Aaron Cosbey
Associate and Senior Advisor, IISD
acosbey@iisd.ca

International Institute for Sustainable Development

Head Office

161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba, Canada R3B 0Y4

Tel: +1(204)958-7700 | Fax: +1(204) 958-7710 | Website: www.iisd.org