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COMPATIBILITY OF THE CARBON BORDER TAX WITH THE LAWS OF THE WORLD TRADE ORGANIZATION

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Abstract. There are different ways to reduce CO2 emissions: in particular, CBT (carbon border tax) is designed to eliminate and combat the adverse effects of climate change. However, one should not ignore the fact that the existence of multilateral international agreements encourages countries to care about the planet and the environment, but also limits the scope of their legal autonomy to take action in various areas, including the policy of taking urgent action on climate change. The exact design of the CBT proposed by the European Commission is not entirely clear, and there is a high probability that it will contradict Article I or III of the GATT (General Agreement on Tariffs and Trade). Thus, it will be further assessed whether CBT can be subject to exceptions from GATT (Article XX). It is important to analyze whether a CBT policy can be formalized legally without contravening WTO law and without risking being prosecuted for this violation. Last but not least, it is very important to assess whether the exceptions to Article XX of the GATT can be used to justify a CBT. Two of those exceptions are particularly relevant to environmental measures, namely those contained in Articles XX(b) and XX(g) of the GATT. If the European Union (EU) wants to use environmental exemptions to protect CBT, the EU needs to remove two hurdles. First, the EU should establish a preliminary justification for the use of Article XX by showing that the sub-clauses apply. Second, the EU should then establish that the measure under consideration does not contradict the leading paragraph, known as the introductory part of Article XX, which means that it should not be arbitrary, unjustified or disguised restriction on trade. At the same time, it is necessary to consider whether CBT is a suitable tool.

Keywords: international energy law, foreign trade, carbon border tax.

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In the European Union, it is planned to introduce a carbon border tax on the products of certain industries in 2026. In this regard, experts in the European Union are widely discussing the compatibility of the carbon border tax with the main rules of the World Trade Organization.

Here are some expert opinions. So, Jeannette Berseth believes that various methods aimed at reducing CO2 emissions can be developed. In particular, CBT is designed to eliminate and combat the adverse effects of climate change. However, one should not ignore the fact that the existence of multilateral international agreements encourages countries to care about the planet and the environment, but also limits the scope of their legal autonomy to take action in various areas, including the policy of taking urgent action on climate change.

The exact design of the CBT proposed by the European Commission is not entirely clear, and there is a high probability that it will contradict Article I or III of the GATT. Thus, it will be further assessed whether CBT can be subject to exceptions from GATT (Article XX). It is important to analyze whether a CBT policy can be formalized legally without contravening WTO law and without risking being prosecuted for this violation. Last but not least, it is very important to assess whether the exceptions to Article XX of the GATT can be used to justify a CBT.

Two of those exceptions are particularly relevant to environmental measures, namely those contained in Articles XX(b) and XX(g) of the GATT. If the EU wants to use environmental exemptions to protect CBT, the EU needs to remove two hurdles [1].

Other authors, Georg Zachmann and Ben McWilliams, believe that although CBT may be compatible with WTO rules, it may face legal problems in the WTO, will depend

on complex preconditions that imply a compromise between political feasibility and effectiveness [2].

In order to identify the compliance of a carbon border tax with WTO rules, we will consider the basic principles of the WTO.

The basic principles of the WTO can be found in three agreements: 1) the General Agreement on Tariffs and Trade (GATT) for International Trade in Goods; 2) the General Agreement on Trade in Services (GATS); and 3) the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). There are five principles related to the articles of those three agreements that are of particular importance [3].

The first principle of the WTO is trade without discrimination (a member country cannot discriminate against another member country in relation to trade) [4].

The introduction of CBT can be considered as a discriminatory measure between the EU and non-EU states.

The second principle, freer trade through negotiation, is emphasized, for example, by Article XXVIII (Tariff Negotiations) of the GATT. Reducing trade barriers is one of the most obvious ways to encourage trade. Relevant barriers include customs duties (or tariffs) and measures, such as import bans or quotas that selectively limit quantities [5].

The third principle, predictability in trade, is important because the promise of stability and predictability in trade gives businesses a clearer idea of their future opportunities [6]. While the new taxes are not unpredictable, the EU needs to provide certainty about how CBT will work and which areas will be taxed.

The fourth principle, which promotes fair competition, is related to the first principle of non-discrimination. The WTO institute describes itself as 'a system of rules dedicated to open, fair and undistorted competition' [7].

The last principle: encouraging development and economic reforms in developing countries [8].

In our opinion, the authors correctly note contradictions with the GATT rules and GATT exceptions related to environmental protection.

Thus, Madison Condon and Ada Ignaciuk point out that two principles established under the GATT are important for CBT. Firstly, it is a national regime in accordance with Article III of the GATT, which requires that imported goods be treated no less favorably than domestic ones. Article I of the GATT establishes a second regime, the 'most-favored-nation treatment', according to which a border tax should not discriminate against imports from WTO member countries.

It is also noted that the term 'like product' is not defined in the GATT [9].

In addition, are products produced in an environmentally sound manner, for example, in accordance with the standards of the Kyoto Protocol and carbon-intensive goods, 'like products' [10]?

The authors note that in cases where a member's national measure turns out to be incompatible with the GATT rules, the member defending this measure may seek justification in accordance with the exceptions listed in Article XX of the GATT. In this context, GATT Article XX on general exceptions sets out some specific cases in which WTO members may be exempt from GATT rules. Two exceptions are of particular importance for environmental protection: sub-clauses (b) and (g) [11]. Article XX(b) and (g) allow WTO members to pursue discriminatory policies that deny national treatment or are otherwise incompatible with WTO principles [12]. There are several cases from the 1990s, including the 1991 Tuna-Dolphin case, as well as the 1996 Shrimp-Turtle case, that are relevant to the case and set a precedent or guide for any future CBT litigation.

In the Tuna-Dolphin I case, concerning US restrictions on the import of Mexican tuna, the Dispute Panel concluded that, in general, Article XX of the GATT does not apply to this case, since the GATT only concerns rules concerning products and does not apply to production processes and methods [13]. As a result, the Group obliged the United States to treat tuna produced in Mexico no less favorably than tuna produced in the United States, since they were 'like' products and required equal treatment [14]. Besides, the Group proposed limiting Article XX(g) to measures taken to conserve only domestic natural resources [15]. At the time of the case, the Commission rejected the idea that a party to the GATT could use trade measures to put pressure on foreign governments to change their policies [16].

Later, in the Tuna-Dolphin II case, which concerned trade disputes between the United States and the EEC, the Commission (or Dispute Panel) still rejected the idea that a party to the GATT could use trade measures to force foreign governments to change policies for any reason [17]. For both exceptions, the Panel ruled in favor of the United States in the dispute over jurisdiction [18]. The Commission could not find any content in the GATT that would mention an exhaustible resource in need of conservation or protection, which should be located within the jurisdictional territory of the country applying such a measure [19].

Finally, in 1996, the Shrimp-Turtle case was adjudicated. The Dispute Panel in this case concluded that economic consideration and fairness (in other words, non-discrimination) were more important than environmental consequences, and concluded that this case did not fall under any of the exceptions under Article XX [20]. In 1998, the Appellate Body overturned the findings

of the Dispute Panel [21]. They pointed out how poorly the work of the dispute settlement commission was done when analyzing the case under the GATT environmental exceptions, and that the argument of the settlement commission was flawed in many respects [22].

Although the opinion of the Appellate Body did not specify the exact cases that may fall under the exceptions to Article XX in the future, they referred to the principle of changing international norms and said that Article XX would evolve over time along with the principles of international environmental law, and that it could be used to protect broad environmental interests [23]. The previous opinion in the Tuna-Dolphin II case was also rejected, stating that trade measures are justified under Article XX if they are aimed at encouraging other countries to change their environmental policies [24].

For CBT to be eligible for the exemption, it must be related to the protection of exhaustible resources. In the US-Gasoline appeal case, the WTO Dispute Settlement Body (General Council) concluded that 'clean air' falls under Article XX(g) [25], rejecting the argument because it does not meet the requirements of the introductory part [26]. Similarly, it can be argued that the atmosphere, which can support life on Earth without serious damage to the environment, is an exhaustible resource. Similarly, in the Shrimp-Turtle case, it was stated that Article XX(g) should be understood in the light of the current concern of the international community about the preservation of the environment [27].

Also, most of the case law in this area dates back to the 1990s, which means that if those cases were repeated today, they could have an outcome that would also encourage other countries to try to mitigate climate change due to legal evolution of the WTO Dispute Settlement Body. As already mentioned, CBT is directly aimed at combating carbon leakage. Carbon leakage can lead to an increase in total emissions, which, in turn, will damage a wide range of natural resources, depending, for example, on the form of production and the risk of pollution. Whether CBT falls under the exception may depend to some extent on whether it is understood more as effective protectionism or environmental protection, or even protectionism disguised as environmental protection.

As mentioned above, although the measure is considered temporarily justified if it falls under any of the previously analyzed exceptions, it must still pass the test established by the introductory part of Article XX of the GATT. That is, the measure should not be applied in such a way that it turns into an instrument of arbitrary or unjustified discrimination between countries where the same conditions prevail, or into a disguised restriction of international trade.

CBT will directly affect the sources of greenhouse gas emissions, most likely in accordance with the proposed threshold set by the EU. However, the details have yet to be clarified. A clear threshold would actually make CBT a more predictable and reasonable tool. In addition, the rationale should be clear regarding the fight against climate change.

However, it is important to know that there are conflicting opinions about whether this is actually a disguised restriction on international trade. As mentioned earlier, trade restrictions on environmental grounds can be seen as 'eco-imperialism', proportionally hitting developing countries harder than developed ones. It may be useful and necessary to consider CBT in the broader picture of other future measures, since CBT may be followed by other initiatives, such as the transfer of clean energy technologies and support for sectors in developing countries that focus on reducing greenhouse gas emissions.

Thus, based on the analysis of expert opinions on the compatibility of a carbon border tax with WTO laws, it can be concluded that there is a possibility that the proposed CBT will fall under the exceptions to Article XX of the GATT. If implemented, there is a high probability that this measure will be challenged by the countries affected by this tax. However, the question of what measures are appropriate to combat climate change is not strictly a legal issue; it is also a matter of natural sciences and politics.

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