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A Legal View on Border Tax Adjustments and Climate Change:

A Latin American Perspective*

*by Valentina Durán Medina and Rodrigo Polanco Lazo***

Introduction

The General Agreements on Tariffs and Trade ("GATT") as amended by the Uruguay Round Amendments, which created the World Trade Organization ("WTO"), contains rules on Border Tax Adjustments ("BTAs").[1] No single section of this agreement deals exclusively with BTAs; however, rules addressing BTAs can be found throughout, namely in Articles II, III, and XVI.[2]

According to the Organization for Economic Cooperation and Development ("OECD") Working Party, BTAs are "any fiscal measures that put into effect the destination principle in whole or in part."[3] In other words, BTAs relieve exported products of some or all of the tax the exporting country charged on similar domestic products in the home market and enables the importing country to charge some or all of the tax on imported products that it charges on similar domestic products. The term "border tax adjustment" is somewhat confusing because it suggests that a fiscal measure is applied at the border, which is not always the case.[4] Although in many cases imports are taxed on entry, certain countries apply a tax to imports after the goods have crossed the border and have been sold to other merchants or consumers. Moreover, the OCED has noted that certain tax systems do not tax exports at all and make no adjustment at the border.[5] Considering these varying tax systems, the OECD Working Party has recommended the replacement of the term "border tax adjustments" with "tax adjustments applied to goods entering into international trade."[6]

The OECD's careful treatment of BTAs illustrates that they are not a novel concept to international trade. However, BTAs have only recently been considered as an innovative policy option for addressing the challenges of climate change. The concept of climate change BTAs is as follows: carbon-taxing countries would levy import fees on goods that non-carbon-taxing countries manufacture. The motivating factor for these measures is—at least in theory—to internalize the real costs of producing goods and services with respect to international climate change regulation, thereby leveling the playing field between producers of like products from different countries.[7]

A BTA would tax imported goods the equivalent of what the producers would have had to pay to produce them in the home market they are entering. Under this system, domestic producers in countries with carbon taxes will not face costly climate change measures that foreign producers do not face in their home countries. An alternative approach would be to impose taxes on imported goods that are equivalent to the enforcement of emissions allowance trading.[8] Therefore, in order to import products from a nation that does not comply with the carbon taxes applied in the importing country, an importer of goods would be required to purchase emission rights in his home country, compensating for the difference.[9]

Some commentators have mentioned that these measures should be called Border Carbon Adjustment ("BCA"), because "requirements to buy into domestic cap-and-trade schemes are more like regulations than taxes."[10] However, while recognizing BCA as a more precise concept, considering BTAs have usually been proposed to address climate change in the form of taxes, we will continue using the term BTA. This article will first provide a background on climate change and multilateral efforts to resolve the problem. It will then move on to a discussion of the potential treatment of BTAs under WTO law. Finally, we will discuss the implications of this analysis in Latin America with a focus on Chile.

Climate Change Background and Multilateral Efforts

Climate change is a widely recognized, global problem caused by humans, and the time for action is now; current trends indicate that we will likely arrive at a point of no return between 2015 and 2020.[11] Commentators note that the cost of taking measures now is much less expensive than waiting until 2020 or 2030.[12] Climate change is regulated by a multilateral treaty and protocol in the context of the United Nations Framework Convention on Climate Change ("UNFCCC").[13] Even if measures to address climate change are both multilateral and domestic, the

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perspective from Latin America, and especially from Chile, is that environmental issues and global problems should be treated multilaterally.[14]

The official position of the Government of Chile's foreign policy, unchanged in recent decades, is "to contribute to the strengthening of multilateralism."[15] In this sense, Chile aims to strengthen the climate regime in the United Nations. The Chilean government officially promotes the joint action of nations on the global agenda in areas such as security threats, natural resources, energy, environment, sustainable development, climate change, international violations, poverty, and governance.[16]

In the context of multilateral solutions, Border Tax Adjustments seem to be a unilateral answer to the problem of climate change. BTAs can be politically feasible for the adoption of national regulations in countries like the United States, but they are seen as a threat to the international trading system and could potentially violate international trade law under the WTO.

Resolving this potential conflict between climate change mitigation measures and international trade law is of paramount importance. Since the early nineties, multilateral environmental agreements, soft law instruments, and the OECD have encouraged the use of a broad range of instruments, and especially the use of market-based instruments, to reduce environmental impacts.[17] States are increasingly employing economic instruments, such as taxes and charges, as instruments of environmental policy-making to address inputs and production processes.[18]

Even though no Border Tax Adjustments have been implemented yet, the United States and the European Union have considered the possibility of imposing BTAs ever since the Climate Conference held in Copenhagen on December 2009 failed to produce a global deal to reduce greenhouse gas ("GHG") emissions.[19]

European Union

BTAs have been a subject of debate in the European Union since 2006 when the EU's High Level Group ("HLG") on Competitiveness, Energy, and Environment advised the European Commission to analyze the viability of all potential policy measures, including border tax adjustments, that could encourage EU trading partners to decrease GHG emissions, so as to reduce climate change risks and the impact of a carbon premium on European competitiveness.[20] However, consensus to implement BTAs has not been reached and European heads of state remain divided on the subject. In December 2006, EU Trade Commissioner Peter Mandelson pointed out that:

> [A] specific "climate" tariff on countries that have not ratified Kyoto . . . would be highly problematic under current [WTO] rules, and almost impossible to implement in practice. [D]eveloping countries are not required to make specific emissions cuts under the Kyoto Protocol; also . . . some U.S. states have ambitious climate policies. [21]

John Hontelez, Secretary General of the European Environmental Bureau[22] affirmed that:

> [BTAs] might be the answer which allows the EU to develop responsible climate policies without having to wait for other countries. They would result in products imported from the US being taxed to compensate for resulting differences in production costs. Thus EU firms would be protected against unfair, carbon-careless competition from outside.[23]

In 2006, then French Prime Minister Dominique de Villepin suggested that countries that do not join a post-2012 international treaty on climate change should face extra tariffs on their industrial exports.[24] De Villepin argued that "[c]ountries like the U.S. and China . . . should not be allowed to benefit from efforts to reduce climate change without having to shoulder some of the costs or suffer from any related loss in competitiveness."[25] Subsequent reports of the HLG do not reach the subject of Border Tax Adjustments and instead called for other measures as international action on climate change.[26]

United States

The relationship between the U.S. and the international climate change regime has been controversial. As the Byrd-Hagel Resolution of 1997 asserts, the United States should not sign or agree to any convention or protocol on any subject matter containing new commitments to limit or reduce GHGs unless it also mandates developing countries to do the same, or that "would result in serious harm to the economy of the United States."[27] It has been reported that some sectors of U.S. "industry have lobbied hard for climate legislation to include border measures, citing competitiveness concerns, the need to encourage large developing country emitters to adopt binding emissions targets, and fears of 'carbon leakage'"—the relocation of firms to countries with fewer carbon restrictions, increasing global emissions or leaving them unaffected.[28]

In this context, in June 2008 the Lieberman-Warner Climate Security Act[29] was introduced in the U.S. Congress with the intention of establishing measures to reduce GHGs, including a cap-and-trade program and a measure requiring certain importers to submit special allowances.[30] Rather than impose a Border Tax Adjustment, this bill would have required importers of GHG-intensive products from other countries without comparable GHG reduction schemes to buy international credits or other emission certificates from the federal government or from a U.S. regulatory program.[31]

The same year, another bill, The Climate Market Auction Trust and Trade Emissions Reduction System Act of 2008 ("Climate Matters Act of 2008"), included measures to reduce GHGs emissions, including offering developing WTO participant countries "access to the carbon market . . . includ[ing] additional incentives such as the ability to choose the base year or maximum level of allowable greenhouse gas emissions for its emissions trading system, rather than requiring it to match the [U.S.] system."[32] This measure targeted the large emerging economies and gave exceptions to: "least developed countries" and "countries that generate less than [five percent] of global emissions."[33] Moreover, the income of the BTA "would be used to offset the negative effects of climate change in developing countries (e.g., through technology transfer)."[34]

On June 26, 2009, the American Clean Energy and Security Act of 2009 ("ACES") was approved by the House of Representatives by a narrow 219-212 margin.[35] Although the bill never passed the Senate, it aimed to reduce emissions with a graduated schedule through 2050 by calling for extra import charges on goods from countries that do not cap greenhouse gas emissions.[36] President Barack Obama considers ACES's border tax adjustments clauses to be tariffs penalizing goods from countries that are not actively limiting GHG emissions, and criticism has arisen due to concerns of protectionism and because the bill appears to make tariff penalties the rule.[37] Obama recognized a legitimate concern that American businesses not be disadvantaged by higher energy costs, but emphasized that various forms of transitional assistance for energy-intensive industries already existed without the need for "a tariff approach."[38]

All U.S. legislative proposals have two common features: they exempt goods from border tax adjustments if imported from countries with minimum GHG emissions, and apply BTAs to "primary products" with high GHG emission levels during their production process, such as: iron, steel, aluminum, cement, glass, paper and pulp, chemicals, and industrial ceramics.[39] ACES also covers any "manufactured item for consumption" that generates "a substantial quantity of greenhouse gas emissions."[40] These policies specifically target developing countries like China, Brazil, and India that are considered large emitters of GHGs because most developed countries already have emissions reduction plans and exports from smaller countries would be excluded by the legislation as they emit less than 0.5% of global emissions.[41] Nevertheless, because of their drafting, these measures could easily affect other developing countries if they increase their GHG emissions, even if overall they contribute minimally in the context of global emissions, as we will explain later.

Border Tax Adjustments and the WTO

As we will see, economists and lawyers in the field of both international trade and environmental law have discussed the legality of BTA measures under WTO law. However, up to now neither BTAs nor climate change policies have been challenged under the WTO dispute settlement system. Commentators have opined that a case regarding a BTA before the WTO would be difficult and controversial for lack of precedent at the WTO and before the international climate regime.[42] Indeed, even the Kyoto Protocol provides in Article 2.3 that parties included in Annex I "shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, *including the adverse effects of climate change, effects on international trade, and social, environmental, and economic impacts on other Parties, especially developing country Parties*."[43]

Articles 2.1 and 2.2 of the Kyoto Protocol list various policies and measures by which industrialized countries can achieve emission limitations, including tax and duty exemptions and subsidies in all greenhouse gas emitting sectors.[44] Nevertheless, the protocol lacks specificity because it does not offer concrete steps or targets to achieve those policies and measures. Due to this lack of specificity, it is difficult to claim jurisdiction over such behavior and to authorize a body or mechanism to address it. As a consequence, policies and measures are not included in the UN climate regime's compliance system and dispute settlement procedure.[45]

It is not clear that the Kyoto Protocol's permissive rules on policies and measures are in conflict with WTO law, either directly or indirectly, and some commentators believe that properly designed BTAs could meet WTO rules, yet others disagree.[46] Discussions revolve around the legality of BTAs under the international trade system, the relation between BTAs and subsidies, the difficulty of assessing or calculating BTAs, and the justification of such measures under climate change regime.

BTAs are Permissible Under WTO Law

BTAs are explicitly allowed by the GATT as long as the tax imposed on imported goods is no greater than the tax established for similar domestic products.[47] It has been noted that "the GATT does not impose any requirement that nations adopt a tax base that can be administered without double taxation, in fact or in principle. For example, countries can impose a BTA on imports without any corresponding rebate for exports."[48]

> However, it is still uncertain whether BTAs can be used for taxable inputs that are not physically incorporated into the final traded product. For instance, it is not clear if an import tax could vary based on the amount of carbon dioxide emitted during a good's production—WTO rules would have to be interpreted in a way that considers products not to be "like" each other based on their carbon footprints.[49]

The latter would be true only if this factor could be considered a "relevant comparator."[50] To do so would require advancing the argument that any product which emits one ton of carbon is a "like product" akin to any other product which emits one ton of carbon. [51]

Some commentators assert that BTAs "raise the costs of imported products based on the amount of greenhouse gases emitted occurring abroad during the manufacturing of each product. In international trade, this type of regulation is a process and production method ("PPM") measure and cannot be used to distinguish between like products."[52] Therefore, the argument goes, "BTAs on environmental taxes embodied in pollution-intensive traded goods are or should be barred when the tax is on emissions or a polluting input rather than the good itself."[53]

The non-adopted report of the GATT Tuna-Dolphin Panel was the origin of the process/product distinction:

> under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as income taxes). . . . The Panel considered that it would be inconsistent to limit the application of this Note to taxes that are born by products while

permitting its application to regulations not applied to the product as such.[54]

However, like the Tuna-Dolphin decision itself, neither the GATT contracting parties nor the WTO have ever adopted the process/product approach. Several scholars "have observed that the process/product distinction itself was rooted in a misunderstanding by the panel of the GATT rules governing BTAs."[55] Moreover, from a historical point of view, "it was the intent of the original GATT negotiators that process as well as product charges be border adjustable."[56]

In addition, further GATT and WTO Dispute Settlement decisions have moved away from the process/product approach and have since considered other methods for determining what "like product" is. Some of those consider the motivation for a government's product categorization in determining its legitimacy, including the Japan Alcohol Panel Report (1987),[57] the U.S. Alcohol case,[58] and the U.S. Taxes on Automobiles Report.[59] This approach is potentially much more sensitive to environmental policy goals like climate change. We must also keep in mind that according to Article III, Section V of the United Nations Framework Convention on Climate Change ("UNFCCC"), "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."[60]

Even if a BTA were permitted and properly assessed, it would still need to overcome other legal trade hurdles. Once found to be covered by GATT Article III, the BTA must also meet the substantive test in that provision, which requires that imported products not be treated less favorably than like domestic products ("national treatment").[61] In addition, the BTA must avoid discrimination between imports from different countries, as required by the "most-favored nation" obligation of GATT Article I.[62] For some authors, a unilaterally imposed BTA on imported goods would most likely go against WTO rules, whereas using national treatment and most-favored nation principles[63] prevents different treatment of foreign products vis-à-vis domestic like products.[64]

Furthermore, there is uncertainty as to what would happen with a cap-and-trade system and whether "the obligation to hold emission credits or allowances up to one's actual level of carbon emissions be qualified as an 'internal tax or other internal charge of any kind' which, under GATT Article III:2, can be imposed also on imports."[65]

Not Imposing BTAs is Equivalent to a Subsidy

One of the most famous scholars to advocate BTAs is Joseph Stiglitz who affirmed that "[n]ot paying the cost of damage to the environment is a subsidy, just as not paying the full costs of workers would be."[66] According to Stiglitz, "in most of the developed countries of the world today, corporations are paying the cost of polluting the global environment, in the form of taxes imposed on coal, oil, and gas."[67] However, American firms are being massively subsidized because of the relative lack of this taxation in the U.S. He proposes a remedy:

> [O]ther countries should prohibit the importation of American goods produced using energy intensive technologies, or, at the very least, impose a high tax on them, to offset the subsidy that those goods currently are receiving . . . [T]he United States itself has recognized this principle. It prohibited the importation of Thai shrimp that caused unnecessary deaths of large numbers of endangered species . . . [and] the WTO sustained the important principle that global environmental concerns trump narrow commercial interests . . . . [I]f one can justify restricting importation of shrimp . . . to protect turtles, certainly one can justify restricting importation of goods produced by technologies that unnecessarily pollute our atmosphere.[68]

The EU also considers not applying BTAs as a potential illegal subsidy that causes two major problems:

> The first is the competitiveness of energy-intensive industries in the EU vis-à-vis competing industries in jurisdictions without similar environmental restrictions. Normally, a foreign producer that operates at lower costs is simply more competitive and should . . . be able to out-compete its domestic rival. But when lower costs result from the lack of environmental costs, the advantage is artificial . . . . The second potential problem is "carbon leakage," which means that any domestic carbon reduction would be offset in the global environmental commons by an increase in carbon emissions elsewhere.[69]

But what happens if we apply this solution to developing countries? Should we not consider the principle of Common but Differentiated Responsibility? This principle is one of the cornerstones of sustainable development, emerging in the context of the 1992 Rio Earth Summit and underpinning the UNFCCC and the Kyoto Protocol.[70] However for developing countries,[71] Stiglitz suggests something different: a common (global) environmental tax on emissions that addresses their social cost.[72]

But, should we consider the absence of emission cuts a subsidy or a carbon tax? It is clearly not a subsidy in a traditional sense, but as some commentators have pointed out:

> The problem is not that the Chinese government is paying Chinese producers or is otherwise transferring funds; rather, the problem is that the government fails to act, that is, it fails to impose and collect a carbon tax or to otherwise force Chinese producers to internalize the full cost of carbon emitted in China.[73]

Thus, even if not imposing a carbon tax or not requiring producers to internalize the cost of carbon could be qualified as a "subsidy" under the WTO Agreement on Subsidies and Countervailing Measures, countervailing duties to offset subsidies by foreign governments can only be levied in the case of a particular subsidy[74] to "an enterprise or industry or group of enterprises or industries."[75]

A further question arises if "carbon credits" would be considered a subsidy if they are distributed for free. What would happen if, using the cap-and-trade system, domestic producers who face competition from competitors who manufacture in countries without GHG laws were given free credits? This proposal would most likely provide a subsidy to the industry in comparison to other domestic industries and could potentially violate trade law, but this conclusion is arguable.

BTAs are Difficult to Assess or Calculate

We have seen that BTAs could be used to "level the playing field between taxed domestic manufacturers and untaxed foreign competitors."[76] Under GATT Articles II and III, WTO members may impose "internal charges" on imported goods.[77] Nevertheless, while internal charges can be relatively easy to identify, "it is difficult to assess the quantity of carbon emissions resulting from the production of a particular good. Could carbon taxes or higher energy costs linked to a cap-and-trade system qualify for a similar adjustment?"[78]

Another key question is whether it is even possible to establish a trade appropriate BTA. A true BTA would tax the actual GHG emissions resulting from manufacture, which seems nearly impossible to quantify. Moreover, it is not yet clear whether a BTA could be administered in a way that is truly free trade neutral, or if due to its administrative difficulty it would inevitably be a trade barrier.

Proposed BTAs are generally based on the average additional cost of the GHG law and raise the following pertinent question under WTO law: if a general tax on carbon emissions is imposed based on the local corporation's actual carbon emissions (so a low emissions factory pays less), and an international company with the same low emissions pays the industry average, would this be legal under WTO rules?

BTAs Can Be Justified to Prevent Climate Change

Even if BTAs conflict with international trade law, they might still be legal if justifiable under GATT Article XX,[79] which specifies the conditions under which State Members can be exempted from WTO general rules. Two of these enumerated exemptions could be relevant in the case of BTAs: if doing so is necessary "to protect human, animal, or plant life or health,"[80] or "relating to the conservation of exhaustible natural resources."[81] In addition, we must keep in mind that the introductory paragraph ("Chapeau") of Article XX allows such measures as long as they "are not 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."[82] Such an exemption would most likely "center on whether, under the introductory phrase of GATT Article XX, a [BTA] . . . is applied on a variable scale that takes account of local conditions in foreign countries, including their own efforts to fight global warming and the level of economic development in developing countries."[83] Therefore, a government "would also have to show that the measure is being applied squarely to avoid 'leakage,' rather than to offset competitive concerns."[84] Additionally, to qualify as an exception under Article XX, the BTA would also have to be the least trade restrictive measure.[85]

A recent article also claims that BTAs "will only survive a WTO challenge if they successfully invoke one of the GATT Article XX environmental exceptions," which would be difficult because BTAs are designed with the principle intent of maintaining economic competitiveness.[86] In contrast, if a BTA based on a domestic carbon tax neither discriminates against imports as compared to domestic products nor as compared to other imported goods, it might be permissible without resorting to the exemptions embodied in GATT Article XX.[87]

Border Tax Adjustments and Developing Countries: Latin America's Case

Some "targeted" countries of future BTAs have expressed their opposition to these measures, most notably China[88] and India.[89] However, for the most part, Latin America has not presented either support or opposition for BTAs. In analyzing why this may be the case, it is first important to examine the contribution of Latin American countries to global GHG production and the exports from Latin America on which BTAs could be applied in the future. Chile is presented as a case study.

In 2004, Chilean emissions were only 0.2% of total global emissions.[90] However, while the annual per capita emission level of 3.9 tons of CO_2 per inhabitant is very modest compared to developed nations, Chile is second in total GHG emissions in South America only to Venezuela,[91] and has emissions similar to Portugal when it undertook its Kyoto reduction obligations.[92]

Furthermore, the economy of Chile is becoming more and more dependent on coal. University of Chile studies show that by 2030 electric generation in Chile will be sixty percent dependent on coal. That means that CO_2 emissions may grow from 14.2 to 85 million tons of CO_2 between 2006 and 2030 and that emission per capita may grow from 3.6 tons of CO_2 in 2005 to 13.8 tons by 2030, more than China and OECD countries.[93] On March 1, 2011, the Central Castilla coal-fired power plant of the Atacama region,[94] the largest coal-fired power plant in South America, was approved by the Chilean impact assessment system ("SEIA"). The day after, SEIA approved a project aimed at extracting coal to be sold to coal-power plants. These developments have generated public concern and controversy.[95]

Directly related to BTAs is the question of the carbon footprint of exported products. This was conceptualized as a way to internalize climate costs generated by the production and transportation of products. Studies have shown that Kyoto Protocol Annex I countries are net importers of carbon and that developing countries are carbon exporters.[96]

Chile has begun to measure the carbon footprint of its main products, particularly exported ones. But in the end, the question is how deep the carbon footprint of each of those products and sectors is, and ultimately: are the countries, which receive Chilean exports, going to adopt a BTA that affects Chilean products? Copper mining, which accounts for the largest portion of exports, is energy intensive. Chile has become an OECD member,[97] and the OECD recommended that Chile increase its application of the polluter pays principle ("PPP") in the Chilean economy.[98] The WTO recommends implementing this PPP through measures such as a carbon tax and tradable permits. International trade rules require Chile to assume the cost of the "carbonization" of its economy or to accept the cost of lost competitiveness.[99]

Conclusion

At first glance, BTAs appear to have the potential to reduce global GHG emissions, but there are some important caveats to consider: a) BTAs are unilateral in a world of multilateral climate change regimes;[100] b) BTAs could be used against developing countries, reversing the principle of common but differentiated responsibility; c) the permissibility of BTAs under the GATT depends on the legal interpretation of the relevant international treaties, colored by political and administrative concerns; d) BTAs most likely would not fit under WTO law, because it is unlikely that they would be the least trade restrictive measure; and e) if BTAs are feasible they will most likely be difficult to administer or enforce.

Independent from considerations of protectionism and transparency, BTAs could be a threat to Latin America through the pressure from foreign markets, in this case pushing towards a low carbon economy. Other such pressure is embodied in the October 2009 *Loi Grenelle 2* in France, which states that after January 2011, food imports will be regulated for carbon footprints, and that for French exports GHG emissions must be reported and included in labeling.[101]

If a carbon BTA could be perfectly designed and administered, theoretically there would be no effect on the share of exports to the country imposing the BTA. It would still be almost equally as profitable to export to that country, and would just be more expensive to buy the goods within the country (from either domestic or international suppliers). Some demand would shift from the carbon heavy items to cheaper, carbon-light items, but an ideal BTA should not have a large effect on the export economy of the developing country. A perfectly designed system could have neutral pressure on the economy of Chile and other countries. However, the issue is whether or not such an ideal BTA could be unilaterally imposed.

For a BTA to be effective, accurate calculation of carbon footprints would be necessary. Moreover, considering the PPP and the Common but Differentiated Responsibility principle, the main question relates to who must pay the costs of carbon produced by production and transportation: the consumer or producer? In a competitive world economy, if the price of an input is raised uniformly, the end product must rise or else the producing firms would find a better use for their capital and stop making the product. It seems that making a producer pay for the carbon directly is an administratively easier way to differentiate between production methods. These pressures, expressed by unilateral measures that should be avoided to address ecological problems, could mean that mitigation obligations might pass from developed to developing countries, reversing the Common but Differentiated Responsibilities principle.

Noting the passing of mitigation obligations in the unilateral application of BTAs, former Chilean President Lagos, Special UN Commissioner for Climate Change, proposed that, in addition to Chile's conformity with unilateral requirements for exporting to the United States or France, exporters to developing countries should equally consider the transportation costs of their goods, and the transportation of those goods.[102]

However, from an environmental perspective, Chile should support BTAs because without them some high carbon industries might relocate to Chile, increasing the carbon footprint per capita disproportionately faster than would otherwise occur without carbon taxes in the developed countries. In early 2011, the Executive Secretary of the UNFCCC, Christiana Figueres, warned the Americas have become "fossilized," rather than using renewable energy, and mentioned that Chile has already reached levels of emissions of gases typical of European countries.[103] Where does the responsibility for the increased carbon footprint in Chile lie? Should it be considered the responsibility of Chile, or that of the countries that induced industries to relocate unnecessarily? As this problem demonstrates, any truly sustainable application of BTAs will require a multilateral approach, taking into consideration the complex interactions between the many participants in the global trading system.

Endnotes: A Legal View on Border Tax Adjustments and Climate Change: A Latin American Perspective

[1] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

[2] *Id. See* J.C. Phillips, *Border Tax Adjustments in International Trade*, 9 U. Queensland L.J. 151, 151 (1975-1976) (noting that "[t]here is no single section in the GATT dealing exclusively with border tax adjustments but GATT rules in this regard are found scattered through several Articles of the agreement, in particular, Article II, Article III, and Article XVI.").

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11 Ricardo Lagos Escobar, *Estado Actual de las Negociaciones de Cambio Climático*, *in* Pilar Moraga, Centro de Derecho Ambiental, Facultad de Derecho Universidad de Chile, El Nuevo Marco Legal para el Cambio Climático 225 (2009) (citing Ricardo Lagos, former Chilean President, in his expression of a "point of no return" in several interviews during his service as special envoy to the Climate Change Convention. *See*, *e.g*, Gerardo Jiménez, *Cerca, el "Quiebre" Climático: Lagos*, El Universal (Sept. 29, 2007), http://www.eluniversal.com.mx/primera/29666.html. *See generally* Dr. Rajendra Pachauri, Chairman, Intergovernmental Panel on Climate Change, Welcoming Ceremony at the Copenhagen Conference of the Parties COP 15/CMP5 in Copenhagen, Den. (Dec. 7, 2009), http://www.ipcc.ch/pdf/presentations/cop%2015/RKP-welc-cer-cop15.pdf (providing an illustration of the state of the art of climate change science).

12 Nicholas Stern, Stern Review: The Economics of Climate Change 1 (2006).

13 *See* Valentina Duran, *Capítulo sexto: Atmósfera*, *in* Los Tratados Ambientales: Principios y Aplicación en Chile 339-74 (2001) (providing a basic explanation of Chile's relationship with the International Climate Change regime).

14 *See Intereses de la Política Exterior de Chile*, Ministerio de Relaciones Exteriores, http://www.minrel.gov.cl/prontus_minrel/site/artic/20080802/pags/20080802193244.php (last visited Mar. 29, 2011).

15 *Id.*

16 *Id.*

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36 *Id.*

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[38] *Id.*
[39] H.R. 3036, *supra* note 29; H.R. 6316, *supra* note 32; H.R. 2454, *supra* note, 35.
[40] H.R. 2454, *supra* note 35; H.R. 6316, *supra* note 32.
[41] *Obama Criticizes Border Tax Adjustments in House Climate Bill*, *supra* note 28, at 2.
[42] *Id.* at 4.
[43] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, http://unfccc.int/resource/docs/convkp/kpeng.pdf (emphasis added).
[44] *Id.*
[45] Fariborz Zelli & Harro Van Asselt, *The Overlap Between the UN Climate Regime and the World Trade Organization: Lessons for Climate Governance Beyond 2012*, *in* Global Climate Governance Beyond 2012: Architecture, Agency, and Adaptation (2010).
[46] World Trade Org. & United Nations Env't Programme, Trade and Climate Change (2009), www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf.
[47] *See* GATT 1994, *supra* note 1, at art. III: 2 ("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. Moreover, no contracting party shall apply internal taxes . . . to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."). *See also id.* at art. III:1 (providing that internal taxes "should not be applied to imported or domestic products so as to afford protection to domestic production."); *Id.* at Addendum to art. XVI ("The exemption of an exported product from duties or taxes born by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed a subsidy.").
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[58] Report of the Panel, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R–39S/206 (Mar. 16, 1992), GATT B.I.S.D. (39th Supp.) at 206 (1992).
[59] Report of the Panel, *United States – Taxes on Automobiles*, DS31/R (Oct. 11, 1994).
[60] United Nations Framework Convention on Climate Change, art. 3, May 9, 1992, 1771 U.N.T.S. 107.
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[79] GATT 1994, *supra* note 1, at art. XX.
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[81] *Id.* at art. XX (g); *see also Obama Criticizes Border Tax Adjustments in House Climate Bill*, *supra* 28, at 4.
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