**Carbon-Related Border Adjustment Measures: Towards Multilaterally Agreed Rules of Application**

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## Abstract

Carbon-related border adjustment measures (BAMs) are nowadays viewed by developed countries as a means to address competitiveness and carbon leakage concerns associated with a cap-and-trade or any other emission reduction system which imposes additional costs on domestic producers. Without sharing a burden of curbing emissions with foreign competitors it seems inconceivable to gain support from business and society for climate change mitigation actions. Furthermore, it is argued that BAMs can be used as a stick to induce third countries, including leading developing ones, to get onboard international emission reduction system and take comparable actions to combat climate change.

The most popular idea with respect to BAMs for climate purposes is to include imports into national emission trading schemes. Importers would have to submit at the border emission allowances in the quantity corresponding to carbon footprint of imported products. Proposals on extension of an emission allowance requirement to imports usually provide for exemptions for certain products/sectors or countries which have taken comparable actions or bound by international commitments, including sectoral agreements, or which belong to least developed countries. Other options for BAMs may include export rebates, a carbon tax on imports or non-fiscal measures, such as energy-efficiency and carbon-intensity standards.

It is not clear whether these proposals are in line with rules of the WTO. In principle, border adjustment is an allowed practice under WTO law under certain conditions. However, the PPM nature of carbon-related BAMs (the fact that they are linked to production methods and not to products directly) makes their legality disputable. The legal status of non-product related PPMs in WTO law is not clear. The main issues here are likeness of PPM-different products and a product-process distinction. It raises a number of legal questions. For instance, can taxes levied not on products but on production methods qualify as indirect taxes and thus be adjusted? Or can two PPM-non-identical products be considered not like? In other words, is it possible to treat products differently depending on the amount of emissions happened during their production abroad?

It is believed that border adjustment of carbon-related domestic measures, even if it would infringe the basic non-discrimination rules of the GATT, may still be justified under general exceptions clauses of GATT Article XX, as a measure "necessary to protect human, animal or plant life or health" (paragraph (b)), or as a measure "*relating* to the conservation of *exhaustible* natural resources" (paragraph (g)). Conditions of the Chapeau of Article XX might be the biggest challenge for a carbon-related BAM.

The prospects for working out and approval of multilateral rules on application of BAMs for climate policy are vague, both within the WTO and the UNFCCC. The WTO is stumbled over disagreements between WTO members on the issues under the Doha Development Agenda. Climate negotiators try to avoid the subject as well because of existing disagreements between parties over future commitments. Consequently, the use of BAMs for climate purposes will likely be postponed due to political considerations and legal uncertainties.

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