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## **Border Adjustments of Emission Trading Klimaschutz oder nackter Protektionismus?**

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# Das EU Emissions Trading Scheme (EU ETS)



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- ETS setzt ein **Limit** für **Gesamtemissionen** für bestimmte Industriesektoren fest, welches jedes Jahr weiter abgesenkt wird
- ETS betrifft über **11.000 energieerzeugende & produzierende Anlagen**, Betreiber von Fluglinien in allen **EU Staaten, Island, Liechtenstein und Norwegen** → ETS deckt ca. 45% aller Treibhausgas-Emissionen der EU ab

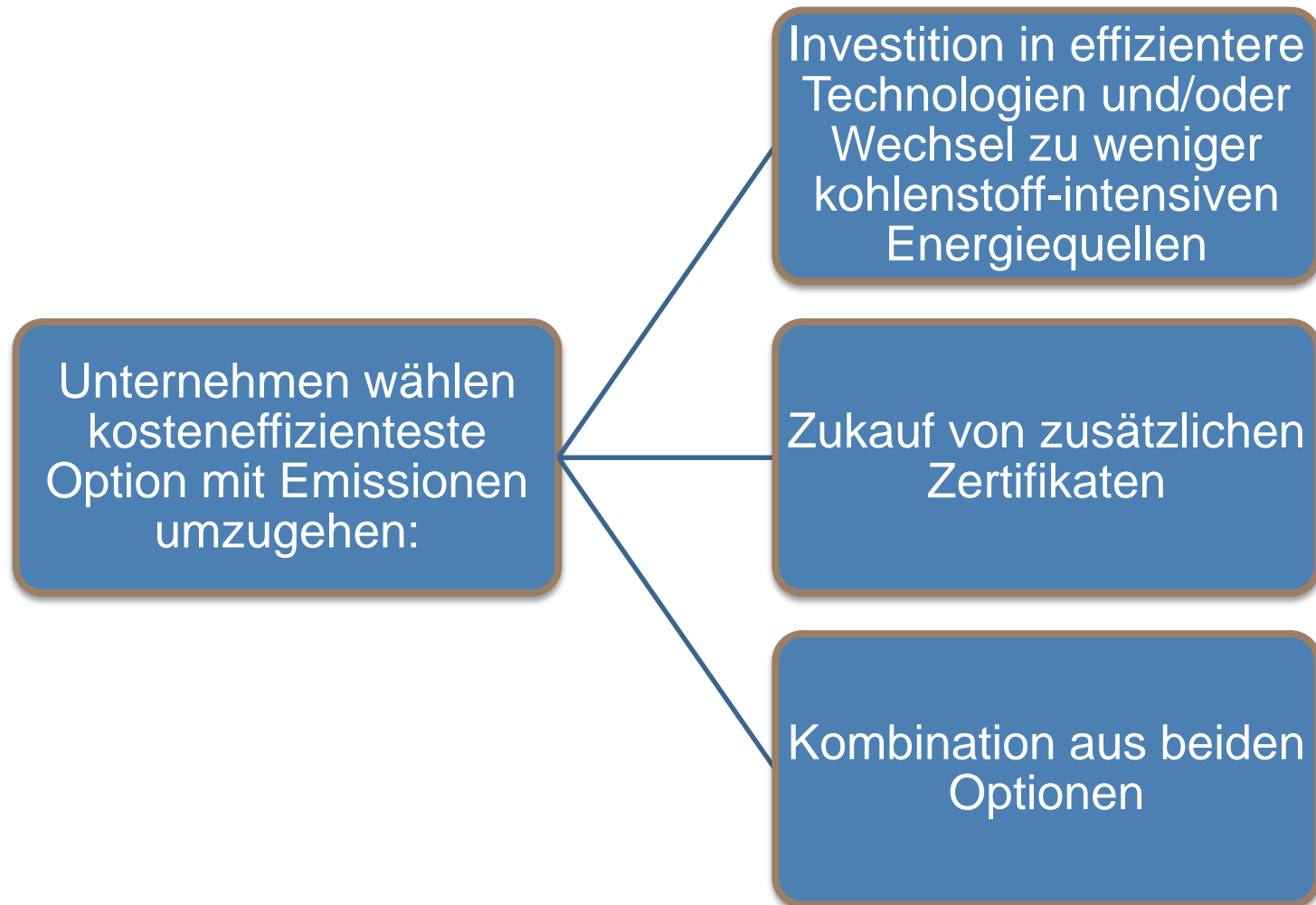
## Rechtliche Grundlagen

- **Richtlinie 2003/87/EG** des Europäischen Parlaments und des Rates vom 13. Oktober 2003 über ein System für den Handel mit Treibhauszertifikaten in der Gemeinschaft und zur Änderung der Richtlinie 96/61/EG des Rates
- **Richtlinie 2009/29/EG** des Europäischen Parlaments und des Rates vom 23. April 2009 zur Änderung der Richtlinie 2003/87/EG zwecks Verbesserung und Ausweitung des Gemeinschaftssystems für den Handel mit Treibhausgasemissionszertifikaten
- **Vorschlag für eine Richtlinie** des Europäischen Parlaments und des Rates **zur Änderung der Richtlinie 2003/87/EG** zwecks Verbesserung der Kosteneffizienz von Emissionsminderungsmaßnahmen und zur Förderung von Investitionen in CO<sup>2</sup>-effiziente Technologien

## Wie funktioniert EU ETS ?

- „cap and trade“
- Emissions-Cap ist auf EU-Ebene festgesetzt und wird p.a. um 1.74% (ab 2021 2.2%) reduziert → Innerhalb dieser Begrenzung erhalten oder erwerben Firmen Emissions-Zertifikate, welche gehandelt werden dürfen
- 1 Emissionszertifikat = Recht 1t Kohlenstoffdioxid (CO<sup>2</sup>) zu emittieren
- Firmen können einen Teil der Zertifikate kostenlos erhalten. Restliche Zertifikate müssen erworben oder durch in Vorjahren angesparte Reserven abgedeckt werden → Anreiz Emissionen einzusparen

## Flexibilität für die Wirtschaft



## Ziele von EU ETS

- Treibhausgas-Emissionen reduzieren
  - 2020: -20% (im Vergleich zu 1990)
  - 2050: -80 bis -95%
- Begünstigung von kohlenstoffarmen Investitionen
  - Je höher der Marktpreis der Zertifikate („CO<sub>2</sub>-Preis“), desto höher der Anreiz einsparende Technologien zu entwickeln
- Vorantreiben von klimafreundlichen Investitionen in Entwicklungsländern
  - Neben Zertifikaten können Unternehmen auch Anrechnungspunkte durch emissionsarme Projekte in Drittländern sammeln
- Aufbau eines internationalen Emissionsmarktes
  - Durch Verbindung von EU ETS mit anderen regionalen/nationalen Systemen sollen Einsparungen von Emissionen kostengünstiger und die globale Kooperation gegen Klimawandel gestärkt werden

## Problematik des „Carbon Leakage“

- Carbon Leakage beschreibt den Fall, wenn Unternehmen Produktionen aus Klimaschutzkostengründen in Drittländer mit weniger restriktiven Regelungen zu Treibhausgasemissionen verlagern
  - Energieintensive Industriezweige (u.a. Chemieindustrie) sind aus Wettbewerbsgründen besonders betroffen → Zertifikate werden an die energieintensiven Sparten dieser Sektoren überwiegend kostenlos verteilt
  - COP21 hat keine vergleichbaren Wettbewerbsbedingungen geschaffen → **Abwanderungsgefahr**: Verschärfung des europäischen Minderungsziels für 2030 und Lockerung der Carbon Leakage Regelungen. Abwanderung energieintensiver Industrien würde nur einer Verlagerung der Emission Vorschub leisten → gleichzeitig Verlust von Arbeitsplätzen und Investitionen
- **Maßnahmen gegen Carbon Leakage sind notwendig, bis weltweit vergleichbare Wettbewerbsbedingungen erreicht sind**



## Ergebnisse der UN-Klimaschutzkonferenz 2015 in Paris

- Verschärfung des bisherigen 2-Grad Ziels auf „deutlich unter 2-Grad mit Option zu 1,5 Grad“ (Alle 5 Jahre wird es Nachbesserungsrunden für die nationalen Klimaziele geben)
- Solidaritäts-Paket mit besonders vom Klimawandel Betroffenen (Finanzierungszusagen, Kapitel „Schäden und Verluste“ im Abkommen)
- Vorgelegte Minderungszusagen der EU werden von angekündigten Mehremissionen anderer Staaten zunichte gemacht (vgl. INDCs, Intended Nationally Determined Contributions: Anstieg bis 2030 um 45% zu 1990) → Klimaschutzanstrengungen der EU verpuffen
- **Problematik der Rechtdurchsetzung;** Kooperative Mittel vs. repressive Mittel: Fehlen eines Streitbeilegungsmechanismus. Keine Sanktionierung der Nichteinhaltung von Verpflichtungen



## Zukunft des EU Emissionshandels

- Es gibt einen Vorschlag der EU Kommission für eine Revision der bestehenden Emissionshandelsrichtlinie 2003/87/EG für die 4. Phase (2021-2030) von EU ETS. Dabei sollen folgenden Schwerpunkte gesetzt werden:
  - Beschleunigung der Emissionsrückgänge, z.B. durch Erhöhung der Cap-Reduzierungsrate von 1.74% auf 2.2%
  - Größerer Fokus auf Carbon Leakage Regelungen
  - Einrichtung von zwei Fonds für kohlenstoffarme Innovationen und Modernisierung des Energiesektors



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# ETS Border Adjustment

Eine Verletzung von GATT?

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## ■ RL 2009/29 Art. 10 b:

- (1)“...geeignete Vorschläge unterbreitet, die Folgendes betreffen können:

b) Einbeziehung der Importeure von Produkten, die von gemäß Artikel 10a ermittelten Sektoren oder Teilspektoren hergestellt werden, in das Gemeinschaftssystem,“

## ■ FAIR: Future Allowance Import Requirement

- Vorschlag der GD Umwelt eingebracht während der Revision der ETS RL im Jahre 2007.

## ■ CIM: Carbon Inclusion Mechanism for the Cement Sector

- Non-Paper Frankreichs zur Ausdehnung des ETS auf Importe für den Sektor Zement vom Februar 2016

# Die Ausweitung von ETS auf Importe

- Funktionsweise der Vorschläge zum ETS-Border-Adjustment-für Importe aus Ländern mit weniger ambitionierten Klimazielen
- Festlegung der betroffenen Länder
- Vergleich: Durchschnitt EU CO<sub>2</sub> Ausstoß
- Zertifikatsabgabe an der Grenze in Höhe des EU-Durchschnitts
- Zertifikatsrückgabe bei Export (FAIR)



## 1. Verstoß gegen GATT Artikel I

## 2. GATT Regeln zum Border Tax Adjustment

## 3. GATT Systematik: Was ist ETS-BTA?

- ▶ heimische Produktregulierung an der Grenze angewandt
- ▶ oder Grenzregulierung

## 4. Heimische Produktregulierung an der Grenze

- ▶ GATT Artikel III:2
- ▶ GATT Artikel III:4

## 5. Grenzmaßnahme

- ▶ GATT Artikel XI
- ▶ GATT Artikel II 1 (b)

## 6. Rechtfertigung GATT Artikel XX

# GATT-Vereinbarkeit der Ausdehnung von ETS auf Importe

- Verstoß gegen GATT Artikel I
- Das Meistbegünstigungsprinzip:
  - Article I GATT: With respect to customs duties and **charges of any kind imposed on or in connection with with importation** or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules formalities in connection with importation and exportation and with respect to all matters referred to in paragraphs 2 and 4 of Article III, **any advantage, favour privilege or immunity granted** by any contracting party **to any product** originating in or destined for any other country **shall be accorded immediately and unconditionally to the like product** originating in or destined for the territories of all other contracting parties.
- UNFCCC und COP 21 Prinzip der **Differentiated but Common Responsibilities**

# Die Allgemeinen GATT-Regeln zum Grenzsteuerausgleich

## GATT Article III. 2 - Border Tax Adjustment (I)

- **Article III. 2:** internal taxes and other charges **on products; other fiscal measures are not covered (eg income tax).**
- **Rationale:** The theory behind restricting the disciplines of Article III.2 to taxes on products appears to have been the assumption by the drafters of the GATT that indirect taxes were fully shifted to the purchasers in the price of the good, while the seller or producer absorbed direct taxes. While this is questionable from an economic standpoint, the distinction nevertheless remains
- 1970 GATT Report of the Working Party on Border Tax Adjustment:  
**defines BTA:** “any fiscal measure which put into effect, in whole or in part, the **destination principle** (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products).”



# Die Allgemeinen GATT-Regeln zum Grenzsteuerausgleich

## GATT Article III. 2 - Border Tax Adjustment (II)

**BTAs are fiscal measures which are covered by Article III. 2.**

1970 GATT Report of the Working Party on Border Tax Adjustment: the Working Party concluded that there was convergence of views to the effect that **taxes directly levied on products were eligible for tax adjustment**. Examples of such taxes are: specific excise duties, sales taxes and cascade taxes and the tax on value added. Furthermore, the Working Party concluded that there was convergence of views that to the effect that **certain taxes that were not directly levied on certain products were not eligible for tax adjustment**. Examples of such taxes comprised social security charges whether on employers or employees and payroll taxes.

With respect to imports, therefore Article II.2(a) of the GATT grants an exception to the rule limiting border charges to the amount of a scheduled tariff binding for a **charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III**. On the export side, a nation is allowed to rebate the amount of any internal tax imposed on domestic goods. An **interpretative note Ad Article XVI.4** provides that such a rebate shall not be considered a subsidy or be the basis for countervailing or antidumping duties.

# Die Allgemeinen GATT-Regeln zum Grenzsteuerausgleich

## GATT Article III. 2 - Border Tax Adjustment (III)

### GATT Artikel II 2 a):

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III\* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part

### GATT Artikel 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 otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.\*

## GATT Artikel I

Heimische Regulierung an der Grenze angewandt :

- GATT Artikel III 2
- GATT Artikel III 4

Grenzmaßnahme:

- GATT Artikel XI
- GATT Artikel II 1b

Unterscheidung: Note Ad Artikel III

Bei Verstoß: Rechtfertigung über GATT Artikel XX

# Grenzmaßnahme oder Anwendung der heimischen Regulierung an der Grenze

## Note Ad Article III:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

## GATT Artikel 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 otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.\*

## GATT Artikel III 4:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

## **GATT Artikel XI 1:**

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

## **GATT Artikel II 1 b:**

The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

**Problem:** ist ETS eine Produktregulierung oder eine Umweltmedienregulierung?

## EU ETS regelt den CO<sub>2</sub> Ausstoß von Anlagen

ETS regelt **keine Produkte**, es hat Auswirkungen auf die Wettbewerbsfähigkeit der heimischen Industrie und auf die Preise der Produkte, die in ETS Anlagen hergestellt werden.

Artikel III bezieht sich auf Produktregulierungen nicht auf Regulierungen, die Auswirkungen auf Produkte haben, **ABER:**

*The basic issue is whether one could regard the ETS-scheme as a regulation affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. How broadly should one interpret the word ‘affecting‘?*



## Difference Between Article III and Article XI/II 1 (b1)

- ▶ How to define the difference between Article III and Articles XI, II?
- ▶ Ordinarily, a measure should first be analysed under Article III. If it fails the tests of Article III, Article XI automatically applies and, unless it falls under one of the narrow exceptions in that Article, it will fail the Article XI tests.
- ▶ This was precisely the panel's analysis in the Tuna Dolphin cases. The U.S. embargo on tuna caught by dolphin-unsafe methods was analysed under Article III. When Article III was found inapplicable because the U.S. embargo concerned fishing techniques rather than the product itself, the embargo was judged inconsistent with Article XI.”

## Difference Between Article III and Article XI/II 1 (b)

- GATT Tuna Panel
- The panel's conclusions in the *tuna-case* that Article III “covers only measures affecting products as such” were heavily criticized. Much of the criticism concerning the so-called *product-process* doctrine was addressed in later WTO dispute settlement cases regarding the substantive issues of Article III, in particular the definition of *like products*.
- How broadly should one interpret the word ‘*affecting*’? It seems clear that this term covers more than ‘*regulations which directly govern the conditions of sale or purchase*’ **but does it also cover all the indirect effects on products which a domestic legislation can have?**
- All legislative activities affect, to some extent, the internal sale of products, therefore some line must be drawn between a product-regulation and a producer-regulation

# Difference Between Article III and Article XI

- In *China – Measures Affecting Imports of Automobile Parts* the Panel observed that ‘a charge cannot be at the same time an ‘ordinary customs duty’ under Article II:1(b) of the GATT and an ‘internal tax or other internal charge’ under Article III:2 of the GATT’.
- The Appellate Body accepted that the Panel had to begin its analysis by ascertaining which of these provisions applied in the circumstances of that dispute. In response to the substantive question the Appellate Body considered that charges covered by Article III are those imposed on goods that have already been ‘imported’ and that the obligation for these charges is triggered by an internal factor. It stated that:
- The key indicator of whether a charge constitutes an ‘internal charge’ within the meaning of GATT Article III para. 2 of the GATT 1994 is whether the obligation to pay a charge must accrue due to an internal factor (e.g. because the product was resold internally or because the product was used internally), in the sense that such ‘internal factor’ occurs after the importation of the product of one Member into the territory of another.

## Difference Between Article III and Article XI/II 1 (b)

- ▶ With respect to Article II instead, the Appellate Body stated that for a charge to constitute an ordinary customs duty the obligation to pay must accrue at the moment and by virtue of, or, in the words of Article II:1 (b), 'on' importation. In other words, a border measure specifies the amount to be paid in order for the good to be allowed into the market
- ▶ ETS for Imports: Importer has to surrender ETS certificates upon importation:
  - ▶ The obligation to surrender the certificates would accrue 'on' importation.
  - ▶ The reason for surrendering the emission trading certificates is due to an internal event, the domestic emission trading system. The *measure* intends to create a level-playing field between domestically produced and imported energy-intensive goods. It would be applied at the border in order for the products to be sold internally.

## Difference Between Article III and Article XI/II 1 (b)

### *China – Measures Affecting Imports of Automobile Parts:*

We consider that a panel's determination of whether a specific charge falls under Article II:1(b) or Article III:2 of the GATT1994 must be made in the light of the characteristics of the measure and the circumstances of the case. In many cases this will be a straightforward exercise. In others, the picture will be more mixed, and the challenge faced by a panel more complex. A panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics. Having done so, the panel must then seek to identify the leading or **core features of the measure at issue**, those that define its "centre of gravity" for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge. **It is not surprising, and indeed to be expected, that the same measure may exhibit some characteristics that suggest it is a measure falling within the scope of Article II:1(b), and others suggesting it is a measure falling within the scope of Article III:2.** In making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel **must identify all relevant characteristics of the measure, and recognize which features are the most central to that measure itself**, and which are to be accorded the most significance for purposes of characterizing the relevant charge and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements.

# Hauptmerkmale ETS/Importregulierung

- ▶ **ETS- Ziel:** Senkung der Treibhausgasemissionen
- ▶ **ETS:** “command-and-control”
- ▶ **Regulierung:** Ziel minus 1,74% pro Jahr Treibhausgasreduzierung
- ▶ **ETS:** Zielerreichung: “market-based”-Instrument
- ▶ **ETS** bezieht sich auf Anlagen, nicht auf Produkte
- ▶ **ETS:** Anlagenbetreiber haben Wahlmöglichkeiten, die der ausländische Produzent nicht hat
- ▶ **ETS:** die Importregelung verlangt nicht, dass Ausländer weniger CO<sub>2</sub> emittieren
- ▶ **Importregulierung:** Abgabe an der Grenze, die das Hauptmerkmal der heimischen Regulierung nicht umfasst, Treibhausgasminderung.
- ▶ **Ergebnis:** Importregulierung ist keine fiskalische oder regulatorische Maßnahme, die von GATT Artikel III:2 oder III:4 erfasst wird.

## GATT Article XI and Article II 1 (b)

- ▶ **Article XI:** effective treaty interpretation
- ▶ **Article II 1 (b)** distinguishes between ‘ordinary customs duties’ (first sentence) and ‘other duties and charges’ (second sentence).
- ▶ **Article II 1 (b)** first sentence requires a WTO Member not to impose customs duties *in excess of* the duties set out in its schedule.
- ▶ **Article II 1 (b)** second sentence provides that, on products subject to a tariff binding, no other duties or charges may be imposed *in excess of* those duties and charges which have been imposed at the date of the Agreement or which have been provided for by legislation in force on that date. The WTO does not define the term ‘ordinary customs duty’ nor term ‘other duties or charges’.



„ BTA as a charge, equivalent to an internal tax“

ETS ist eine Umweltmaßnahme, könnte es auch als fiskalische Maßnahme angesehen werden?

### Definition: Fiskalische Maßnahme

*Compulsory financial contribution imposed by the government to raise revenue, levied on the income or property of persons or organizations on the production costs or sales prices of goods and services*

### Problem:

*„The term ‘directly or indirectly applied’ should be understood to mean applied on or in connection with products, whereas ,‘indirectly’ means a tax applied, not on a product as such but on the processing of the product. Could this broader reading mean that traditional command-and-control regulations which entail a cost on business, could be adjusted at the border?“*

## GATT Artikel III 4:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

### Probleme:

- Affecting internal sale
  - Jede Regulierung hat Auswirkungen auf die Preise eines Produkts
- Less favourable treatment (lft)
  - Keine Gleichbehandlung erforderlich, aber
  - „effective equalities of competitive opportunities“
  - Reformulated Gasoline: AB hat lft angenommen, da die Exporteure weniger Möglichkeiten hatten, als die heimische Industrie

## GATT Artikel XX

Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

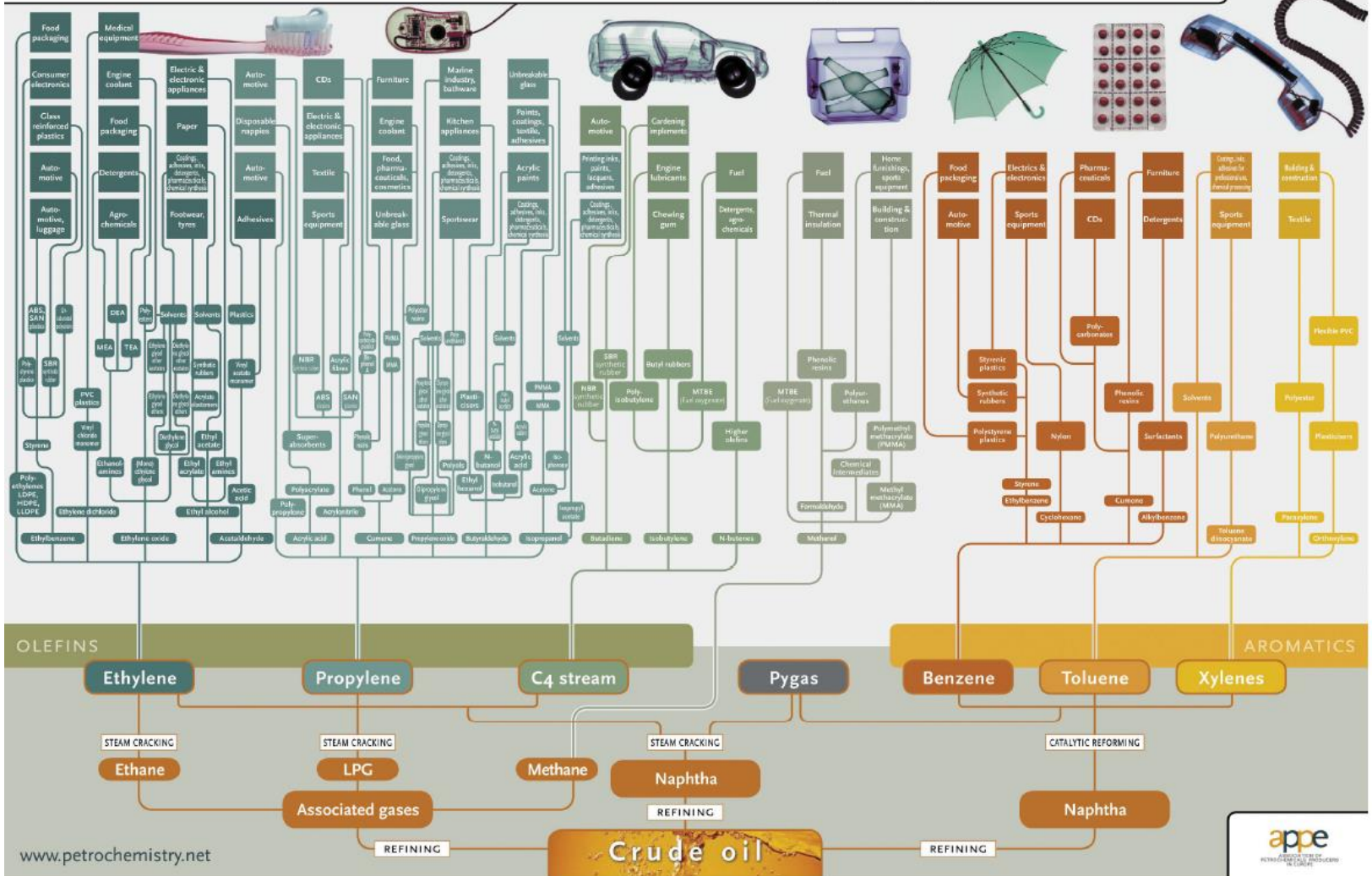
(g) Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

### Probleme:

- „necessary“ für die Umwelt oder die heimische Wirtschaft?
- „relating to the conservation of natural resources“?
- Chapeau: arbitrary or unjustifiable discrimination or disguised restriction on international trade?

# Belastung der Chemie-Industrie durch ETS

## Petrochemicals make things happen



Non-ETS

ETS

# Klimaschutzziele der EU für die Reduktion von Treibhausgasen bis 2020

## EU-Treibhausgase in Mio. Tonnen

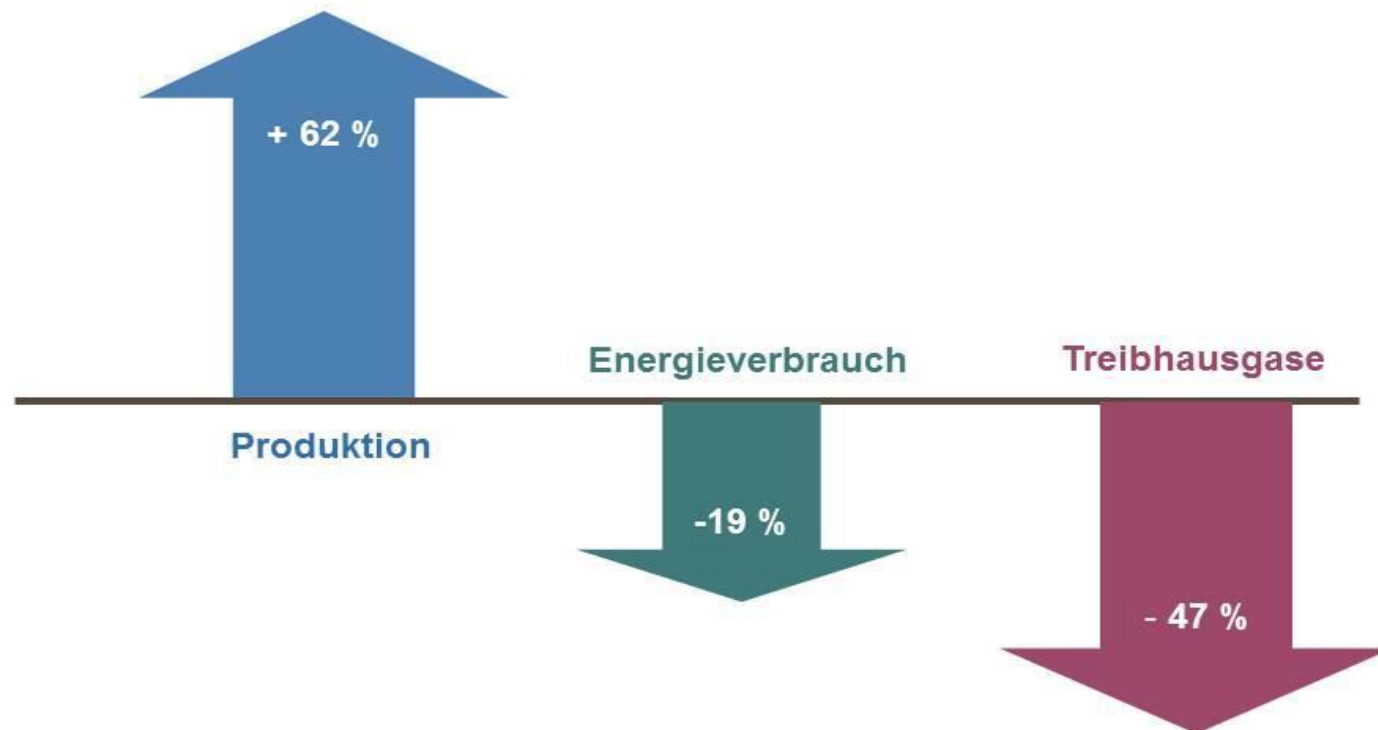
Reduktionsziel der EU-27: Bis 2020 20 Prozent gegenüber 1990



Quelle: VCI-Berechnungen auf der Grundlage von Daten der UNFCCC, der EEA und der EU-Kommission.  
„Sonstige“ ist eine Restgröße.

# Beitrag der Chemie-Industrie zum Erreichen der Pariser Klimaschutzziele

Klimaschutzbilanz der chemischen Industrie in Deutschland  
Veränderung 1990 zu 2014

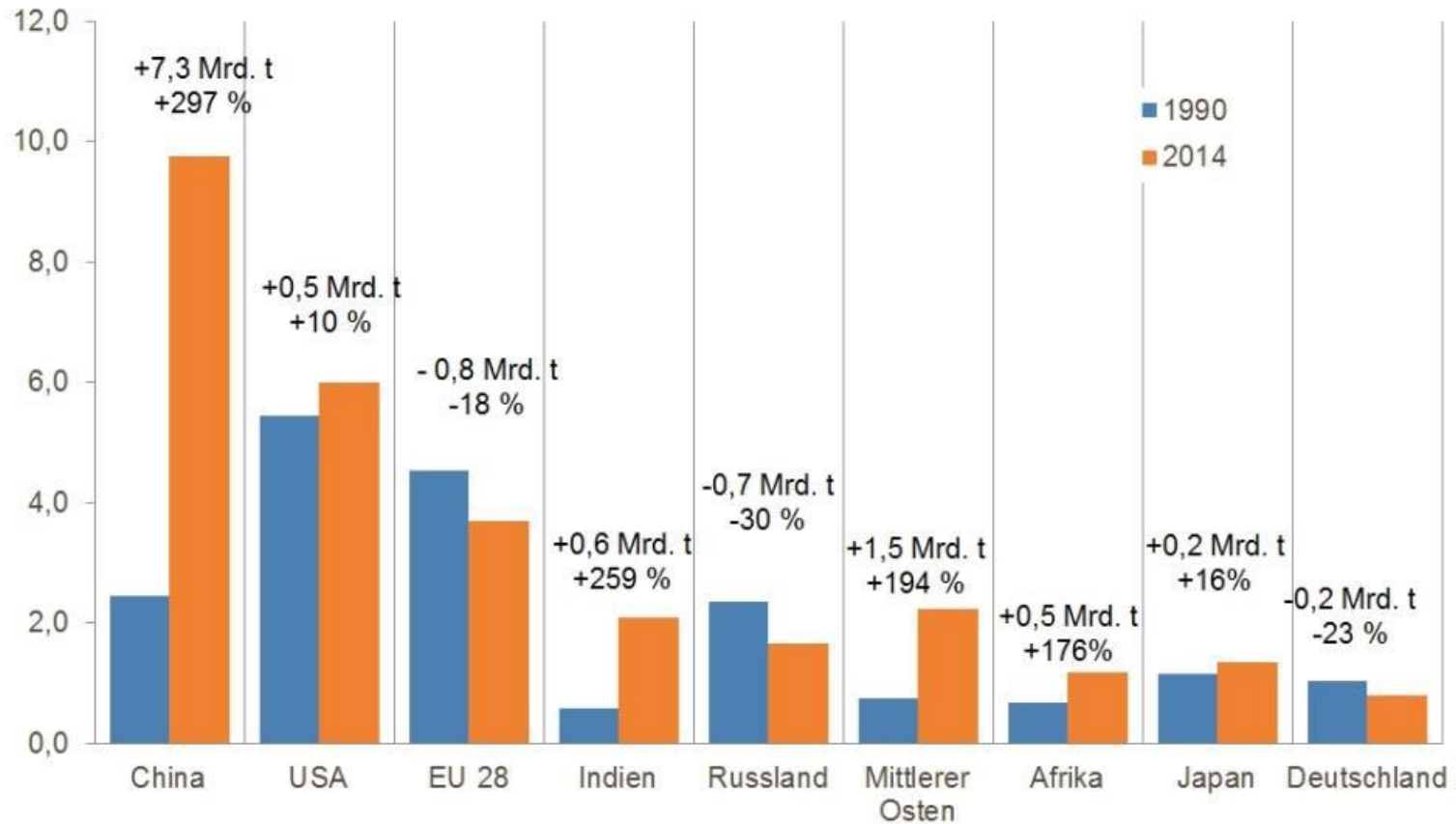


Quelle: VCI-Berechnungen auf der Grundlage von Daten des Statistischen Bundesamtes.



# Reduktionserfolge vs. Mehremissionen ?

CO<sub>2</sub>-Emissionen in ausgewählten Ländern und Regionen  
In Mrd. Tonnen, Vergleich 1990 und 2014 in Mrd. Tonnen und in Prozent



Quelle: BP Statistical Review of World Energy June 2015; VCI