

***ADDENDUM-1*****TRADE AND ENVIRONMENT****An overview of measures to counter climate change and their compatibility with WTO rules**

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**A. INTRODUCTION**

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Regulatory schemes designed to help conserve the environment have been introduced worldwide over the past few years, and further proposals are under consideration in many countries. Protecting the environment is no less an important policy objective than the liberalization of trade, but some of the schemes in place can at times serve to restrict or distort trade, and the risk of trade frictions being caused by them is increasing. For this reason, it has become important to consider how environmental policy and trade policy can be harmonized.

Even among environmental policies, climate change policies in particular have been commonly acknowledged as important tasks for the international community. In 1992, the United Nations Framework Convention on Climate Change (UNFCCC), which stipulated the framework for international collaboration related to this problem, was adopted. In 1997, the Kyoto Protocol, which incorporated numerical targets for greenhouse gas emissions reduction in developed countries, was adopted; it came into effect in 2005. Later on, during the 21st annual Conference of Parties to the UN Climate Convention (COP21) held in December 2015, the Paris Agreement was adopted to take the place of the Kyoto Protocol as a new international framework for the mitigation of greenhouse gas emissions, etc. beyond 2020.

During international climate change negotiations, the CBDR (Common but Differentiated Responsibilities) (UNFCCC Article 3.1) of developed and developing countries, as stipulated by the UNFCCC, have been accepted as established principles, and negotiations have taken place on the assumption that developed countries bear more significant responsibilities than developing countries. (Statements have been made by countries such as the US, however, that the principles should be reviewed due to the significant increase of emissions in emerging countries such as China and India. Thus, the Paris Agreement adopted at COP21, while also touching on the CBDR, set forth that all countries, including major emitters, are obligated to submit and renew their emission goals every five years and to report on the implementation status and receive reviews.) On the other hand, a major reduction in greenhouse gas emissions imposes significant financial burden. There are assertions that developed countries need to adopt border measures (*i.e.*, imposition of surcharges) in particular on imported goods from emerging countries since they have significant economic power yet do not bear the responsibilities that developing countries have under the CBDR. The basis for such an argument is as follows:

***i. Ensuring the effectiveness of measures to combat climate change***

Introducing regulations to reduce greenhouse gas emissions in developed countries may lead to domestic products being replaced with products manufactured overseas, which are not subject to such restrictions. This would result in a failure to reduce overall reductions in greenhouse gas

emissions worldwide. This phenomenon is known as the “carbon leakage”<sup>1</sup> problem, and border measures are often advocated as a potential solution.

**ii. Maintaining industrial competitiveness**

Differing obligations and costs relating to the reduction of greenhouse gas emissions between industrialized and developing nations leads to unequal conditions for the industrial sector which need to be corrected.

**iii. Providing incentives to implement measures to combat climate change**

Countries whose efforts to reduce greenhouse gas emissions are insufficient and countries that are reluctant to agree to implement legally binding reduction targets should be given incentives to participate in an international framework and fulfill their respective obligations.

On the other hand, the rules of international trade have not necessarily been changed to accommodate the increasing importance of environmental protection. Rather, the interpretation of existing rules has been gradually adjusted. The GATT, which came into effect in 1947, had no clear rules to balance trade with environmental protection. The Agreement does, however, acknowledge the validity of restrictions and/or distortions to free trade under certain Exceptions, providing certain conditions are met, such as in Article XX(b) (when “necessary to protect human, animal or plant life or health”), and Article XX(g) (when “relating to the conservation of exhaustible natural resources”).

The Marrakesh Agreement Establishing the World Trade Organization, which absorbed and replaced the GATT and established the WTO in 1994, includes statements in its preamble acknowledging the need to “protect and preserve the environment” and “the objective of sustainable development”. Furthermore, the Ministerial Decision on Trade and Environment was announced at the same time as the signing of the Agreement, acknowledging the need for the multilateral liberalization of trade to be compatible with environmental policy.

The fact that the international response to climate change, along with the examination of resulting border measures to be implemented in the name of environmental protection, have come to have a significant influence on trade policy in recent times has caused far-reaching debates within international economic law regarding the relationship between measures to combat climate change and the current WTO legal system. This Addendum seeks to provide an overview of the proposed policies relating to border measures to address climate change, and at the same time summarize the major debates taking place regarding their relationship with the current WTO Agreements.

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<sup>1</sup> Carbon leakage can also occur when, as a result of measures to prevent climate change in a particular country, demand for fossil fuels, which are a major source of emissions, declines, causing a reduction in price on the global market. This may result in the use of such fossil fuels increasing in other countries, causing an increase in greenhouse gas emissions in those countries. This Addendum, however, uses the term “carbon leakage” only to describe the replacement of domestic products with products manufactured overseas (including both cases where domestic production is transferred overseas, and cases where production is not transferred directly, but domestic manufacturing is nevertheless reduced due to competition from products manufactured overseas).

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## **B. DEFINITION OF BORDER MEASURES TO COUNTER CLIMATE CHANGE**

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### ***1. OUTLINE OF PROPOSED SCHEMES***

As described in “1. Introduction”, some have said that border measures to impose taxes, surcharges, or other obligations on imported goods from countries with no obligations to reduce greenhouse gas emissions or insufficient efforts to reduce greenhouse gas emissions are needed. Border measures to combat climate change that have been proposed to date have mainly involved two kinds of measures - “border carbon taxes” and the obligatory submission of greenhouse gas emission permits when importing goods.

Border carbon taxes are linked to domestic carbon tariffs (taxes imposed relative to the emission of greenhouse gases such as CO<sub>2</sub>), and are likely to be levied according to the level of greenhouse gases emitted during the manufacture of the product in question. President Sarkozy of France, for example, has frequently proposed this system in various speeches. As of March 2010, however, France had not yet succeeded in introducing its own domestic carbon tax, and has not clarified the products that will be subject to the imposition of border carbon taxes, their method of levying, the tariffs’ relationship to domestic carbon taxes, or the methods for implementing tariffs across the EU. As a result, this section will deal mainly with the system for trading emissions permits.

The obligation to submit emissions permits at the time of import is an obligation for products produced in sectors with heavy environmental impacts to submit to the government of the importing country a certain amount of emissions permits that take into account the costs of emission reduction of the domestic industry in that country. In the same way as border carbon taxes, it is designed to ensure that imported products bear the same burden as domestic products, which are subject to domestic measures to reduce greenhouse gas emissions. The USA and EU have both made such proposals. In the USA, a fairly detailed framework of such a system has already appeared in drafts of legislation debated in Congress, while the EU is still in the stage of considering its introduction.

#### ***(State of considerations in the EU: EU-ETS)***

The EU operates the EU-ETS (Emission Trading System), which is the world’s largest emissions trading market for greenhouse gases. The EU-ETS has not, to date, incorporated any border measures. In its rules for 2013 onwards, concerns relating to carbon leakage are to be dealt with through the free allocation of emissions quotas to companies.

Specifically, industries that will be eligible for the free allocation of emissions quotas are defined in the EU-ETS Directive 2003/87, subsequent to its amendment (by Directive 2009/29) on 23<sup>rd</sup> April 2009, in Article 10a, based on factors such as the level to which they are able to pass the costs incurred in implementing the Directive onto the price of their products, and the level to which they are subject to international competition. Already, based on the European Commission Decision of 24<sup>th</sup> December 2009, 164 industries have been designated as eligible for the allocation of free emissions quotas.

At the same time, Article 10b(1) of the above-mentioned EU-ETS Directive, the following regulations are defined.

- By 30 June 2010, the Commission shall, in the light of the outcome of the international negotiations and the extent to which these lead to global greenhouse gas emission reductions,

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submit to the European Parliament and to the Council an analytical report assessing the situation with regard to energy-intensive sectors or subsectors that have been determined to be exposed to significant risks of carbon leakage.

- This shall be accompanied by appropriate proposals, which may include:
  - (a) Adjustment of the free allocation rate of industries to which emission quotas are allocated for free.
  - (b) Incorporating importers into EU-ETS regarding importation of products of industries for which quotas are allotted for free.
  - (c) Assessing and taking appropriate countermeasures concerning the effects to energy security of Member countries from carbon leakage.
- Consideration should be made when determining which measures are appropriate for agreements for each area that have binding authority and cause reductions in greenhouse gas emissions that are sufficient to deal with the climate change problem.

Furthermore, in the report that was to be submitted by June 30, 2010, as directed in the above EU-ETS order, the following have been concluded, indicating that border measures have been considered as options for carbon leakage countermeasures.

- The European Commission analyzed the status of energy intensive industries regarding the risks of carbon leakage (production transference from countries with leaner carbon restrictions to the EU)
- The main conclusion is that there are instances where the existing measures that prevent carbon leakage from these industries (*i.e.*, free allotment and access to international credit) are justified as before. Furthermore, if there are existing measures that prevent carbon leakage, increasing greenhouse gas emission reduction goals to 30% is indicated to have definitive effects against carbon leakage if the other countries are complying with reduction goals proposed by the Copenhagen Agreement.
- The European Commission in particular will continue to supervise the risk of carbon leakage related to third-party countries that have not taken steps to restrict emissions. Import products will be included in the EUETS' subjects as a potential measure that will become subjected to analysis.

### **(State of affairs in the USA, especially with regard to the Waxman-Markey Bill)**

In the USA, Congress has repeatedly debated climate change legislation (for example, the Boxer-Lieberman-Warner Climate Security Act (110<sup>th</sup> Congressional Session, S.3036), and a range of suggestions have been made in regard to a system of mandatory submission of emission permits. The following is a summary of the American Clean Energy and Security Act of 2009 (H.R. 2454), commonly known as the Waxman-Markey Bill.

- (i) Industries to which the Bill applies
  - Industries with a minimum energy intensity (quantity of energy used per unit volume manufactured) or greenhouse gas intensity (quantity of greenhouse gases emitted per unit volume manufactured) of 5%, as well as a minimum trade intensity (the ratio of the value of imports of a product to the value of the domestic market for the product (domestically shipped product value + imported product value)) of 15%.
  - Industries with a minimum energy intensity or greenhouse gas intensity of 20%, regardless of

their trade intensity.

- In addition, industries considered equivalent to the industries above based on the regulations of the legislation.

\*Regardless of the above, the oil refinery industry is deemed not to be an applicable industry.

\*According to various analyses, industries that are covered under these conditions include chemicals, paper, non-metallic minerals (cement, glass, etc.) and primary metals (aluminum, steel, etc.)

(ii) Products to which the Bill applies

- Based on a comparison of industrial categorization and customs duty categorization, products acknowledged as manufactured within industries identified in (i) above.

- Products that meet all the following conditions:

- (a) Products that include a substantial quantity of one or more products manufactured in the applicable industries listed in (i) above.
- (b) Products manufactured within an industry subject to regulations that assume the imposition of border measures, and for which one or more emissions permits are required to be submitted under such regulated obligations on import.
- (c) Products manufactured within an industry with a minimum trade intensity of 15%
- (d) Products for which the introduction of border measures is both technically and administratively possible, and the energy intensity and greenhouse gas intensity of its manufacturing process, as well as the possibility of shifting the costs of its production into the product price and other considerations, can be shown by domestic producers to be appropriate in terms of the objectives of border measures systems, based on appropriate factors, and these claims are acknowledged by government

(iii) Conditions for measures to come into effect

- A situation where no binding multilateral environmental agreement which includes the world's major emitters of greenhouse gases contributing in a fair way towards global emissions reductions and has provisions for corrective measures in regard to countries that do not abide by their greenhouse gas emissions reduction commitments, is in force with respect to the USA by 1<sup>st</sup> January 2018 .

- A situation where products listed in (ii) above, related to industries in (i) above, are imported into the USA, and where less than 85% in value of such imports come from a country or countries meeting one or more of the conditions below (in other words, where 15% or more of imports come from countries not meeting any of these conditions).

- (a) Countries participating in an international agreement relating to reductions in emissions of greenhouse gases to which the USA is also a party, and bears the same level, or a greater level, of responsibility for reducing greenhouse gas emissions.
- (b) Countries participating in a multilateral or bilateral agreement with the USA involving reductions in emissions of greenhouse gases in the industry in question.
- (c) Countries in which the relevant industry has the same or a lower level of energy intensity or greenhouse gas intensity than that of the same industry in the USA.

(iv) Imposed Measures

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- When applicable products are imported into the USA, emissions permits must be submitted to the US government in a volume appropriate in consideration of the burden of greenhouse gas costs to US domestic industry.
- Imports from countries that meet one of the following conditions are, however, exempted from this requirement.
  - (a) Conditions (a) to (c) in (iii) above
  - (b) Countries recognized by the United Nations as a Least Developed Country (LDCs)
  - (c) Countries whose greenhouse gas emissions constitute a maximum of 0.5% of global emissions, and whose imports into the US of products identified in (ii) above constitute a maximum of 5% of such imports.
- (v) Timing of Imposition, and Application for Suspension of Imposition
  - The President of the USA must define the industries to which border measures will be applied by 30<sup>th</sup> June 2018 (subsequently reviewed every four years).
  - In cases where the US President recognizes that the implementation of border measures in a particular industry will be detrimental to the US economy or environment, an application may be made to Congress to delay such an imposition, but in such cases, if no decision to approve the delay is authorized by both the Senate and the House of Representatives within 90 days of such an application, it will not be possible to cancel the imposition of measures.
  - Products to which measures are applied are those imported into the USA on or after 1<sup>st</sup> January 2020.

**Figure II-A1 Summary of border measures contained in the US Waxman-Markey Bill**

(i) Applicable industries	(ii) Applicable products	(iii) Conditions for imposition	(iv) Details of measures	(v) Period, etc.
<ul style="list-style-type: none"> <li>● Industries with a minimum energy intensity or greenhouse gas intensity of 5%, and in addition a minimum trade intensity of 15%.</li> <li>● Industries with a minimum energy intensity or greenhouse gas intensity of 20%, regardless of their trade intensity.</li> <li>● Etc.</li> </ul> <p>*Specifically, high likelihood of applicability to chemical, paper, cement, steel industries, etc.</p>	<ul style="list-style-type: none"> <li>● Based on a comparison of industrial categorization and customs duty categorization, products acknowledged as manufactured within industries identified as applicable in (i) above.</li> <li>● Products that meet all the following conditions:                             <ul style="list-style-type: none"> <li>(a) Products that include a substantial quantity of one or more products manufactured in the applicable industries listed in (i) above.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>● No binding, multilateral agreement on the reduction of greenhouse gas emissions has been entered into by 1<sup>st</sup> January 2018, in which the world's leading polluters are participating</li> <li>● Of products listed in (ii) above, related to industries in (i) above, a maximum of 85% in value of imports comes from a country or countries meeting one or more of the conditions below:                             <ul style="list-style-type: none"> <li>(a) Countries</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>● When applicable products are imported to the USA, a greenhouse gas emissions permit must be submitted to the US government.</li> <li>● Imports from countries that meet any of the following conditions are, however, exempted.                             <ul style="list-style-type: none"> <li>(a) Conditions (a) to (c) in (iii) above</li> <li>(b) Least Developed Nations (LDCs)</li> <li>(c) Countries whose greenhouse gas</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>● Applicable industries to be defined by 30<sup>th</sup> June 2018 (revised every four years)</li> <li>● The President may request Congress for a delay in the imposition of measures, which can be implemented provided both the Senate and the House approve it within 90 days.</li> <li>● Border measures to be imposed from 1<sup>st</sup> January 2020.</li> </ul>

(i) Applicable industries	(ii) Applicable products	(iii) Conditions for imposition	(iv) Details of measures	(v) Period, etc.
	<p>(b) Products manufactured within an industry subject to regulations that assume the imposition of border measures, and for which one or more emissions permits are required to be submitted under such regulated obligations on import.</p> <p>(c) Products manufactured within an industry with a minimum trade intensity of 15%</p> <p>(d) Products for which the introduction of border measures is both technically and administratively possible, and for which border measures are considered appropriate for the applicable objectives</p>	<p>bearing the same level, or a greater level, of responsibility as the USA for reducing greenhouse gas emissions.</p> <p>(b) Countries participating in a multilateral or bilateral agreement with the USA involving reductions in emissions of greenhouse gases in the industry in question.</p> <p>Countries in which the relevant industry has the same or a lower level of energy intensity or greenhouse gas intensity than that of the same industry in the USA.</p>	<p>emissions constitute a maximum of 0.5% of global emissions, and whose imports to the US constitute a maximum of 5% of such imports.</p>	

Legislation currently before the US Senate (known as the Boxer-Kerry Bill) also envisages the introduction of border measures, but as of March 2010 no details had been defined, and section 765 of the draft notes that the text of this part of the bill is yet to be finalized.

According to reports, President Obama welcomed the passing of the Waxman-Markey Bill in his remarks after the Bill's passing by the House of Representatives on 28<sup>th</sup> June 2009, but commented "I think we have to be very careful about sending any protectionist signals out there", demonstrating a measure of caution regarding the adoption of border measures for the purpose of countering climate change.

## ***2. EVALUATION OF THE IMPACT OF MEASURES TO COMBAT CLIMATE ON INDUSTRY***

Even if disparities exist in the level of measures to counter climate change between different countries, provided that the extra costs can be absorbed by the companies with a small amount of effort, or can be passed on to the product price without significantly affecting demand, domestic products may not be replaced by overseas products with a higher greenhouse gas intensity, and carbon leakage may be prevented. If, for example, the proportion of overall manufacturing costs represented by costs that rise when measures to combat climate change are implemented (such as energy costs) is small, the overall impact would be limited. On the other hand, in industries where energy costs cover a large proportion of manufacturing costs, and where competition from emerging countries not under burdens of greenhouse gas reductions similar to those of developed nations is strong, significant impacts may occur.

A US Government report on the impact on industry of implementing the Waxman-Markey Bill quotes a range of calculations relating to the introduction of emissions trading systems in the USA. The main points are summarized below.

- In the manufacturing sector as a whole, the reduction in domestic production and the increase in imports resulting from disparities in environmental measures are estimated at between 0 and 1%, and carbon leakage is expected to be low.
- In sectors such as the paper and steel industries, which have comparatively high levels of both greenhouse gas intensity and trade intensity, the impact of disparities in environmental countermeasures is estimated as larger than average, but even then, the reduction in domestic production and the increase in imports are estimated at between 1 and 3%.
- Among industries with particularly high levels of both greenhouse gas intensity and trade intensity, however, the reduction in domestic production could be over 5%, increasing the possibility of a more significant level of impact.

As this example shows, the reduction in industrial competitiveness and the occurrence of carbon leakage may be a problem not for the manufacturing sector as a whole, but rather only for certain specific industries. If this is the case, it may be argued that preventative measures should be applied in an appropriate manner, i.e., not across a wide range of products, but only for a limited number of goods.

Alternative measures such as the free allocation of greenhouse gas emissions permits may also be useful in limiting the impact of carbon leakage and harm to industrial competitiveness, but the best way forward will likely depend on the specific conditions at hand.

## ***3. TRENDS IN INTERNATIONAL DEBATE***

### ***(The structure of opposing arguments)***

Countries that are proactive in the adoption of border measures related to climate change measures are aiming to stress their concerns as the entire world aims to reduce emissions. This will be achieved by indicating the possibilities of introducing border measures against countries that do not join the international framework as countries that produce great amount of emissions, such as China, continue to reject accepting requirements. It goes without saying that as mentioned above, there are those who oppose the introduction of border measures or seek careful examination, since



such measures are not necessarily always clear as to how they are consistent with the WTO rules, and there is a risk that they may be viewed as protectionist measures (*see* (1) above).

On the other hand, developing countries and emerging economies that are predicted to be the targets of such measures (in particular China and India, etc.) strongly object to border measures, perceiving them as major obstacles when it comes to exporting their country's products.

**(Statement on trade measures in the UNFCCC)**

In respect to this issue, international agreements that have already been established include UNFCCC Article 3 Clause 5 adopted in 1992 and the Cancun Agreements paragraphs agreed upon in 2010. They have stated the following provisions (those underlined are additions).

**Article 3**

In their actions to achieve the objectives of the Convention and to implement its provisions, the Parties shall be guided, INTER ALIA, by the following:

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

This is an expression that followed the main paragraph of Article XX of GATT. It does not indicate specific prohibited matter or interpretation, surpassing the provisions of GATT, concerning the trade measures for combating climate change.

**Cancun Agreements Paragraph 90**

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change; measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

**(History of discussions at COP)**

With western countries examining the introduction of border measures related to climate change countermeasures, the treatment of border measures has been argued as a point of contention concerning the international framework from 2013 onward related to climate change. In August 2009, India proposed strengthening the provisions of the articles, by proposing that "all unilateral border measures with climate change as their reasons must not be adopted". Although emerging economies such as China and Saudi Arabia strongly supported this, developing countries including Japan were against the move to refer only to border measures and prohibit them completely, when no agreement related to the greenhouse gas emission reduction goals for each country had been achieved. In the end, conflicts between developed and developing countries over

the treatment of border measures were not resolved, even at the COP15 held in December. The Copenhagen Agreement that summarized the COP15 discussions did not refer to this point. In COP17 in 2011, India proposed that “since unilateral trade measures pose adverse effects for developing countries environmentally, socially, and financially, going against the principles of the UNFCCC, contracting countries should be clearly banned from using unilateral trade measures.” However, developed countries refuted this, stating that the agenda has already been discussed in other international organizations having expertise. As result, the report that the general secretary compiled after the meeting merely stated that “there was a related discussion during COP17”. No specific discussions on this matter took place in subsequent COP meetings, and no statement on trade measures was included in the Paris Agreement adopted at COP21 in 2015 either.

### **(Debate within the WTO)**

The relationship between the WTO Agreement and multilateral environmental agreements (MEAs) is a subject of negotiation in the Doha Round, which began in 2001 (see Doha Ministerial Declaration, paragraph 31(i)). To date, the relationship between WTO rules and MEAs that include specific provisions relating to trade, including the Washington Convention (which prohibits international trade in endangered species) and the Basel Convention (which controls trans-boundary movements of hazardous wastes), has been widely debated, but no discussion has taken place relating to a potential climate change treaty (see 4. “The relationship between trade restrictions based on multilateral environmental agreements and the WTO agreement” in Chapter 3, Part II).

Outside of the Doha Round context, an Informal Trade Minister Dialogue on Climate Change Issues was held to discuss trade and climate change at COP 13 (the 13<sup>th</sup> Conference of the Parties to the UNFCCC). At this meeting, it was confirmed that trade policy and measures to counter climate change were not mutually incompatible, but rather should be considered as mutually supportive. The participating countries agreed that there was a need to wait for the results of the climate change negotiations in order to establish new international trade rules that deal with climate change issues.

This policy of “climate change first, trade later” was reaffirmed after COP 15 at the unofficial WTO Ministerial meeting held in January 2010 on the sidelines of the World Economic Forum (the Davos Forum).

On 26<sup>th</sup> September 2009, the WTO and the United Nations Environmental Program (UNEP) released a joint report containing analysis of the relationship between trade and climate change from a range of perspectives. The report summarized the state of precedents and theories relating to the treatment of border measures applied for the purpose of countering climate change with regard to the WTO Agreements. This report, however, neither represents any particular stance by the WTO Secretariat concerning the compatibility of border measures with WTO rules nor has any legal force with relation to the rights and obligations of WTO Members.

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## **C. MAIN ISSUES RELATING TO THE WTO AGREEMENTS**

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The relationship between border measures relating to climate change and the WTO Agreements does not consist merely of legal technicalities concerning the interpretation of the text of rules allowing the unilateral levying on imports of financial burdens heavier than the multilaterally

agreed bound tariffs. It is also directly connected to the policy debate relating to how much freedom to act individually is appropriate in a situation where no international agreement has yet been reached regarding the sharing of costs needed to protect the global environment.

The central discussion points here are firstly, the extent to which border tax adjustments should be allowed, and secondly, the extent to which border measures that focus not on the physical properties of the product, but rather on its production process (known as “PPM (Process and Production Methods) measures”), should be permitted.

## ***1. BORDER TAX ADJUSTMENTS***

Border tax adjustments are measures taken to adjust the disparity between internal taxes applied in different countries to products traded across international borders. This can be demonstrated by the case of consumption taxes, for example, which are levied when a product is purchased domestically, and may be levied on products imported from overseas (import border tax adjustment), or refunded on domestic products exported overseas (export border tax adjustment).

Provisions relating to these measures include GATT Articles II: 2(a) and III: 2 regarding imports, and GATT Article VI:4, the notes to Article XVI and the WTO Agreement on Subsidies, among others, relating to exports.

This Addendum is particularly concerned with the issue of whether or not the levying of border carbon taxes should be permitted as a border tax adjustment. It is based on the deliberations in the United States Congress of such laws related to border measures. To summarize in a few words, there are no regulations that foresaw border carbon taxes, nor has any interpretation of border carbon taxes been established that defines whether or not they should be categorized as border tax adjustments of the type foreseen by the GATT.

### **1) SHOULD BORDER CARBON TAXES BE TREATED AS BORDER ADJUSTMENTS?**

Border carbon taxes are not a type of measures foreseen during the drafting of the GATT. There is no clear precedent to suggest whether border carbon taxes should be acknowledged as a type of “border adjustment”, which is recognized by the GATT in addition to ordinary customs tariffs. There are arguments in the academic literature both for and against this position.

Border tax adjustments are a system where, if an internal tax is imposed on a certain product, levying charges on similar products overseas upon import or refunding taxes for such domestic products upon export to the extent of the internal tax will not be considered an infringement of tariff concessions or the granting of a subsidy. This system, in terms of imported products, is recognized under GATT Articles II: 2(a) and III:2. These provisions enable contracting parties to levy a charge equivalent to, for example, a domestic consumption tax, on overseas products upon import, without being accused of an infringement of tariff concessions.

GATT Article II: 2(a) requires that, in order for an internal tax to be adjusted at the border, it must be “imposed...in respect of an article from which the imported product has been manufactured or produced in whole or in part” (underline added). This is because it is assumed that internal taxes, for which border tax adjustments are permitted, are generally imposed on the products themselves, or on the materials or components, etc. used in products.

If a carbon tax is a tax imposed on a “product” (e.g. on steel products), it would satisfy as a matter of course the condition underlined above in the provisions of GATT Article II: 2(a), and it would

theoretically be possible to adjust that tax at the border. However, in consideration of the debate on "like products," illustrated in (2) below, merely levying a carbon tax on imported products would be likely to be prohibited.

If, on the other hand, a carbon tax is considered to be a tax imposed on carbon dioxide (or other greenhouse gases), the following questions need to be answered in order to decide whether the tax can be adjusted at the border: whether or not the object of any internal tax (i) has to be physically present in the imported product, and if not, (ii) has to be an input required to manufacture the product (in other words, whether or not there would be a difference in treatment between positive inputs such as energy, and byproducts such as carbon dioxide). In this respect, some scholars argue that a tax on carbon dioxide is border-adjustable, citing the language of the provisions on border tax adjustments upon export and the Report of the GATT Working Party on Border Tax Adjustments (1970), but there are others who opposed such an interpretation. This controversy has not yet been resolved.

## 2) GATT ARTICLE III: 2 – “LIKE PRODUCTS”

The first sentence of GATT Article III:2 states that “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 like domestic products” (underlines added), thereby stipulating that when applying internal taxes to imported products, they must not be even slightly more burdensome than those applied to “like domestic products”. The question arises as to what exactly constitutes a “like product” - whether, for example, steel manufactured in a process that emits large quantities of greenhouse gases and steel manufactured using a process that emits only a very small amount of greenhouse gases are “like products”.

### (Criteria for “like products”)

Precedents have stated that, while decisions should be made based on the specific circumstances of the case at hand, there are four attributes, which require consideration in order to judge whether domestically produced and imported products should be considered “like products” referred to in GATT Article III: 2 (see Japan – Alcoholic Beverages II, EC – Asbestos)

- (i) Physical attributes
- (ii) Extent to which products are used for the same purpose
- (iii) Extent to which consumers consider, and use, the products as substitutes for one another
- (iv) International customs classification.

Of these four, if a decision is based on (i), (ii) and (iv), since the volume of greenhouse gases emitted during the manufacturing process has no bearing on the finished products’ attributes, this will have no impact on the decision as to whether or not products are “like products”.

On the other hand, there is the possibility that placing an emphasis on attribute (iii) may affect the decision of whether or not greenhouse gas emissions produced during production periods are “like products”. For example, assuming a market in which the size of greenhouse gas emissions during the production process of a product is used as a criterion for consumer activities, there is a possibility that products with high greenhouse gas emissions and products with low greenhouse gas emissions may be judged as being “like products” when they are in direct competition or are interchangeable products. However, if one were to consider actually applying this method, one

would see that it is not always easy to determine the amount of greenhouse gases emitted during the production of a product. Furthermore, it is not clear how much difference in emissions would make products classified as “like products” or “products that are not alike”. Therefore, there have been arguments for the preparation of an international standard that would become a basis when determining whether or not products are “like products” according to the emissions of greenhouse gas.

**(The impact of decisions relating to “like products” on the legality of border carbon taxes)**

If the amount of greenhouse gases emitted during the manufacturing process does not affect whether or not the finished products are considered “like products”, any border carbon tax that is levied according to the volume of greenhouse gas emitted during the production process will be considered an infringement of the first sentence in GATT Article III: 2.

For example, if the carbon tax was set at 1,000 yen for every ton of greenhouse gas emitted, and the manufacture of a certain quantity of domestic steel involved the emission of one ton of greenhouse gas, while the manufacture of the equivalent quantity of imported steel involved an emissions of two tons, then the tax burden on the former would be 1,000 yen, while that on the latter would be 2,000 yen. If the domestic and imported steel are judged to be “like products”, then the placing of a heavier burden of tax on the imported product (2,000 yen compared to 1,000 yen) would amount to taxation “in excess of” internal taxes or other internal charges applied to “like” domestic products under the first sentence of GATT Article III: 2.

### **3) THE RELATIONSHIP BETWEEN BORDER CARBON TAXES AND MOST-FAVOURED NATION TREATMENT**

(1) and (2) above discussed the points that could be raised when a WTO Member dissatisfied with border carbon taxes makes a claims that its products, if subjected to a border carbon tax, are being disadvantageously treated compared with products produced domestically in the Member to which it is exporting. In other words, it would be claiming an infringement of national treatment obligations. It is also possible, however, that a claim could be made by a Member suggesting that its exports are being treated disadvantageously compared with exports from another country, in violation of most-favored nation treatment (MFN) rules.

When the tax rates for a border carbon tax calculated by a uniform method are applied to all imports based on the amount of greenhouse gas emissions during the manufacturing of products and other similar criteria, such tax measures would seem to be in compliance with MFN treatment obligations, as they appear, on the surface, to treat all countries equally. However, according to certain precedents, the provision in GATT Article I: 1 does not require just an outward appearance of identical treatment among exporting countries, but rather requires substantively equal treatment for products of all contracting parties (Canada - Certain Measures Affecting the Automotive Industry). Therefore, even in cases where the tax rates applied are calculated by the same method, some issues could arise, such as whether or not such tax rates cause substantive inequality between products originating in countries capable of reducing their greenhouse gas emissions easily thanks to advantages such as advanced technology and easy access to financing, and those manufactured in other countries which enjoy no such advantages.

If, on the other hand, in consideration of the points mentioned above, tax rates for a border carbon tax are adjusted depending on the situation of exporting countries, this raises a new question of whether or not such adjustments are truly appropriate, especially under the present circumstance where no international agreement has been reached with regard to specific emission reduction

targets that individual countries are obliged to achieve.

Some border measures currently under consideration exempt certain categories of country from the scope of application, e.g. the member countries that are covered by an international agreement that incorporates mandatory reduction of greenhouse gas emissions, least-developed countries (LDCs), and small countries whose greenhouse gas emissions barely impact total global of emissions.

These measures can be regarded as arrangements that reflect the situations of the respective exporting countries. However, if such measures are put into operation before an international agreement is established to indicate the appropriate criteria for judging what treatment should be given for different exporting countries, they are highly likely to be in breach of the MFN treatment obligation in relation to the contracting parties which cannot enjoy such exemptions.

### ***(1) The Relationship between Border Carbon Taxes and GATT Article XX***

Even in cases where a border carbon tax is judged to be infringing on GATT Articles I, II and III, this in itself may not constitute a breach of WTO rules. It is necessary to next consider whether a border carbon tax that infringes other GATT regulations may be considered acceptable under the exceptions permitted by GATT Article XX (General Exceptions).

In order to justify measures based on GATT Article XX, it is necessary to demonstrate that the measure in question corresponds to one or more of the exceptions listed in paragraphs (a) to (j), and that furthermore, it meets the constraints given in the main text of GATT Article XX (the part of the Article that is applicable to all paragraphs from (a) to (j)), referred to as the “chapeau”.

Measures implemented with the objective of environmental protection are often claimed justified under paragraph (g). For this reason, based on precedents (in particular, United States - Standards for Reformulated and Conventional Gasoline and United States - Import Prohibition of Certain Shrimp and Shrimp Products and their implementing Panels), whether a border carbon tax counts as such an exception should be considered first for its consistency with Article XX(g), after which its relationship to the chapeau of Article XX would be considered.

#### ***Border Carbon Taxes and GATT Article XX(g) (Is “a low-greenhouse gas atmosphere” an “exhaustible natural resource”?)***

In order to determine whether or not a border carbon tax can be justified under Article XX(g), it must first be asked whether the border carbon tax is a measure that contributes to the conservation of an “exhaustible natural resource”. If the tax is considered to be a measure taken to maintain low concentrations of greenhouse gases in the atmosphere, then the question becomes whether “a low-greenhouse gas atmosphere” can be considered an “exhaustible natural resource”. It is clear that it is both “exhaustible” and “natural”, and provided the definition of “resource” is not defined too narrowly, there is a strong likelihood of that the answer will be in the affirmative. According to precedents, “exhaustible natural resources” include not just mineral resources such as precious metals, but also “clean air” (US- Standards for Reformulated and Conventional Gasoline).

#### ***(Can action be taken to preserve exhaustible natural resources in areas outside of the direct jurisdiction of the regulating country?)***

Next, the issue of whether or not the preservation of an exhaustible natural resource outside the jurisdiction of the regulating country is justification for invoking GATT Article XX needs to be considered. In a precedent where this issue was raised, the conservation of migratory sea turtles was

the reason that regulations targeting shrimp fishing methods within other countries' fishing areas were recognized as protecting exhaustible natural resources (US – Import Prohibition of Certain Shrimp and Shrimp Products), giving reason to assume that if a certain level of linkage can be demonstrated between greenhouse gas emissions in other countries and the preservation of the regulating country's share of the atmosphere, border carbon taxes may be acknowledged as a measure to protect the country's own exhaustible natural resources. Since greenhouse gas emissions anywhere in the world will eventually have an impact on the concentration of greenhouse gases in the atmosphere as a whole, it is difficult to imagine that measures would be considered inconsistent with Article XX(g) on the grounds that the source of emissions is outside the jurisdiction of the regulating country.

**(Are the “related” to the conservation of exhaustible natural resources?)**

The next step is to look at the relationship between the objective of border carbon taxes and the “conservation of exhaustible natural resources”. The text of GATT Article XX(g) requires only that measures to be justified under its conditions need to be “relating to” the conservation of exhaustible natural resources, but the precedents suggest that it is insufficient for measures to be merely “secondarily” or “unintentionally” beneficial to the conservation of natural resources. While precedents have not required measures to be “necessary” for such conservation, they nevertheless demand that the conservation of natural resources be the main purpose of the measures (in other words, they require a substantive relationship between the measure and the purpose).

If, in line with precedents, border carbon taxes are not evaluated on their own but are considered as part of the regulatory scheme that includes domestic carbon taxes, it is thought that such measures would fulfill the conditions of GATT Article XX(g), since it can be clearly shown that the measures overall have as the main objective an aim to conserve a low-greenhouse gas atmosphere.

Opponents of a border carbon tax may contend that such measures would be implemented with the intention of maintaining the industrial competitiveness of a developed country, or preserving employment, which cannot be regarded as equivalent to “conserving exhaustible natural resources”. However, just because, a border carbon tax may have the effect of maintaining the competitiveness of domestic industries does not necessarily mean that it is not a measure which conserves limited natural resources. As a result of a country strengthening domestic greenhouse gas emissions regulations, industries with high emissions levels may move to countries with less stringent regulations, and the overall level of global emissions may remain unchanged (or even increase). Unless this idea of “carbon leakage” is judged to be untrue, or the structure of border carbon taxes is of such a design as to make it impossible to explain them as a countermeasure to carbon leakage, it would probably be possible to explain border carbon taxes as a “measure relating to the conservation of exhaustible natural resources”.

**(Are border carbon taxes being implemented “in conjunction with reductions in domestic production”?)**

In order to justify a measure relating to the conservation of exhaustible natural resources under GATT Article XX(g), the measure must be “made effective in conjunction with restrictions on domestic production or consumption”. This does not require exactly the same treatment of imports and domestic products, and in precedents it has been shown sufficient to demonstrate “even handedness” when implementing restrictions on products (US-Gasoline standards case). For this reason, other than in cases where border carbon taxes are implemented completely independently of any domestic carbon taxes, provided that a carbon tax is levied on both imports and domestic

products, and the absolute tax burden (taxation rate) is the same as, or lower than, that applied to domestic products, it would seem normal for this to be considered as “even-handed” treatment.

***(2) The relationship between border carbon taxes and the chapeau of GATT Article XX***

In (i) above we considered the conditions for justifying a border carbon tax based on paragraph (g) of GATT Article XX. In order for a measure to be recognized under the GATT provisions, however, it must also meet the conditions spelled out in the chapeau of Article XX.

The chapeau of Article XX states that measures that meet the conditions given in paragraphs (a) to (g) must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.

In precedents, it has been noted that GATT Article XX is, by its very nature, used to justify “exceptional” measures against the rights granted to Members by the other articles of the GATT. It has been pointed out that the invocation of GATT Article XX by a Member must not constitute an abuse of its rights, and it is emphasized that in considering consistency between the application of a certain measure and the chapeau of GATT Article XX, the rights of both exporting and importing countries must be balanced equitably.

Based on these considerations, in the US - Import Prohibition of Certain Shrimp and Shrimp Products case, the discussion concerning whether or not the actions of the USA constituted arbitrary or unjustifiable discrimination focused on whether or not (1) the restrictions are flexible enough to reflect domestic circumstances within the exporting country, (2) appropriate negotiations were conducted with the exporting country before regulations were implemented, and (3) due process was guaranteed in regard to the implementation of restrictions.

***(Are the restrictions flexible enough to reflect domestic circumstances within the exporting country?)***

In the US-Shrimp precedent, the Appellate Body held that the implementation of economic sanctions and the requirement of measures equivalent to those of the implementing country in order to fulfill environmental criteria amounted to “arbitrary or unjustifiable discrimination”. At the same time, it concluded that requiring procedures that fulfill environmental criteria to be “comparable in effectiveness” to regulations in the implementing country, and making the adoption of some sort of criteria a prerequisite for permitting imports (while recognizing flexibility regarding its specific form) did not amount to “arbitrary or unjustifiable discrimination”.

As a result, it is possible that border carbon taxes may be considered “arbitrary or unjustifiable discrimination” if it is levied at a pre-determined rate without consideration of the domestic conditions of the exporting country, even if the tax results in the same nominal burden as that applied to domestic industries. On the other hand, when calculating border carbon tax rates, if the regulation states that this should be done together with due consideration of the domestic situation (level of economic development, etc.) of the exporting country, it is likely that this condition can be fulfilled, at least on a prima facie basis. The precedent also takes into consideration the fact that the measures taken by the USA were severe, equivalent to a prohibition on imports, and there is therefore the possibility that trade measures equivalent to the imposition of border carbon taxes may be considered in a different light.

***(Were appropriate negotiations conducted with the exporting country before regulations were***



**implemented?)**

One important fact pointed out in US-Shrimp was that while the USA had reached agreements regarding import rules that fulfilled environmental considerations with some countries, it had implemented import restrictions in regard to some other exporting countries, including the plaintiffs, without any prior negotiations. The US negotiation efforts were thus judged to be insufficient, leading to a finding of “unjustified discrimination”. In this case, the measures adopted by the USA were in effect a complete prohibition of imports that did not fulfill domestic standards, which was considered “the most powerful ‘weapon’ within a Member country’s arsenal of trade measures”.

In contrast, the Article 21.5 Panel responsible for establishing whether or not the USA had implemented adjustment measures as instructed by the Appellate Body affirmed the consistency of the USA’s measures with GATT Article XX, based on the fact that although an agreement to establish mutually agreeable import rules with the plaintiff had not been reached, there had in this case been efforts to negotiate an agreement. In other words, the obligation to attempt to negotiate does not extend to an obligation to conclude such negotiations, at least in the time span considered by the Article 21.5 Panel.

As a result, there is a good possibility that the conditions of GATT Article XX can be fulfilled, provided that negotiations are implemented in good faith with the Member on the receiving end of border carbon tax measures, even if an agreement is not reached. Furthermore, if the trade measure implemented is less severe than an import prohibition, there is the possibility that a lower level of effort to negotiate may be required than that demonstrated in the precedent, which included, for instance, convening an international conference aiming to reach agreement on a multilateral accord for the conservation of sea turtles.

All major economies of the world, including the USA and European countries, have been engaged over the long term in international negotiations with the objective of reducing global greenhouse gas emissions. The fact that these international negotiations have been taking place, however, may not in itself be sufficient. It is possible that countries may be required to demonstrate that they have invested significant efforts in good-faith negotiations that aim to avoid the introduction of border measures, rather than simply a pretense of engaging in such negotiations.

**(Was due process guaranteed in regard to the restrictions’ implementation?)**

The precedent pointed out the lack of specific criteria for judging whether or not standards in the importing country had been met when reaching its finding of “arbitrary discrimination”. Additionally, it noted a lack of transparency in the decision-making process, and a lack of fairness in the procedures surrounding the implementation of criteria, as one of the elements of its decision. The subsequent Article 21.5 Panel acknowledged that there had been improvements in these areas that rectified the earlier judgment that there was “arbitrary discrimination”.

It is therefore important that the importing country is able to demonstrate that procedures are conducted in line with fair and equitable decision-making criteria when implementing a border carbon tax, in particular when making a decision regarding specific taxation rates as discussed in (i) above.

**(3) Conclusions**

In order to use GATT Article XX to justify an infringement of GATT Articles II or III by a border carbon tax, it is first necessary to demonstrate that the relevant measure is consistent with the

conditions of paragraph (g). Provided that a border carbon tax is introduced as part of package of measures to reduce greenhouse gas emissions, i.e. together with domestic carbon taxes, it is often pointed out that the taxation system could be expected to meet these conditions.

On the other hand, in order to ensure that the border carbon tax is also considered consistent with the chapeau of GATT Article XX, and in particular that it does not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, the taxation system will need to be designed to contain enough flexibility to ensure that taxation rates can be adjusted in consideration of the particular circumstances of the exporting country.

#### **4) THE OBLIGATION TO SUBMIT GREENHOUSE GAS EMISSION PERMITS**

This section has mainly dealt with the relationship between border carbon taxes and the WTO Agreement. The following section considers briefly how obliging importers to submit greenhouse gas emission permits should be considered in relation to this.

The obligation to submit emissions permits is different to a border carbon tax in the sense that, as it is not a measure that simply requires a monetary payment, it is not covered by GATT Articles II and III: 2, but rather by Article XI, which covers “prohibitions or restrictions other than duties, taxes or other charges”, or by Article III: 4, which regulates the application of domestic restrictions on imported products.

If the obligation to submit emissions permits is considered to be a border measure separate from the application of duties or tariffs, it would be likely to infringe on the text of GATT Article XI: 1, which states that “No prohibitions or restrictions other than duties, taxes or other charges... shall be instituted or maintained by any contracting party”, and for this reason, the obligation would require justification under GATT Article XX.

On the other hand, if the obligation to submit emissions permits is not a border measure applied only to overseas products, but is simply one dimension of domestic restrictions, then the issue becomes its relationship with the regulation in GATT Article III:4, which requires overseas products to be “accorded treatment no less favorable” than domestic products. In such a case, the conclusion is thought likely to be similar to that regarding the consistency of border carbon taxes with GATT Article III: 2.

It could also be argued that the obligation to “submit emissions permits” on import is not a measure designed to quantitatively limit imports, but is in fact no more than a means of imposing a monetary burden via the purchase of emissions permits, and therefore constitutes one of the aforementioned “duties, taxes or other charges”. As a result, some argue that such measures should be dealt with under the provisions of GATT Article II and III: 2 rather than Articles XI or III: 4. In this case, the arguments regarding border carbon taxes would also be applicable to the system of obligations for submission of emissions permits.

#### **5) CONCLUSION**

From the considerations outlined above, it can be seen that the text of GATT imposes a wide variety of restrictions on the design of both border carbon taxes and the obligation to submit emissions permits on import. (Although not described in the main issue, border measures to reimburse the amortization costs of emission allowances also exist, and whether or not this can be dealt with as a subsidies issue under the ASCM needs to be discussed.)

The consistency of border measures used to counter climate change with WTO rules can thus be

said to be dependent upon the specifics of regulatory designs, rather than on general premises.

(Main citations)

- U.S. Government (2009), “The Effects of H. R. 2454 on International Competitiveness and Emission Leakage in Energy-Intensive Trade-Exposed Industries – An Interagency Report Responding to a Request from Senators Bayh, Specter, Stabenow, McCaskill, and Brown”.

WTO-UNEP (2009), “Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization”, World Trade Organization.

## ***2. PPM MEASURES***

PPM measures are characterized by the fact that they restrict trade through focusing not on the physical properties of the imported product but rather on its production processes. In many cases, regulations implemented for the purpose of environmental protection are designed to prevent harm caused during a product’s manufacturing processes (for example through the emission of pollutants); these are therefore PPM measures.

As seen in the United States-Import Prohibition of Certain Shrimp and Shrimp Products case detailed in section 4 (“Specific issues relating to the evaluation of WTO compatibility”), to date the WTO Appellate Body has taken a two-tiered approach to examining the legality of trade measures implemented for the purpose of environmental protection. Firstly, in regard to compatibility with GATT Articles II, III and XI, the Appellate Body has interpreted the text of these Articles strictly, tending to find that measures infringe on these rules. Secondly, in regard to whether or not such measures are allowed as exceptions under the terms of GATT Article XX, the Appellate Body has made decisions based on a case-by-case examination of the balance of the rights and obligations of Members. As a result, while some trade measures implemented for the purpose of environmental protection are permitted, the disorderly expansion of PPM measures, which could lead, for instance, to a situation where imports are allowed only for products that have been manufactured in countries which maintain similar labor standards and human rights criteria as the intended destination, has been avoided.

Assuming the existing framework for interpreting the GATT is followed in the case of border carbon taxes, border measures based on the importing country’s measures to combat climate change may not be allowed as a border tax adjustment, and in that case, the decision regarding whether or not the exceptions of GATT Article XX apply will be critical. Since there is no international agreement regarding each country’s share of the burden of reducing emissions of greenhouse gases, in order to be approved as an exception under GATT Article XX, it is necessary to implement measures that retain the option of lessening the burden for certain countries, in particular with regard to developing countries from the perspective of “common but differentiated responsibilities”. On the other hand, it is obviously essential for such measures to work effectively to prevent carbon leakage. When designing domestic rules, therefore, sufficient consideration must be given to what sort of emissions reductions measures are being implemented by trading partners (particularly developing countries), and a way must be found to meet both of these requirements simultaneously.

## ***3. PARAMETERS OF CURRENT RULES***

Given the Appellate Body’s deliberation methods described above, whether measures are

WTO-legal, and in particular, whether the exceptions of GATT Article XX apply, are decided on the merits of each case. While it may be possible to discern from precedents a certain level of understanding as to what measures may be permitted by the WTO Agreements, it is difficult to predict accurately during the designing stage of domestic rules which measures would be allowed. There is thus always a risk that disputes may occur due to differing interpretations of the rules among WTO Members. Disputes over climate change issues have the potential to have a significant economic impact, and the opposing interests of countries are liable to lead quickly to a political conflict. The impact of any such conflict on the WTO system is thus a major cause for concern.

For this reason, it is important that a fair and effective international framework in which all the main nations participate is reached in the climate change negotiations as quickly as possible to provide a basis for multilateral negotiations to clarify conditions under which trade measures are and are not allowed for the purpose of countering climate change. Revising the text of GATT, providing clear interpretive rules, and agreeing to exemptions from the obligations of the GATT in cases where measures may infringe upon its rules are possible ways to do this. Since the reality is that international negotiations on climate change are close to a standstill, however, the problem of how to handle such issues in the absence of an international agreement remains.

## **COLUMN: NEGOTIATION PROGRESS ON DOHA DEVELOPMENT AGENDA CONCERNING THE ENVIRONMENT**

### **1) BACKGROUND OF DISCUSSIONS**

In the Marrakesh Ministerial Conference held in April 1994, a resolution was made to set up a Committee on Trade and Environment (CTE) in the WTO with the objective of establishing a mutually supportive environment policy and a trade policy, and also to discuss a total of 10 items including; (1) the relationship (including those based on multilateral environmental agreements (MEAs)) between trade measures and environmental objectives of the WTO Agreement; (2) the relationship between the WTO Agreement and the following measures (requirements for environmental objectives related to commodity tax and penalties of environmental objectives, technical regulations, voluntary standards, packaging, labeling and recycling, etc.); and (3) the relationship between the WTO Agreement and the dispute settlement mechanism of multilateral environmental agreements.

Later, in the Doha Ministerial Conference held in November 2001, the EU sought negotiations on the following three issues: (1) clarification on the relationship between the WTO Agreement and MEAs; (2) clarification of the relationship between the WTO Agreement and environment labeling; and (3) risk assessment and management in case of insufficient scientific basis. However, because most countries were opposed to conducting negotiations on trade and environment, and were in favor of continuing the discussion on the 10 items above, the Ministerial Declaration proposed the launch of negotiations in limited fields as a compromise solution (Paragraph 31: (i) relationship with trade obligations (STO: Specific Trade Obligation) of MEAs and the WTO Agreement; (ii) information exchange between the MEAs and the WTO Committee; and (iii) review of three items including improvements in market access to environmental goods and services etc., at the Committee on Trade and Environment Special Session (CTESS), and continuation of the discussions, which left open possibilities of negotiations on (i) the impact on developing countries of market access due to environmental measures; (ii) relevant provisions of the TRIPS Agreement; and (iii) environment labeling) by the 5th Ministerial Conference (Cancun) (Paragraph 32).

In the 5th Ministerial Conference held in Cancun in September 2003, none of the items in Paragraph 32 were negotiated, and substantial discussions were resumed after Cancun beginning in April 2004.

In the General Council Decision (framework agreement) of August 2004, in CTESS the identification of products as environmental goods, and in NAMA consideration of reducing or eliminating applied tariffs were included. With regard to paragraphs 31 (i) and (ii), the Hong Kong Ministerial Declaration of December 2005 describes "to recognize the progress in the work" (Declaration paragraph 31), and with regard to paragraphs 31 (iii), the policy "to complete work expeditiously" (Declaration paragraph 32) was confirmed.

## 2) CURRENT STATUS

Regarding paragraph 31 (i) (relationship between the WTO Agreement and MEAs), Japan and EU, etc. advocated a top-down approach on the relationship between the WTO rules and the MEAs. Other countries (the United States, Australia, and developing countries) advocated a bottom-up approach on the relationship between provisions on limited individual MEAs and the WTO rules. The United States and Australia, with possibilities to solve the problems by integrating domestic agencies responsible for trade and environment, emphasized the sharing of domestic experience in the CTESS. In the CTESS of 2007, the debate continued in order to organize the discussions that had been held so far concerning domestic adjustments for the negotiation and implementation of MEAs, sharing of domestic experience gained from integration of the agencies responsible for trade and environment, and the use of expertise of MEAs in dispute settlement.

Regarding paragraph 31(ii) (information exchange between WTO and MEAs and criteria for granting observer status), although the importance of information exchange between secretariats of each country is acknowledged, the discussions have come to a halt in recent years. However, since the EU submitted a proposal in May 2006 and the United States submitted a proposed in February 2007, reviews are being carried out concerning these proposals.

Regarding Paragraph 31(iii) (reduction of tariff and non-tariffs barriers on environmental related products), since negotiations in the Committee on Trade and Environment commenced in 2002, developed countries such as Japan, the United States, the EU, Canada, Australia, New Zealand, Switzerland, and Republic of Korea have proposed a list of environmental goods for tariff reduction and/or elimination. In May 2007, nine countries (Japan, Canada, the EU, Republic of Korea, New Zealand, Norway, Taiwan, Switzerland and the United States) proposed a joint list of goods. On the other hand, developing countries, mainly India, South Africa, Brazil etc., claimed that the problem of "dual-use" goods (goods which can be used for other than environmental purposes) which were involved in the list-based approach for multi-arrangements regarding environmental goods had not been resolved. The proposal stated that the conventional approach ("project-based approach") for tax exemption for individual environmental conservation and improvement projects is desirable. Again in September 2007, Brazil proposed entrusting the issue to bilateral negotiations (request & offer method) instead of the list-based approach; it also proposed that biofuel should be added to the list. Additionally, in November 2007, the United States in collaboration with the EU proposed negotiations in the Doha Round regarding the elimination of trade barriers and tariffs against the products or services that improve energy efficiency. In July 2008, the CTESS Chairman instructed that each country should submit a list of items recognized as environmental goods for request and offer by September, and to carry out intensive consultations in October. In October, a format for submission was presented to each country by the Chairman. In response to this, in February 2010, from the perspective of climate change issues, Japan submitted to the WTO a list of energy-saving products eligible for tariff reduction. Since then, countries have submitted proposals in response to

the Chairman's request. At the APEC Summit in September 2012, it was agreed to reduce the applied tariff rate on 54 environmental goods to 5% or less by the end of 2015. This was also favorably accepted by the WTO as a positive sign. However, there were suggestions among member countries that technical discussions should continue until the 9th WTO Ministerial Council meeting at the end of 2013, and thus to date no significant progress has been made in the negotiation. In response to the formulation of the list of environmental goods (solar panels, wind power generation equipment, gas turbines, gaseous filters, exhaust gas measuring apparatus, etc.) agreed upon by the APEC, 14 interested WTO member countries and regions (Japan, the US, the EU, China, the Republic of Korea, Chinese Taipei, Hong Kong, Singapore, Canada, Australia, New Zealand, Switzerland, Norway and Costa Rica) launched negotiations on environmental goods. Japan believes that acceleration of negotiations on environmental goods will contribute to the revitalization of the entire Doha Round, the global spreading of environmental goods for global warming measures, and supporting environment-related industries. Therefore, Japan announced its intention to take active measures for the acceleration of negotiations on environmental goods.