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March 31, 2009

# Goals of Project

- Explain trade dimension to climate policy
- Explicate WTO law and identify potential conflicts from new climate measures
- Solutions to head off looming collisions

## How Climate and Trade Intersect

- Competitiveness (unlevel playing field)
- Carbon Leakage
- Leverage Against Free Riders

# Competitiveness Effects of Climate Policy Change

- Sector/industry (e.g., chemicals)
  - More imports, fewer exports
- Economy-wide
  - $\Delta$  income, investment, jobs
- Don't forget effects of inaction

# “Leakage”: Three Concepts in Play

- Outward movement of investment, production to less regulated countries (“job leakage”)
- Amount of emission reduction in carbon-constrained country offset by outward movement of GDP
- Incoherence of climate regime from growth of carbon emissions in China, India, etc. Global GHG metric

# Trade Law, Not Just Semantics

- “Competitiveness” not valid rationale in WTO for environmental measure
- Ditto for “job leakage”
- Coherence of UNFCCC is justification for invoking environmental exception

# Overview of Applicable WTO Law

## Chapter 2



## WTO Law Discussed in Book

- General Agreement on Tariffs and Trade (GATT)
- Agreement on Subsidies and Countervailing Measures (ASCM)
- Agreement on Technical Barriers to Trade (TBT)
- We examine WTO rules and case law thru 2008



# Key GATT Rules

- Article I Most-Favoured-Nation (MFN)
- Article II Concessions/ border adjustment
- Article III National treatment
- Article XX General Exceptions (b) (g)

# GATT Article II vs. Article III

## Art. II

- Border measures, including customs duties and import charges
- Border adjustment

## Art. III

- Internal measures regulations, taxes
- Can be imposed at point of importation (Ad Note)

# GATT Article XX

- Chapeau- prohibits arbitrary or unjustifiable discrimination or disguised restriction on international trade
- List of approved policy purposes (closed list)
- (G) “relating to the conservation of exhaustible natural resources ... in conjunction with restrictions on domestic production or consumption”

# WTO Rules on Subsidies

- ASCM Articles 1, 2: Definition of subsidy and specificity
- Article 3 Prohibited subsidies – export subsidy (and domestic content subsidy)
- Article 5 Outlaws actionable subsidies that cause adverse effects (“serious prejudice”)
- Article 8 Nonactionable subsidies. Expired

## Chapter 3:

### Examines WTO Status of Climate Measures:

- Tariffs, charges on imports
- Internal carbon taxes
- Export rebate of emission allowance
- GHG performance standards
- Subsidies to affected industries
- Trade Sanctions
- Transport emission charges
- UNFCCC provisions, existing or new

# Carbon Measures on Imports

- Regulatory costs of domestic measures cannot be offset by taxes on imports
- Border: Charges for energy, pollution?
- Internal: Is carbon footprint a factor for “like” product?

# Carbon Charge: Policy Space

- GATT Art. II:2(a) allows “charge equivalent to internal tax... in respect of an article from which the imported product has been manufactured or produced in whole or in part”
- Domestic carbon tax alongside import charge on “articles” (e.g., coal) used in foreign production
- Based on certificate

# “Performance Standards” on Products

- GATT Art. III and XX
  - Like products, less favorable treatment
- TBT Agreement-
  - Within scope of TBT? *Mexico v. US Tuna*
  - Regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective.



# Cap-and-Trade in WTO Rules

- Implicates WTO rules at the interface of imports or exports
- Requirements on importers- import charge or internal regulation?
- Country specific rules would be MFN violation (FTA exception ?)

# How Subsidy Rules Govern Emission Allowances

- Is free allowance a “subsidy” under ASCM?
- Grandfathering, phase-ins not subsidy
- We claim that free allowances are WTO law “subsidy”
  - “Government revenue that is otherwise due”
- If a subsidy, then subject to:
  - ASCM Art. 3; If specific, Art. 5 and Part V

# Boxer-Lieberman-Warner Climate Security Act of 2008 (“Boxer”)

- Features
  - Cap & trade
  - Large initial free allocation of emission allowances (74%)
  - Import measure on covered goods (e.g., steel)
  - Importer has to purchase international reserve allowance, but excludes countries taking “comparable” GHG action, and LDCs
  - Rebate of emission allowance on export

# Analysis of Import Clause in Boxer

- Not internal tax, but rather import “charge”.  
And violates GATT Art. II:1(b)
- Discrimination based on GHG intensity  
violates GATT Art. I (MFN)
- Recourse to GATT General Exception, Art.  
XX(g)

# Does Art. XX permit Boxer?

- Leading case. *US – Shrimp*, import ban based on “comparable” measure
- Boxer uses *Shrimp* case as guidepost
- We agree that it is valid precedent, but caution against assumption that bigger stakes here don’t matter

# Boxer Fits Art. XX(g) Purpose, But Violates Chapeau

- Challenge as applied: Discretion on # of reserve allowances required for imports
- Mixed purposes- “Promoting fairness while reducing emissions”
- Idiosyncratic selection of baseline
- Clean energy products not given individual treatment
- Procedural due process violations

# Does Boxer Violate ASCM Rules?

- Rebate of emission allowance on export
- Grant of free emission allowance to producers
  - Free allowances is common feature
  - Australia- “Emission-intensive trade-exposed industry assistance”

# Rebate of Energy Tax on Export

- Export rebates available for indirect taxes
- Conventional wisdom is that energy taxes or pollution taxes are not indirect
- New rules in ASCM Annex II (& note 61) may provide greater policy space
- Do “indirect taxes” now include taxes on energy used in production process?



## Policy Recommendations

- 1. Avoid WTO dispute settlement
- 2. WTO Negotiations
- 3. Adopt Copenhagen principles on trade
- 4. 3-year Moratorium on border measures
- 5. Code of Good WTO Practice
  - Inside WTO as plurilateral agreement
  - Outside WTO, among like-minded WTO Members

# 1. Avoid WTO Disputes

- Avoid adjudicating climate disputes in WTO tribunals
  - Time-consuming, causes uncertainty in markets
  - Stress on WTO whether climate measure upheld or struck down (non-implementation)

## 2. WTO Negotiations

- Doha Round or in WTO Bodies
  - Define WTO “green spaces” for climate through an official WTO Code
  - Add Climate to Doha Agenda?
  - Harmonized Tariff Schedule
  - Sectoral Agreements

### 3. Climate Negotiations COP 15

- Developing country caps + no unilateral trade measures (pp. 74, 99)
- Non-binding Principles on the use of trade measure for climate change
  - Pascal Lamy suggestion on “signal” to WTO

## 4. Moratorium on Unilateral Measures

- Moratorium (p. 100) on use of climate border measures on imported products
  - Would last from 2009 to 2012 (3 years)
  - US Congress should lead by example
  - Provide space and time to negotiate legal or non-binding agreements

## Chapter 5

# 5. Code of Good WTO Practice

- Agreement of like-minded WTO Members
  - Critical mass of major emitting economies
- Code signatories agree to a “Peace Clause” on challenges of climate measures **that conform to the Code**
- Code conveys no obligations or rights to non-signatories

# Key Provisions of Code

- Although auctions preferred, emission permits given freely are not “subsidy”
- No emission allowance or carbon tax rebate on exportation. “Producer responsibility”
- OKs import measures based on comparability with international entity to assess
- Policy space for certain clean energy subsidies
- Prohibit climate-harmful subsidies

# Conclusions

- WTO rules do impose constraints on design of trade-related climate measures
- U.S. measure consistent with Art. XX is possible, but measures against US also possible
- Assumption that climate subsidies do not violate ASCM is unjustified