

# Carbon Capture Policy Should Be Aligned For Global Adoption

By **Hunter Johnston and Jeff Weiss**

Early efforts at decarbonizing the world economy focused on renewable energy for electricity production, but many policymakers are now considering the possibility of immediately and substantially reducing emissions from fossil fuels through wide-scale deployment of carbon capture, utilization and storage, or CCUS.

So-called blue fuels — fuels produced using CCUS — are increasingly available at scale, and can make a major contribution to transitional decarbonization goals within the 2030-2050 time frame. That said, there are legal, commercial, regulatory and policy issues in the European Union, the U.S. and elsewhere that must be resolved to fully support the deployment of CCUS technologies and products.

This is the final part of a four-part article about CCUS. The first part discussed the need and new momentum for CCUS. The second part reviewed key decarbonization developments in the EU. The third part looked at the potential for CCUS and decarbonization in the U.S.

This installment considers how the interests of multiple stakeholders may align around CCUS, identifies some issues that must be resolved and makes recommendations for promoting global adoption of CCUS and decarbonized supply chains.

## Positions of Key Stakeholders on CCUS

Both the Trump administration and the incoming Biden administration strongly support the use of CCUS in decarbonization — as does a bipartisan coalition of members of Congress.

President-elect Joe Biden has remained clear that the U.S. will rejoin the Paris Agreement in early 2021. But even with the return of the U.S. to the agreement, the EU will remain skeptical about whether the U.S. can meet its decarbonization commitments consistent with the net zero 2050 goal.

It is not yet clear whether the U.S. Senate will be in Republican or Democratic control, with upcoming runoffs in Georgia that will determine the majority. Conventional wisdom is that a Republican-controlled U.S. Senate will not be inclined to pass legislation establishing a carbon pricing regime and a carbon border adjustment mechanism in the near term.

This changes if both of the Georgia Senate seats flip in the January special election, and Democrats take control of the chamber. At that point, there may be opportunities to move specific climate policies, such as a carbon pricing scheme and border adjustment mechanism, using Senate procedures as part of a broader climate strategy in accord with



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the net zero 2050 goal.

But in either scenario, the EU could pressure the U.S. to increase the ambition of its climate policies by simply implementing its carbon border adjustment proposal — leaving American exporters uncompetitive with other countries trading with EU member states, unless the U.S. adopts substantially equivalent policies.

The U.S. could then be forced to respond to such a policy in order to protect U.S. industry competitiveness in international trade. A pro-business, Republican-controlled Senate would likely recognize the need to adopt policies in line with international practices to ensure American competitiveness.

Moreover, there is considerable and growing support for carbon fees in various Republican and conservative leaning organizations and groups.[1] Thus, there may be an opportunity for adoption of such a carbon scheme during the next session of Congress, depending on international pressure and trade considerations.

It is still unclear what an EU carbon border adjustment scheme will look like, in terms of the scope of products and industries covered, the method employed, and related calculation methodologies and enforcement approaches. The high potential that the EU will adopt a carbon policy that affects shipping and aviation, and will impose a carbon border adjustment mechanism for energy-intensive industries, could cause the U.S. to adopt its own carbon fee regime, thus helping to create a worldwide demand for lower-carbon products.

But a divergence in policy between the U.S. and EU on the use of low-carbon blue fuels in the transition to a green economy could cripple the ability of the two sides to collaborate and create a more global approach to tackling climate change.

## **Recommendations**

In order to avoid such divergence, and strive toward an aligned approach to carbon border adjustment measures, the U.S. and EU should, at minimum, ensure that their respective approaches adhere to international trade commitments.

But they should also seek to develop aligned approaches on how to measure and disclose carbon intensity — and on broader issues, including the scope, application and enforcement of GHG reduction measures.

## ***Nondiscrimination***

With respect to trade rules, World Trade Organization members cannot discriminate among like products. This includes providing less favorable treatment to imported products than to like domestic products, and providing less favorable treatment to products imported from one trading partner than to like products imported from another trading partner.

One of the key factors in determining whether products are "like" is to examine whether they are in a competitive relationship in the marketplace — for example, by comparing the end uses of the products at issue to see if they are directly competitive or substitutable.[2]

Since either blue or green products can be used to save a given amount of GHG emissions, from an international trade law perspective, a government should not be making a policy distinction between such products to achieve its carbon reduction goals. So, for example, if a jurisdiction were to impose a carbon border tax, the formula for calculating the tax would

need to be designed and implemented in a nondiscriminatory manner, based on sound science.

Assuming that the EU, the U.S. or other jurisdictions were to discriminate among products based on their raw materials — e.g., not allowing certain raw materials to be used to reduce GHG emissions for purposes of calculating carbon intensity and a resulting reduction in carbon tax — it would need to demonstrate that such discrimination was covered by a relevant exception under the General Agreement on Tariffs and Trade.[3]

It would also need to show that the measure is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." [4] A large part of the GATT analysis would likely hinge on whether there is a reasonably available alternative that achieves the policy objective and is less trade-restrictive.[5]

In this case, the science is clear that blue products can be used to reduce GHG emissions, and that their use is necessary in the transition to a green economy. As a result, discrimination against blue products would not be justified. In fact, such discrimination would actually lead to poorer performance at limiting GHG emissions.

### ***Common Approach***

In an optimal scenario, the U.S. and EU would develop a common approach to carbon border adjustment measures — including with respect to scope, methodologies to measure and report on carbon intensity and impose taxes, and enforcement.

That would create a platform for other nations to join, and create the beginnings of a de facto global approach that would survive legal and political scrutiny and be adopted worldwide.

### ***Measurement***

With respect to the measurement issue specifically, there needs to be a common basis that is recognized by the U.S. and the EU — and hopefully, China — for measurement, through a lifecycle analysis, and transparent disclosure[6] of the carbon intensity of manufactured products.

There also needs to be a common definition of blue products; a common means of determining, on a commercial basis, the value of blue products in the carbon marketplace — i.e., the premium of blue products in the marketplace over gray products; and a common means of determining, and then ensuring on an ongoing basis, that products comply with relevant requirements.

Using tools for international regulatory cooperation, the U.S. and EU should develop a common, high-level approach to these issues, as part of a bilateral agreement that would be designed to be expanded to other like-minded countries, and eventually internationalized.

To improve the chances for alignment, the U.S. and EU should consider relying on current global best practices, and, where there are gaps, should encourage the development of many of the technical specifications and conformity assessment procedures in international standards development bodies — i.e., bodies that develop standards in an open, transparent, impartial, consensus-based process that meet the WTO Committee Decision principles.

Through such processes, technical experts from business, academia and the NGO sector, as well as from relevant agencies and ministries, could work together to create common standards that are evenhanded and science-based, and that would subsequently be adopted by countries at the national level, to minimize unnecessary differences that could cause trade frictions.

### ***Reliance on Existing Law and Policy Framework***

Finally, policies adopted in the U.S. to implement decarbonization of the industrial sector should rely on the existing framework in the Section 45Q tax credit. This framework provides a comprehensive set of standards and incentives based upon lifecycle measurement of GHGs and secure geologic storage, and robust disclosure and transparency regarding methods employed in carbon sequestration.

CCUS policies require public confidence and scientific credibility. The regulations and policies establishing guidance for taking advantage of the Section 45Q tax credit, as promulgated by the U.S. Department of Treasury and the IRS, the U.S. Environmental Protection Agency and the U.S. Department of Energy represent the leading framework for CCUS policy in the world. Protecting and advancing this policy is vital to establishing durable and transparent standards for measuring decarbonization progress.

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[1] See the Carbon Leadership Council, <https://clcouncil.org/our-plan/>; The Alliance for Market Solutions, <https://amsresearch.org/about/>.

[2] See, e.g., Appellate Body Report, Korea — Alcoholic Beverages, para. 127.

[3] See GATT Article XX.

[4] See GATT Article XX chapeau.

[5] See, e.g., Appellate Body Report, Colombia — Textiles, paras. 5.71-5.74.

[6] For example, the U.S. and the EU could establish a common framework for carbon intensity disclosure using blockchain tools to establish transparency and consistency in carbon intensity measurement.