Trade Policy

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Reciprocity in the World Trade Organization

What and Why Reciprocity?

- Reciprocity has been a motivating principle of the GATT/WTO system
- The thrust of the GATT/WTO system is that the agreement defines reciprocity (or balance), not the other way around. An agreed outcome from a negotiating round, the system presumes, is an outcome that each member considers advantageous, by whatever standard the member chooses to apply.
- Reciprocity serves to motivate negotiations. Participants and commentators use reciprocity, or its functional equivalent, “balance”, as a standard against which to evaluate an outcome. The rules, however, do not define that standard; determining that standard is part of the evaluation itself.

What is the concept of reciprocity?

One can find, in the results of negotiations, clear evidence of the influence of reciprocity. One can also find evidence that more is at play than reaching a mercantilist balance of concessions received versus concessions given.

Are there multiple potential dimensions to reciprocity?

Dimensions and Tradeoffs to Reciprocity

- Fewer concessions given, fewer received
- Governments face harder tradeoffs between domestic winners and losers
- There are non-economic objectives
- Locking in or signaling commitment
- Construction of a system from which all benefit

National Treatment

What is the concept, motivation, and principle of national treatment in international trade?

What is National Treatment in CPTPP?

- Each Party shall accord national treatment to the goods of the other Parties in accordance with Article III of GATT 1994, including its interpretative notes, and to this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis.

What is National Treatment in GATT?

- The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, ***should <u>not</u> be applied to imported or domestic products so as to afford <u>protection</u> to domestic production***.

What is National Treatment in GATT? Cont.

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 <u>like domestic products</u>.*** 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.

What Are Trade Restrictions in CPTPP?

Unless otherwise provided in this Agreement, no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of GATT 1994 and its interpretative notes, and to this end Article XI of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis.

What is Trade Restrictions in GATT?

No <u>prohibitions or restrictions</u> 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 or on the exportation or sale for export of any product destined for the territory of any other contracting party.

What About Fees in CPTPP?

Each Party shall ensure, in accordance with Article VIII:1 of GATT 1994 and its interpretative notes, that all fees and charges of whatever character (other than export taxes, customs duties, charges equivalent to an internal tax or other internal charge applied consistently with Article III:2 of GATT 1994, and antidumping and countervailing duties) imposed on or in connection with importation or exportation are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic goods or a taxation of imports or exports for fiscal purposes.

What about Fees in GATT?

(a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

What does this tell us about how trade agreements focus on creating a common playing field for firms whether in trade or investment when operating internationally?

The Legality of Local Content Measures

The Legality of Local Content Measures under WTO Law

- Local content measures have proliferated and become a popular tool for governments to incentivize national industry. This article sets out a typology of such measures and analyses the legality of the different types of measures under WTO law. Questions arise not only with respect to national treatment, the government procurement exemption and the rules on state trading enterprises under the GATT, but also with respect to the TRIMs Agreement, the SCM Agreement as well as the GATS. The article concludes that very few measures can be considered compatible with WTO law.

The Legality of Local Content Measures under WTO Law cont.

- Local content measures are by no means new: they have been flourishing – and the subject of trade negotiations – for decades. Praised and considered to be an effective tool for development of national industry or transfer of technology by some, others, particularly developed countries, regard them as non-tariff trade barriers that lead to the establishment of fundamentally non-competitive national industries.

….we understand local content measures as measures that condition a benefit on the use of local goods and/or services in producing goods and/or services…

Why Local Content Measures?

- They can also be categorized by their method of calculating the domestic content, most commonly by ‘value added’. This is normally done referring to the ‘rules of origin’, which also decide whether a product counts as national for purposes of benefiting from a certain FTA. The construction of these very rules can be used and often is used as a policy tool for advancing local industry too

Why Local Content Measures?

- Many activities require a license or permit granted by a government agency…The precise amount of local content the licensee has to use can be determined in several ways. It can be fixed by law, as is commonly the case in cultural content requirements, or it can be part of the offer of the licensor itself. The latter model can be used in licenses that are auctioned off: the state evaluates the bids and takes the amount of local content promised into account as one criterion, giving preference to bidders promising to use more local content.

Why Local Content Measures?

- Governments regularly prefer local over imported products in their procurement policies. This preference can be reflected in different ways in procurement policies. It might consist of regarding the use of local content as an advantage in bidding procedures or of an outright requirement to buy national goods and services.

Why Local Content Measures?

- Often, however, local content requirements are not explicit. Where government procurement policies officially do not discriminate between foreign and local goods, it is not unheard of that decision-makers look favourably upon the use of local content. Likewise, where licenses are supposed to be granted on a non-discriminatory basis, at times local applicants are preferred without good cause. It is difficult to identify these non-legal 'requirements', even though they can, at times, have just as harsh an effect as legal requirements.

WTO Application to Domestic Content

- One of the very core principles of the original GATT laid down in its Article III is that of national treatment in the sense that imported products may not be discriminated against vis-à-vis their domestic counterparts. Local content measures most often violate at least one of the paragraphs of Article III because by their very nature they condition a benefit on the use of goods of national origin and thus discriminate goods according to their territorial origin.

WTO Application to Domestic Content

- The first element concerning ‘like’ products is usually the focal point in Article III cases. This is not the case with respect to cases concerning local content because such measures de jure condition a benefit on the use of local goods and thus discriminate in favour of such goods compared to identical imported goods. This is particularly clear where the measure requires a very specific item of local content (say use of nationally produced solar panels)….The second element concerns whether the requirement or advantage is derived from a ‘law, regulation or requirement’ that affects the internal sale, offering for sale, purchase, transportation, distribution or use

WTO Application to Domestic Content

- Consequently, when private companies voluntarily accept to adhere to local content requirements when entering into contractual relations with a government, there is evidence pointing to that there is a government measure covered by Article III:4….. However, only WTO Members are bound by GATT obligations. In other words, only measures that are attributable to the state can be relevant requirements. If the measure is an act by the state such as a law this is clearly the case. The situation is more complex if the contract is not concluded with a governmental agency, but with a State-Owned Enterprise (SOE)…The first difficulty thus is to determine whether SOEs are considered part of the state.

WTO Application to Domestic Content cont.

- The third element of the analysis of Article III:4 of the GATT concerns whether the imported product is treated 'less favourably'. The GATT Article III concerns both de jure and de facto discrimination. In local content cases, the discrimination is always de jure as the measure discriminates on the basis of the origin of the product, explicitly conditioning the grant of a benefit on the use of local content and thereby treating the imported product less favourably than the local one. This element will therefore nearly automatically be fulfilled in cases concerning local content.

What is the Legality of Domestic Content Requirements?

- Our analysis has shown that most local content measures described in our taxonomy would run afoul of the national treatment obligation in Article III:4 and/or 5 of the GATT. To the extent a measure falls within the ambit of the derogation in paragraph 8(a), it still violates the GPA where the WTO Member has signed on to the GPA. There are however a few loop holes: certain WTO Members have not signed on to the GPA or have exempted certain local governments.

Local content rules not imposed by the government itself, but by State Trading Enterprises (STEs) can, as the case may be, escape the national treatment discipline in Article III because they lack the necessary nexus with the government. Naturally, if the government mandates local content in e.g. all solar panels, this would violate the national treatment principle in Article III. The question is whether local content requirements imposed by STEs themselves without a nexus to the government can still be disciplined under the national treatment obligation – not directly, but through Article XVII of the GATT