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主 論 文 の 要 旨

論文題目

Border Carbon Adjustments in International Trade Law:
An Approach for the Implementation through Regional
Trade Agreements

(国際貿易法における国境炭素調整措置--地域の貿易協定を
通した実施のためのアプローチ)

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論 文 内 容 の 要 旨

Introduction

The last decades witnessed the highest increase of temperature since the first scientific records were made around 100 years ago. The global warming is expected to cause extreme weather events, including heat waves, floods and droughts. Scientists believe that continued emissions of greenhouse gas (GHG) from industrial processes will cause further warming and changes in all components of the climate system. The reduction of GHG emissions shall play a key role in limiting climate change and in order to avoid irreversible damage with catastrophic consequences, contributions with various actors including lawmakers, policy-makers and international organizations are required.

Putting a financial burden on emissions is considered as the most effective means to combat climate change besides promoting low-carbon technologies and enhancing social awareness. This market-based mechanism may take forms of emission trading, taxation system or regulations. Such a mechanism is expected to encourage stakeholders in the market to adapt from low-efficient production methods to

eco-friendly means. However, these policies may cause significant costs on industries for promoting low emissions and high-efficiency technologies and the consumers for changing spending behaviors from high emission intensive to low emission products.

This situation may result in unequal competition conditions between domestic and foreign producers. Producers in countries with no or lax carbon reduction regulations enjoy the advantage of selling their products with a lower price compared to products from domestic producers that must bear emissions reduction costs. Therefore, producers may have incentives to relocate their carbon-intensive production to countries with no or lax carbon constraint regime to balance the competition condition.

As a result, a strict climate policy in one country could lead to an increase of GHG emissions in other countries, especially in least-developed or developing countries which do not have carbon restraints. The fight against climate change could then be meaningless. This phenomenon is called as “carbon leakage.”

This issue can be overcome by adopting border adjustment measures against foreign products. The measures could balance the playing field between domestic and foreign products and encourage domestic industries to take part in national emissions reduction schemes. Those measures could also encourage the foreign producers to reduce the emissions of their products during the production process for lower duties and lax regulations from importing countries with strict emission reduction regime. As a consequence, developing countries, which are major global GHG emitters and exporters of carbon intensive products, may be directed to low carbon economies comparable to those which exist in developed countries. On the other hand, such measures may be criticized by developing countries since the difference in the level of developments should lead to different burden of climate change mitigation. Such

political considerations may prevent developing countries from participating in climate change negotiations and trigger retaliation measures.

The application of border adjustments measures raises some issues under international trade law. Accordingly, scholars have referred to the idea of restricting trade through imposing measures on carbon-intensive products in different ways, this study uses the term “Border Carbon Adjustments” (BCAs). They may take forms of price-based or non-price-based restrictions or regulations including carbon taxes, emission allowances that importers need to submit, and emission reduction related regulations.

The WTO Agreements does not contain specific provisions regarding climate change mitigation, partly because they were not drafted to address this problem. However, WTO suggests some provisions do concern BCAs. For example, the disciplines on tariff, non-discrimination principles, and the general exceptions may be relevant. Thus, if a WTO Member adopts climate measures, or restrictions on trade, such measures may raise an issue of their compatibility with WTO law, especially when the BCA in question applies on non-product-related processes and production methods.

This thesis examines the consistency of BCAs with WTO law and, in order to solve some uncertainties under WTO law, suggests the use of regional trade agreements (RTAs), or a regional approach under free trade agreements or custom unions to the imposition. The aim of this research is to propose the possibility of regulating BCAs within RTAs in order to accommodate climate change mitigation and the issue of carbon leakage because under the universal international trade law of today, which WTO law presents, there is no comprehensive solution to the problem of climate-related measures. My suggestion or proposal in this thesis could enhance

certainty and predictability and enable WTO Members, both developed and developing countries, to develop their domestic environmental policies on climate change mitigation. In addition, my suggestion could decrease the number of disputes concerning the compatibility of climate-related measures with WTO law. The scope of this study is limited to legal issues and does not cover economic and environmental issues which BCAs may arise.

Thesis Outline

This thesis contains three main chapters except the introductory section and the concluding chapter. Chapter 1 discusses the issue of BCAs in the context of climate change. It first identifies the risk of climate change and the current efforts to address this phenomenon within the multilateral framework, as well as at the regional and national level. It examines the relationship between climate change policies and international trade rules, especially a potential conflict between the rights and obligations of WTO Members and their trade-related measures for GHG emission reduction. Chapter 1 then highlights the issue of carbon leakage as a central obstacle to national climate policies and possible options to address this issue. Among several measures, BCAs have increasingly gained support from scholars and policy makers. However, they may have problematic under WTO law.

Chapter 2 examines of the legal compatibility of border carbon adjustments under WTO law. It first highlights past proposals of BCAs that the U.S and the EU have made. It then address the central question whether the BCAs are compatible with WTO law. The research shows that such measures are not *a priori* illegal under WTO law. However, they need to satisfy the conditions for eligibility of measures for border adjustment and must be consistent with the non-discrimination principles when

imposed on imports. If BCAs are inconsistent with WTO law concerning border adjustment they have to meet the requirements of Article XX of GATT under exceptions relating to public health and environmental policy reasons. The justifications for the import-sided BCAs under Article XX heavily depend on their examination of the “good faith” test under the Chapeau of Article XX. On the side of exportation, BCAs need to comply with the WTO subsidy rules with a greater legal uncertainty when export rebates of carbon taxes and emissions allowance may be condemned as prohibited subsidies with obstacles for justifications under Article XX of GATT. Whether BCAs are allowed under WTO law is uncertain. The risk of a dispute being filed over these measures before the WTO dispute settlement mechanism is high. This has called for negotiated solutions that could provide legal certainty to the issue of BCAs. Proposals have been made for legal changes at the WTO, including amendment of existing trade rules, waiver of specific obligations, authoritative interpretation of provisions and a plurilateral trade and climate agreement. However, the examination of those solutions within the WTO exhibits lack feasibility and effectiveness at least in the short and medium term. Thus, such shortcomings of multilateral fora call for a more appealing approach for the negotiation of implementing BCAs in practice.

Chapter 3 proposes a regional approach about this matter, instead of a multilateral approach under the WTO Agreements. It identifies prospects for countries to negotiate climate-related measures affecting trade such as BCAs within regional trade agreements such as the North American Free Trade Agreement, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Regional Comprehensive Economic Partner. In particular, this chapter discusses the incentives for countries to

conclude RTAs with climate-related provisions, legal issues related to the inclusion of such provisions and proposals for implementing BCAs within RTAs. Insofar as such RTAs meet the requirements under Article XXIV of GATT, the advantage of this approach is that other WTO Members which are not a party to the RTA concerned would not dispute such a measure before WTO bodies. Any proposal for implementing BCAs through RTAs should make its benefits clear that can surpass obligations through trade preferences without violating WTO law. By avoiding discrimination and differentiation ensuring a fair, inclusive, and transparent process, the adoption of BCAs under RTAs would overcome legal challenges under WTO law. Although obstacles might occur concerning administrative burdens and potential trade impacts in the short-term, BCAs show their merits as a desirable option for global climate action in the long run when social concerns and physical manifestation of climate change progressively rise over time.

Summary of main findings

The issue of climate change is very challenging and it is difficult for the international community to adopt a universal international agreement on climate change. Despite efforts of the international community, this “top-down approach” has not succeeded in securing wide participation, mutual acceptance on a global burden sharing and design for compliance. On the other hand, the “bottom-up approach” is represented by national climate change mitigation measures such as emission trading schemes (ETS), carbon taxes on fuel consumption, and other national carbon-intensity standards and regulations.

However, due to the unilateral nature of national climate policies, unequal competition conditions may occur between domestic and foreign producers. If the producers in

countries with limited carbon reduction regulations enjoy the advantage of selling their products at a lower price than producers that are obliged to bear emissions reduction costs, the latter producers may have incentives to relocate their carbon-intensive production to countries with no or lax carbon constraint regimes. Thus, a strict climate policy in one country may lead to an increase in GHG emissions in other countries; and the fight against climate change could be then meaningless.

There are a number of measures to address competitiveness and carbon leakage arising from the implementation of carbon reductions regime. Out of such measures, border adjustments, which target imports and exports that originate from or are destined for countries that have no comparable GHG emissions reductions system has recently gained support not only from policymakers but also from scholars. Such border carbon adjustments (BCAs) include tariffs, taxes, quotas, subsidies or technical regulations that can level GHG emissions costs both upward and downward. The main aim of BCAs is to address the risk of carbon leakage by imposing trade restrictions on carbon-intensive imports and compensation of emissions costs for domestic exporters. Such measures need to meet the requirements of border adjustments for price-based measures, non-discrimination treatment to imported products, and subsidies rules on exportation of WTO law.

Firstly, the price-based BCAs applying on imported products need to qualify as indirect taxes, otherwise they would be considered ordinary customs duties and prohibited under Article II:1(b) of the GATT when the amount of applied taxes is higher than the bound tariffs of the Member. While border adjustments of consumption taxes are widely used and acceptable practice by WTO Members, the legal framework for border adjustments of taxes and regulations relating to processes and productions methods

(PPMs) presents many hurdles. Thus, whether BCAs can qualify as indirect taxes is uncertain since the design of such measures based on the carbon footprint of imported products is connected with PPMs and the WTO adjudicative bodies have not decided on this matter.

Secondly, BCAs need to pass the test of non-discrimination treatment under the GATT and the TBT Agreement. Due to the PPMs characteristic, BCAs might be unable to pass the likeness test and thus be found to violate the most-favoured-nation and national treatment principles. Likewise, export-side BCAs might be considered as prohibited export subsidies under the SCM Agreement.

However, Members may invoke Article XX of the GATT to justify BCAs which may otherwise breach WTO law. Whether a BCA could be justified by this provision depends upon whether it is considered to arbitrarily discriminate between products from countries where the same condition prevails. In other words, countries which adopt BCAs have to consider conditions in other countries and make proper efforts to find a negotiated solution in an international climate agreement. The design of the BCAs should be flexible enough to exclude imported products from countries that have taken emission reduction efforts and to take into account the level of economic development of countries.

On the side of exportation, the imposition of BCAs in forms of allowance exemptions or rebates will face legal obstacles because such measures could be considered as prohibited subsidies under Article 3.1 of the SCM Agreement. Also, given the strict requirements of Article XX of the GATT, this article is unlikely to justify violations of the SCM Agreement.

Although Members could seek for the clarification of provisions concerning BCAs

through the WTO dispute settlement system to reduce legal hurdles, a main drawback of this approach is that it only provides a one-time, case-by-case solution. Accordingly, WTO panels and the Appellate Body may settle disputes concerning various BCAs differently and the legality of a specific BCA remains uncertain. Moreover, their decisions would have adverse affect on an important climate-protection policy of a Member State and could lead to non-compliance and retaliatory measures from that country. As a consequence, countries that seek to adopt BCAs need a negotiated solution providing legal certainty in a long-term. Such solutions could be achieved by negotiations of WTO Members at a multilateral, pluri-lateral or regional level. However, seeking multilateral and pluri-lateral negotiations is neither feasible nor effective due to WTO consensus decision-making.

Then, a regional approach is more appealing. Using Regional Trade Agreements such as free trade agreements (FTAs) and custom unions (CUs) by WTO members as an instrument to enhance climate change mitigation is a realistic scenario at the moment. This idea comes from the ordinary meaning of Article XXIV of the GATT. If climate change provisions are included in RTAs, the international community may multilateralize such provisions. Whether the implementation of BCAs through RTAs satisfies the requirements of Article XXIV of the GATT is still uncertain. However, because such BCAs apply only to the parties to the RTA at issue, it is very unlikely that a dispute concerning such BCAs is referred to the WTO Dispute Settlement Body. At least, such possibility is lower than in the case of unilateral BCAs.