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WTO Law Compatibility of a 'Feebate' Scheme on Imported Products

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Introduction

Any tax on imported products needs to comply with international trade law. This chapter analyzes whether the feebate scheme proposed in chapter 7 complies with the World Trade Organization's General Agreement on Tariffs and Trade, its Agreement on Subsidies and Countervailing Measures (SCM Agreement), as well as with free trade agreements between Canada, the European Union, and the United States, on one side, and CIF's Forest Investment Program (FIP) countries, on the other side. The risk of trade retaliation, while important economically and politically, is outside the scope of the present chapter, which focuses on legal compliance aspects.[1]

Case law can guide policy makers in designing a tax scheme that minimizes concerns with WTO law incompatibility, although some legal uncertainty remains, which is discussed below.

Besides avoiding tax features that violate WTO law provisions, policy makers should include elements that allow for the application of exceptions to these violations. GATT Article XX provides environmental exceptions to violations of other GATT provisions. A measure that is incompatible with other GATT provisions can still be GATT-compatible if it meets the requirements set in the Chapeau of Article XX and at least one of the exceptions listed in the article. The same exceptions may also apply to violations of the SCM Agreement and FTAs.

Avoiding Features That Violate GATT Provisions

Applying an internal tax at the border is more likely to comply with GATT provisions than introducing an import charge. GATT Article II constrains the amount of import charges on goods to established tariff schedules. Article II:1(a) reads, "*Each contracting party shall accord to the commerce of the other contracting parties' treatment no less favorable than that provided for in the*

1 For general discussions on WTO law and climate policy, see Esty (1994), IISD and UNEP (2013), and Pirlot (2017).

appropriate Part of the appropriate Schedule annexed to this Agreement." Article II:1(b) further shields imports from import charges by adding that they should not be subject to any other charge or duty imposed on importation or in connection with importation. Thus, to comply with Article II, an import charge set to incentivize imports of sustainable timber cannot exceed established tariff schedules. While such schedule varies by product, a complying tax rate might be too low to achieve the intended effect for the feebate scheme. However, the constraints set in Article II do not apply to internal charges, which fall under GATT Article III.

Various design features determine whether the scheme is an import charge or an internal charge. A charge is internal if it applies to forestry products with a factor that occurs internally, that is, within the customs borders of the importing country and after importation (*China – Autoparts*).[2] Consumption can qualify as an internal factor. However, it is uncertain whether *consumption* could qualify as an internal factor that triggers an obligation to pay for the sustainability of timber *production*. The legal qualification of a tax as internal under domestic law does not automatically make it internal under the GATT. While according to some analysts a border tax adjustment (BTA)[3] is necessarily an internal tax (Van den Bossche, Henry, and Zdouc 2017), under WTO law it is not settled whether adjustment is allowed for carbon taxes (Pirlot 2017). In any case, the characterization of a tax as internal does not prevent the collection of payments upstream (that is, at the moment of importation), as long as the obligation to pay arises subsequently (*China – Autoparts*).[4] The use of sustainability labels on timber products increases consumers' awareness of the climate and environmental impacts of their choices, potentially strengthening the argument that the obligation to pay accrues by virtue of consumption.[5]

Varying the tax rate per product type instead of per the sustainability of production is more likely to comply with GATT provisions. Analysts disagree on whether GATT Article III applies only to charges on products or also to charges on production processes (Howse and Regan 2000; Trachtman 2017). If Article III applies only to taxes on products, the feebate scheme would fall outside its application, with the consequent application of the tariff limit set in Article II. However, case law is not clear on this point. In the tuna case, the panel took the stance that Article III applies only to products (*US – Tuna*)[6] and a previous panel found that the chemical elements physically present in the imported good could be a basis for BTA (*US – Superfund*).[7] However, both of these cases are from the pre-WTO era. No panel or the Appellate Body has provided guidance on this point in more recent years; thus, legal uncertainty remains.

The same tax rate should apply to imported and domestic "like" products. GATT Article III:2 requires that imported products are not subject to higher taxes than like domestic products. Even a slightly higher tax would be incompatible with this provision. Whether two products are

2 Appellate Body Reports, China – Measures Affecting Imports of Automobile Parts, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, DSR 2009.

3 BTAs on imports are fiscal measures that impose on imported products part or all the tax charged in the importing country on similar domestic products.

4 Appellate Body Reports, China – Measures Affecting Imports of Automobile Parts, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, DSR 2009.

5 The use of consumer labels needs to comply with WTO law. Relevant provisions would be GATT Article III:4 and the Agreement on Technical Barriers to Trade (TBT Agreement). A measure that does not comply with the TBT Agreement might be WTO law-compatible if it meets the requirements set in GATT Article XX, even though the applicability of Article XX exceptions to TBT provisions is debated (Van den Bossche, Henry, and Zdouc 2017).

6 GATT Panel Report, United States – Restrictions on Imports of Tuna, DS21/R, September 3, 1991, unadopted, BISD 39S/155.

7 GATT Panel Report, United States – Taxes on Petroleum and Certain Imported Substances, L/6175, adopted 17 June 1987, BISD 34S/136.

like needs to be determined on a case-by-case basis. Relevant aspects are, for instance, the properties of the product, its use, consumers' preferences, and the product tariff classification (Van den Bossche, Henry and Zdouc 2017). While there is no close number of relevant aspects or a clear hierarchy between these aspects, in essence the like test checks whether two products are close to being perfect substitutes (*Philippines – Distilled Spirits*).[8] Following this logic, if forestry products produced with different sustainability standards compete on the market, they should not be subject to different tax rates. The use of sustainability labels may affect consumers' preferences and reduce the substitutability between timber products obtained with different sustainable forest management levels. Yet this effect (even if present) may not necessarily be considered by a future panel or the Appellate Body to establish likeness.

GATT Article III also provides that domestic and imported "directly competitive or substitutable products" (DCSP) should not be differently taxed to afford protection to domestic production. DCSP is a broader category than "like" products, encompassing products that have a high degree of substitutability but are not almost perfect substitutes. In *Korea – Alcoholic Beverages*,[9] the Appellate Body found that in assessing DCSP, not only is current competition relevant but so too is potential competition. The cross-price elasticity of demand for products is thus a relevant, but not necessarily decisive, criterion to establish DCSP. More recently, the Appellate Body found that price competition is a very relevant criterion to establish DCSP, even if it occurs only in one segment of the market (*Philippines – Distilled Spirits*).[10] Moreover, the determination of potential competition can be based on consumer preferences in other WTO member markets, at least when the two markets are sufficiently similar (*Korea – Alcoholic Beverages*).[11]

Because of the focus on potential competition, forestry commodities produced with a different level of sustainability are likely to be DCSP, if not found to be "like."[12] DCSP should not be taxed differently, but contrary to like products, here a *de minimis* rule applies, meaning that a difference in taxation can exist within certain limits (*Japan – Alcoholic Beverages II*).[13] These limits have to be determined on a case-by-case basis (*Korea – Alcoholic Beverages*).[14] Previous rulings suggest that neither a tax difference that prevents access to a market (*Canada – Periodicals*)[15] nor tax rates that are 10 to 40 times higher than those applied to domestic products satisfy the *de minimis* threshold (*Philippines – Distilled Spirits*).[16]

Differential taxation of DCSP is incompatible with GATT Article III if the tax is applied to afford protection to domestic production. Determining whether a measure affords protection to domestic production requires performing a comprehensive analysis of the measure,

8 Appellate Body Reports, Philippines – Taxes on Distilled Spirits, WT/DS396/AB/R, WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII.
9 Appellate Body Report, Korea – Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I.
10 Appellate Body Reports, Philippines – Taxes on Distilled Spirits, WT/DS396/AB/R, WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII.
11 Appellate Body Report, Korea – Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I.
12 Note that, because even products that are qualitatively different could be considered as being like, the fact that a commodity is not produced in an importing country does not necessarily make taxation of these products WTO law-compatible. The imported product could still be considered a substitute for a domestic produced good, and thus a tax on imported products could be seen as protecting internal production.
13 Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I.
14 Appellate Body Report, Korea – Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I.
15 Appellate Body Report, Canada – Certain Measures Concerning Periodicals, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I.
16 Appellate Body Reports, Philippines – Taxes on Distilled Spirits, WT/DS396/AB/R, WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII.

considering for instance the magnitude of differential taxation (*Japan – Alcoholic Beverages II*),[17] the competitiveness effects of such differentiation (*Korea – Alcoholic Beverages*),[18] and the relative proportion of domestic and imported products that fall under the higher tax bracket (*Chile – Alcoholic Beverages*).[19] The intent of the measure is unlikely to play a role in this assessment (*Chile – Alcoholic Beverages*).[20] Given this plethora of criteria,[21] it is difficult to establish whether the feebate scheme is incompatible with GATT Article III. This assessment will necessarily depend on the specific features of the scheme, such as how the tax brackets are defined and the relative sustainability level of imported and domestic timber products.

A tax rate that varies depending on the sustainability level of the forestry regime in place in the exporting country is more likely to violate GATT provisions. GATT Article I forbids parties to differentiate treatment of like products depending on their country of origin. This prohibition applies also to internal taxes. While various criteria define when two products are like (Van den Bossche, Henry, and Zdouc 2017), commodities that compete on the market are plausibly found to be like (Trachtman 2017). Article I prohibits both *de jure* and *de facto* discrimination that grants any competitive advantage to products based on their country of origin (*Canada – Autos*).[22] *De facto* discrimination can occur when a measure does not explicitly differentiate import conditions by origin, but the requirements set for more favorable import conditions are not met by products from certain countries. To establish whether an advantage exists, the actual trade effects are not necessarily relevant (*EC – Seal Products*),[23] and even mere *potential* trade advantages for a country can count as an advantage (*EC – Bananas III*).[24] Thus, a tax rate that varies depending on the SFM regime or practice in place in different countries may violate Article I despite the nominal tax rate being equal per equal level of SFM.

GATT compliance may require guaranteeing foreign producers' equal access to sustainability certification. The panel in *EEC – Imports of Beef* found that an EEC measure that limited suspension of an import levy to beef products certified by a US agency discriminated imports from Canada because the agency had the mandate to certify only meat from the United States.[25] Foreign forestry producers need thus to have possible access to sustainability certificates for the feebate to comply with GATT Article I. Some existing standards, such as FSC, are widely available.

There is significant legal uncertainty regarding the possibility for the proposed feebate scheme to comply with GATT Article II and Article III. Compliance issues may notably arise if domestic and imported forest products produced with different sustainability levels are nonetheless considered like, and if the scheme entailed exceeding limits set in the importing country's WTO tariff schedule.

17 Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I.
18 Appellate Body Report, Korea – Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I.
19 Appellate Body Report, Chile – Taxes on Alcoholic Beverages, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I.
20 Ibid.
21 For a full discussion of these criteria, see Van den Bossche, Henry, and Zdouc (2017).
22 Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R.
23 Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R.
24 Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II.
25 GATT Panel Report, European Economic Community – Imports of Beef from Canada, L/5099, adopted 10 March 1981, BISD 28S/92.

Including Features That Qualify for Exceptions to GATT Violations

Determining whether an exception applies is a two-step process. For an exception to apply under GATT Article XX, the measure needs to meet the requirements set in at least one of its subparagraphs. In particular, subparagraphs (b) "*measures necessary to protect human, animal or plant life or health*" and (g) "*measures relating to the conservation of exhaustible natural resources*" provide exceptions based on environmental considerations. In addition, the measure needs to meet the requirements set in the Chapeau of Article XX. Each of these elements are reviewed below.

Article XX(b) – Measures necessary to protect human, animal, or plant life or health

Fiscal measures for SFM are likely seen as "necessary," especially when their tax rate varies per degree of sustainability of production processes. A measure is necessary if it contributes substantially to achieving a common interest. The stronger the common interest to protect and the more the measure contributes to protecting this interest, the more the measure is necessary (*Brazil – Retreaded Tyres*).[26] Preserving forests for climate change mitigation is a key societal interest, as recognized in many international agreements; environmental taxes need to target the external cost of timber production or incentives for SFM will be diluted. Thus, a feebate scheme with a tax rate that varies per degree of SFM can be seen as necessary. Another relevant aspect to consider is the impact of the measure on trade. The higher this impact, the less the measure is necessary (*Brazil – Retreaded Tyres*).[27] The trade impact of the feebate scheme will depend on various factors, such as the applied tax rate and the administrative complexity of obtaining sustainability certificates. In *Brazil – Retreaded Tyres*,[28] however, the Appellate Body found that an import ban can be necessary, despite significant restrictive impact on imports.

No reasonably available, less trade-restrictive alternatives should exist. The responding party needs only to make a *prima facie* case that the measure is necessary. It is then up to the complaining party to indicate the existence of alternative, less trade-restrictive measures, and eventually for the responding party to rebut this indication. The alternative measure needs to be "reasonably available," and thus not be available only in theory (*Brazil – Retreaded Tyres*)[29] or be very difficult to implement (*EC – Asbestos*).[30] Attempting to negotiate an international arrangement before acting unilaterally helps to show that no available alternative exists, and open-mindedness toward an international solution should also remain after the tax scheme is introduced (Trachtman 2017).

Alternative measures with similar effects might not be reasonably available. Expenditure-side policies are limited by fiscal constraints and risk incentivizing the exploitation of forests that would remain otherwise preserved. Forestry certificates alone are subject to free riding and, similarly to bans, may not provide dynamic incentives for SFM (see box 6.1). Bans are also a more restrictive measure than a Pigouvian tax and are widely used in combating deforestation.

26 Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV.
27 Ibid.
28 Ibid.
29 Ibid.
30 Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII.

The sustainability impact of the measure should be material. Measures that have only insignificant effects on protecting the policy aim pursued may not meet the requirement set in Article XX(b) (*Brazil – Retreaded Tyres*)[31] despite there being no predefined threshold to meet (*EC – Seal Products*).[32] If the criteria used to determine SFM degree yield sustainability outcomes, the mitigating effects of a tax rate that varies per SFM degree are stronger than those of a measure that does not target the external cost of production methods. The former are thus more likely to make a material contribution toward environmental sustainability.

The suggested tax scheme can satisfy the requirements of Article XX(b).

Article XX(g) – Measures relating to the conservation of exhaustible natural resources

Measures that incentivize SFM are likely to qualify as "relating to" the conservation of exhaustible natural resources. A measure "relates to" if it has a close and genuine relationship with its ends (*US – Shrimp*).[33] Various factors are relevant to establishing the existence of this relationship, such as the design and the structure of the measure, and its effects (*China – Rare Earths*).[34] Conservation does not only refer to measures that preserve a resource; it also encompasses policies that reduce the pace of extraction of a resource (*China – Rare Earths*).[35] As it makes forests more sustainable and mitigates climate change, the suggested scheme likely fulfills this requirement. The protected natural resource can be forests themselves or even the climate, as the identification of the relevant resources must be made in light of the "*current concerns of the community of nations*" (*US – Shrimp*, para. 129).[36]

If the scheme applies to both imported and domestic forestry products, it can satisfy the conditions of Article XX(g). Restrictions on domestic production need to be real and even-handed compared with restrictions on imports, but Article XX does not require identical treatment between domestic and imported products (*China – Rare Earths*).[37]

Article XX's Chapeau

To comply with Article XX's Chapeau, the measure should neither (i) be arbitrary or unjustifiable nor (ii) constitute a disguised restriction on international trade.

Well-designed fiscal policies for SFM are neither arbitrary nor unjustifiable. Whether a measure is arbitrary or unjustifiable depends more on its objectives than on its effects (*Brazil – Retreaded Tyres*).[38] Coherently, the measure should not conceal an intention to restrict

31 Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV.
32 Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R.
33 Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII.
34 Appellate Body Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R.
35 Ibid.
36 Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII.
37 Appellate Body Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 29 August 2014.
38 Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527.

international trade (*EC – Asbestos*).[39] The aim pursued by fiscal measures for SFM finds support in the climate regime and is therefore neither arbitrary nor unjustifiable, especially if the tax rate varies by degree of sustainability of production. Seeking a multilateral solution with exporting countries in good faith signals that the unilateral action is not unjustifiable (*US – Shrimp*).[40]

The measure should not coerce other countries to adopt a specific SFM regime or join an international agreement (*US – Shrimp*).[41] Instead, it should allow for flexibility, to account for differences that prevail in exporting countries, even though Article XX does not require the importing country to explicitly consider the conditions that prevail in every other state (*US – Shrimp*, Article 21.5 – Malaysia).[42] Allowing flexibility in proving SFM via various practices and via a diverse range of certificates reduces coerciveness. The different certificates accepted should be roughly comparable in their stringency so equity and effectiveness are not compromised.

Due process in applying the tax scheme to imported products is necessary (*US – Shrimp*).[43] The certification process and the recognition of these certificates at customs authorities should be transparent, predictable, and accessible.

If the scheme is carefully designed, it can comply with the Chapeau of Article XX.

Extraterritoriality

WTO law may restrict countries' ability to consider the features of production processes that take place in foreign jurisdictions. While various elements indicate that the scheme could fall within the jurisdiction of the importing state, legal uncertainty remains.

The transboundary negative externalities caused by unsustainable forest management may provide a jurisdictional basis for the feebate scheme. While Article XX does not contain an explicit jurisdictional limit, it may contain an implicit one (Van den Bossche, Henry, and Zdouc 2017). Uncertainty exists on this issue because no case law explicitly addresses this matter. The Appellate Body held that the United States had jurisdiction to impose a ban on imports of shrimp harvested with methods that endangered sea turtles because sea turtles sometimes migrate through waters where the United States has jurisdiction (*US – Shrimp*).[44] This case suggests that jurisdiction exists if there is a *sufficient nexus* between the state that imposes the measure and the interest protected (ibid.). A panel previously held that the European Communities (EC) did not have the jurisdiction to regulate activities that were not protecting human life and health in the EC (*EC – Tariff Preferences*).[45] If this line of reasoning is followed, a country may not have the jurisdiction to apply an SFM scheme to conserve forests abroad under Article XX(g). However, jurisdiction might be still based on the fact that climate change is a threat to the economy and security of many countries, potentially making the nexus "sufficient."

39 Panel Report, European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/R, 18 September 2000, DSR 2000:VII.
40 Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII.
41 Ibid.
42 Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII.
43 Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII.
44 Ibid.
45 Panel Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III.

Making the consumer or the importer of forestry products the nominal taxpayer may strengthen the jurisdictional claim of the importing country.[46] States have jurisdiction over conducts that take place within their territory (territoriality principle). If the action seen as producing emissions is the purchase of timber products by consumers, that is, an internal act, the jurisdictional claim of the importing country could be based also on the territoriality principle. As discussed above, whether a future panel or the Appellate Body will see the feebate scheme as a consumption tax remains unclear, as the legal qualification of a tax as internal under domestic law does not make it automatically internal under WTO law. If instead the act of importing timber is identified as the taxable activity, GATT Article II, and its tariff limits, would likely apply. There is thus a trade-off between making the scheme compatible with Article II and making the exceptions of Article XX applicable.

If carefully designed, the importing country could have jurisdiction to implement the feebate scheme.

Agreement on Subsidies and Countervailing Measures

Fiscal policies for climate change need to comply with the SCM Agreement. Compatibility with this agreement requires considering whether the measure is an "actionable" subsidy, that is, a specific subsidy that harms the interest of a foreign industry or the interests of another state.[47] The subsidy could take the form of forgone tax revenues (otherwise due) or direct fund transfers.

A Pigouvian tax calibrated on the sustainability of production is unlikely to be seen as incompatible with the SCM Agreement. The suggested tax scheme lowers the tax rate upon proof that the emissions released were actually lower than assumed. The lower tax rate could either be applied directly when the tax is first collected or it could take the form of a rebate to be received in a later period. In the former case, the scheme is a Pigouvian tax tailored on SFM levels, and it is thus unlikely to be seen as a subsidy (Trachtman 2017). The rebate could instead be seen as a direct transfer, as it is granted to producers, despite the nominal tax liability falling on consumers/importers.

Policy makers need to establish objective criteria to grant rebates. To be actionable, a subsidy needs to be specific, meaning that it targets certain enterprises. A subsidy is unlikely to be specific if objective criteria define eligibility. Linking the rebate to sustainability practices has a high degree of objectivity, which may, therefore, make the "subsidy" nonspecific.[48] If found specific, the rebate should not have adverse effects for other countries' industries or interests. If the rebate scheme is applied to both internal and imported products, it may not be seen as harming foreign producers—also because it aims to level the playing field. If foreign producers tend to adopt lower sustainability practices, they may receive lower rebates, but they may also avoid part of the tax liability if they fall below the assumed default value.

If the scheme is found contrary to SCM Agreement provisions, GATT Article XX exceptions may apply. As discussed above, the scheme can meet the requirements set by Article XX. The

46 For an application of this strategy to carbon pricing in the international shipping sector, see Dominioni, Heine, and Martinez Romera (2018).
47 The SCM Agreement distinguishes two types of specific subsidies: prohibited ones and actionable ones. Most subsidies fall into the category of actionable subsidies. While not being prohibited, actionable subsidies are subject to challenge if they cause adverse effects to the interests of other WTO member states. Actionable subsidies can be challenged either via countervailing action or multilateral dispute settlement (read more at: https://www.wto.org/english/tratop_e/scm_e/subs_e.htm).
48 Similarly, related to carbon taxes, see Trachtman (2017).

applicability of these exceptions to non-GATT provisions is, however, uncertain under WTO law, at least for agreements that do not make explicit reference to Article XX (Van den Bossche, Henry, and Zdouc 2017). While the SCM Agreement does not contain an explicit reference to GATT Article XX, Article 32 states that "no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." It is not clear, however, whether as a result of this provision GATT Article XX applies.

EU Import Taxes in Free Trade Agreements

Countries' ability to impose taxes on imported goods may be constrained by FTAs. In particular, Canada, the EU, and the United States have established FTAs with some FIP member countries.

FTAs signed by Canada, the EU, and the United States with FIP member countries do not forbid implementing an internal tax on imported products if the measure is in line with GATT Article III.[49] Some of these agreements, however, limit the imposition of new, or require the dismantling of existing, charges imposed on or in connection with the importation of commodities. Therefore, the compliance of the feebate scheme with FTAs will depend on its design, particularly on whether it is designed as an internal tax. Internal taxes that do not comply with Article III because the tax rate varies according to the external cost caused by unsustainable forest management could be justified under Article XX, even though the application of these exceptions outside the GATT may depend on the specific wording contained in each FTA.[50]

Conclusion

If carefully designed, the feebate scheme described in chapter 7 is not a priori incompatible with WTO law. In particular, it could be compatible with the GATT, the SCM Agreement, and FTAs that have been established between the EU and FIP countries.

While design of the scheme will be key in reducing WTO law compatibility concerns, seeking an exception under Article XX might remain the safer option under the GATT. Structuring the feebate scheme as an internal tax could reduce incompatibility concerns with respect to both the GATT and FTAs. A scheme that applies an equal tax rate per marginal external damage to domestic and imported products is also more likely to comply with WTO law. Obtaining sustainability certificates and rebates should be accessible to both domestic producers and exporters. Distributing the rebates based on objective criteria, such as the sustainability level of production processes, can also support the legality of the measure. Although these design features may reduce WTO law compatibility concerns, the scheme may remain incompatible with GATT Article II and Article III. For this reason, seeking an exception under Article XX might be the safest way to comply with the GATT.

49 For instance, Article 19.1 of the "stepping stone" economic partnership agreement between Côte d'Ivoire and the European Community and its member states establishes that "*Products imported from the other Party shall not be directly or indirectly subject to internal taxation or other internal charges of any type surpassing those which are directly or indirectly applicable to similar domestic products. Furthermore, both Parties shall refrain from applying any other form of taxation or other internal charges with the aim of providing protection for domestic production.*" Article 19.2 adds, "*Products imported from the other Party shall benefit from treatment which is no less favorable than the treatment given to similar domestic products in respect of all laws, regulations and requirements applicable to their sale, offering for sale, purchase, transportation, distribution or use on the national market. The provisions of this paragraph shall not prevent the application of tariffs for differentiated internal transportation based exclusively on the fuel-efficient use of transport and not on the origin of the product.*"

50 For a discussion of the conditions needed for the application of Article XX outside the GATT, see Trachtman (2017).

A feebate scheme that violates GATT provisions is more likely to qualify for GATT Article XX exceptions if it is designed to meet the following criteria: The scheme has a material effect in improving the sustainability of forestry. The scheme is applied to respect the canons of transparency, accessibility, and predictability. Unilateral action is preceded by good faith negotiations at the international level. It is also important to provide flexibility to obtain rebates to not force foreign jurisdictions to adopt a specific type of forestry management regime. Accepting forestry certificates released by different, international and national, certification agencies could provide sufficient flexibility in application. To ensure that the measure is effective and equitable, there should be a minimum comparability between the stringency of the different certifications accepted.

Similar criteria may support the legality of the measure if it is found to be incompatible with the SCM Agreement or FTAs established between the EU and FIP countries, even though the applicability of these exceptions to these agreements is debated.

Making the consumer of forestry products the nominal taxpayer may strengthen the jurisdictional claim of the importing country.

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