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OUTLINE

- I. Concept of a Border Adjustment Measure (BAM)
- II. Existing Practices and Legislative Proposals in the Climate Policy Context
- III. WTO-Compatibility
- IV. Prospects of Adoption of Multilateral Rules on Application of Climate-Related BAMs

Concept of a BAM

- Idea behind: *to level taxation and internal regulation systems among countries according to the destination principle: “taxes follow goods”*
- OECD definition of BTA:
“any fiscal measures which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products” (The 1970 GATT Working Party Report on BTA)
- BAMs: - on importation and on exportation
 - fiscal and non-fiscal measures

BAMs: Existing Practices

- BTAs for VATs and excise duties is normal practice
- BTAs in the environmental policy:
 - A Superfund tax: an excise tax on certain chemicals used as inputs for producing chemical derivative products (US, since 1986).
 - An excise tax on ozone-depleting chemicals in connection with obligations under the Montreal Protocol (US, since 1989)
- BTAs in climate policy: not yet in use
 - Foreseen by the UNFCCC? Art. 3.5
 - Proposals for the national climate change legislation:
 - US: Waxman-Markey, ACESA (2009) and Boxer-Kerry (2009)*
 - EU: Art. 10 (b) of the revised ETS Directive (2009)*

BAMs For Climate Purposes

- New, climate-related, purposes:
 - Prevent carbon leakage
 - Correct a negative market externality of GHG pollutions according to a „polluter pays“ principle
 - Enable deeper emission cuts in a cap-&-trade
 - Encourage third countries to take a comparative action. A stick?

PLUS

- Traditional purposes of border adjustment:
 - fiscal, *incl. avoiding double taxation*
 - leveling playing field

BAMs: Legislative Proposals

- An importer allowance requirement
 - US Waxman-Markey and Boxer-Kerry Bills, not before 2020
 - Importers of covered goods/sectors would have to buy allowances from US “international reserve”*
 - Exemptions from coverage under certain conditions*
 - EU ETS Directive, Art. 10(b), foreseen as an option
 - The Commission shall make a proposal by 30.06.2010 depending on the outcome of Copenhagen and carbon leakage concerns*
- Export rebates (Waxman-Markey Bill; discussed as an option also in the EU, FAIR proposal of 2008)

Also possible:

- A carbon tax on imports (French government)
- Energy-efficiency and carbon-intensity standards applied to imports (discussed in the EU)

WTO Relevant Provisions

Border adjustment on/of	An internal tax	An internal regulation
Importation	GATT Art. II:2 (a) and Note to Article III, Article III:2 (NT for fiscal measures) and Article I:1 (MFN). If incompliant – prohibited under Art. II:1 (b) (as in excess of a binding tariff ceiling)	Note Ad Article III and Article III:4 (NT for non-fiscal measures) plus TBT Agreement and Article I:1 (MFN). If incompliant – prohibited under Art. XI:1 (as a quantitative restriction)
Exportation	GATT Art. VI:4 and Note to Article XVI, plus the SCM Agreement (incl. its Annex I) and Article I:1 (MFN also on exportation) (if incompliant – prohibited as an export subsidy under Art. 3.1 of the ASCM)	N/A

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- # Carbon-related BAMs: Areas of Potential Conflict with WTO law

The legal status of non-product-related PPMs is not clear.

Rule no.1: Adjustment made only for indirect taxes.

Question: Can taxes levied not on products but on production methods qualify as indirect and, thus, be adjusted?

Rule no. 2: Traditional “like product” test excludes non-physical characteristics from consideration of likeness.

Question: Can two PPM-non-identical products be considered not like? Is it possible to treat products differently depending on the amount of emissions occurred during their production abroad?

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Justification under Article XX

A two-tier test:

- XX (b): a measure is “*necessary* to protect human, animal or plant life or health”

or

- XX (g): a measure “*relating* to the conservation of *exhaustible* natural resources if ... *made effective in conjunction with restrictions on domestic production or consumption*”

and

- The Chapeau: a measure does not constitute “a means of arbitrary or unjustifiable discrimination between countries *where the same conditions prevail*, or a disguised restriction on international trade”.

Requirements of the Chapeau

Note: Chapeau of GATT Art. XX=UNFCCC Art. 3.5

A panel will likely look at:

- Design of a measure
- Rationale for discrimination and its connection to the objective
- Flexibility to take into account different situations

- "The more a border adjustment measure differentiates between different countries, the more likely it would violate the MFN-clause, but the more it would be compliant with the chapeau conditions. ... Countries wanting to design border adjustment measure need to consciously choose a strategy that either rests on avoiding violation of the commitments and principles in the GATT or on satisfying the conditions of the general exceptions". (Van Asselt, Brewer and Mehling (2009))

- "the adoption of essentially the same program" vs. "the adoption of a program comparable in effectiveness"

- International coordination and cooperation efforts

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BAMs: MULTILATERALLY AGREED RULES?

Within the WTO

- Through the litigation process?
- Amendments to WTO provisions?
- A waiver?
- A plurilateral agreement/Code?

Within the UNFCCC

- As part of Kyoto-II?
- In parallel (a separate COP decision or a protocol?)

Or joint WTO-UNFCCC Working Group?

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CONCLUSIONS

1. Border adjustment is an acceptable practice under WTO law under certain conditions
2. Carbon-related BAMs stumbled over PPM issue will likely get in conflict with WTO substantive rules of non-discrimination. Chances for justification under GATT exceptions are not clear
3. Multilaterally agreed rules on BAMs for climate purposes are currently not feasible
4. Use of BAMs for climate purposes will likely be postponed due to political considerations and legal uncertainties