In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau
The Coordinating Bureau was originally set up and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute. Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review
The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora
elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series
• Participation and Litigation Rights of Environmental Associations in European, Führ/Roller (eds.), P. Lang, 1991.

Elni Website: elni.org
On the elni website www.ELNI.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.

WTO Compatibility of Border Tax Adjustments as a Means for Promoting Environmental Protection
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Environmental issues are international issues. Many would agree with this statement when thinking of climate change, biodiversity loss and globalised markets. Environmental impacts in particular do not cease at country borders. For this reason the current issue of elni Review (2/2010) focuses on the environmental law of countries outside the EU – especially those considered to be developing or emerging countries. Questions of law arising in those legal spheres are likely to be different in nature, because developments in social and environmental law generally occur more slowly than developments in economic law do.

This issue of elni Review (2/2010) contains valuable insights on this subject, based on the following contributions:

First off, Richard Gutierrez tackles ‘new age’ trade agreements and their possible contribution to toxic trade in his article, examining the legal provisions under the Japanese economic partnership agreements that gave rise to the concerns over toxic waste trade and dumping. He also discusses the corresponding implications, particularly on the implementation of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal by the Southeast Asian countries.

In an article entitled ‘WTO Compatibility of Border Tax Adjustments as a Means for Promoting Environmental Protection’, Rike U. Krämer analyses the rationale behind Border Tax Adjustments, its contribution to a level-playing field, and its legality under WTO law.

‘Intellectual Property Rights, Genetical Resources and Traditional Knowledge: An Approach from the Perspective of Megadiverse Countries’ by Airton Guilherme Berger Filho discusses biodiversity as well as biopiracy issues against the background of intellectual property rights and the rights of the native populations and the local communities regarding their territory, their cultural and environmental goods.

Jimena Murillo Chávarro and Frank Maes provide details on the Andean Community, its legal instruments and a corresponding decision in their article ‘The Legal Nature of the Biodiversity Provisions adopted by the Andean Community’.


Alongside articles covering environmental law issues of developing and emerging countries, this issue of elni Review also deals with three additional issues:


Furthermore, Hanna D. Tolasma looks at the legal instrument of integrated environmental permitting, discussing in the process the integrated approach under the IPPC Directive and recent developments on integrated permitting in the Netherlands.

Finally, we cover recent developments in the law on island protection in China and provide a brief summary of the ELNI-VMR-VVOR congress 2010. The latter addressed the environmental effects of industrial installations the European Directive on Industrial Emissions (IED/current IPPC Directive) and took place in Ghent on 17 September 2010.

Contributions for the next issue of the elni Review are very welcome. Please send contributions to the editors by mid-February 2011.

Nicola Below/Martin Führ
October 2010

European Environmental Law Forum
Kick-off Symposium:

19th and 20th May 2011
in Leipzig, Germany

“Key Challenges and Developments of European Environmental Law”

The German Helmholtz Centre for Environmental Research (UFZ) is organising a European expert symposium to promote exchange in the field of European environmental jurisprudence.

The symposium is divided into two parts. In the first part the key challenges and developments of environmental law will be discussed. There will be presentations on central topics of European environmental law, followed by open debate. In the second part, the situation with regard to the exchange of ideas and information on environmental law amongst experts of this field will be addressed with a view to establishing a European Environmental Law Forum. This forum is to be a common open network and shall encompass regular European conferences.

Please note that this symposium is only open to invited experts.

For more information on the Helmholtz Centre for Environmental Research (UFZ), please visit http://www.ufz.de/
1 Introduction

Even before the United Nations Climate Change Conference in Copenhagen – also known as the 15th Conference of the Parties (COP 15) – failed, a climate protection instrument other than a legally-binding international agreement had been discussed at regional and national level: border tax adjustments (hereafter BTA). Lacking an international agreement, BTAs have been regarded as another option for creating a level playing field between states with an ambitious climate protection regime and states without such regulations. Not only did drafts for a US climate law provide the opportunity for establishing BTAs (not yet enacted)1 such measures were also discussed within the European Union.

Yet, some concerns have been recently expressed about BTAs. Apart from practical questions (e.g. measuring the carbon impact and the tax tariff) legal questions concerning BTAs have been raised, especially the legality of BTAs under World Trade Organisation (WTO) law. While not dealing with the specificities of the applicability of BTAs in greater detail, this article aims to provide a broad overview of the potential of BTAs to promote environmental protection and their compatibility with WTO law. In order to do so, the rationale behind BTAs and the mechanism of achieving a level playing field with this instrument are examined in the following section (2). Subsequently, a definition of BTAs is provided (3). In the fourth chapter the question of the legality of BTAs under WTO law is addressed in a general context (4). A conclusion is drawn at the end of the article (5).

2 The rationale of Border Tax Adjustment measures

BTAs are not a new concept. Their use dates back to the late 18th century and has remained relevant to international negotiations ever since.2 Accordingly, BTAs were used in the negotiation process which led to the General Agreement on Tariffs and Trade (GATT) in 1947 as well as the one which led to the WTO in 1994. What are the reasons for including BTAs in the environmental debate? The two main reasons put forward for drawing upon BTAs in such debate are to create a level playing field and to combat carbon leakage or the creation of so-called ‘carbon havens’ while lacking an international binding agreement. Both reasons are strongly connected to each other. International trade theory assumes that different levels of environmental regulations in several countries lead to different requirements for producers. Consequently, different levels of environmental costs are imposed on the enterprises. As a result a price advantage is created for the enterprises located in countries with less strict environmental regulations.3 Accordingly, enterprises located in a country with high environmental standards can either shift their production process to a country with less stringent standards or lose their share of the international market. Both possibilities result in carbon leakage or the creation of carbon havens as production is shifted to countries with a low level of environmental protection or enterprises producing in countries with low standards can extend their market share. Inevitably, reality is much more complex than this summarising scenario. The likelihood of carbon leakage depends greatly on the environmental regulation in question and the characteristics of the sector.4 However, an international binding agreement establishing a high level of environmental protection would also establish a level playing field.

In general, there are three instruments for preventing competitive disadvantages of this kind and hence also carbon leakage: (1) legally-binding international standards; (2) BTAs: these can establish a level playing field via taxation of imports and exports; and (3) in member states having established an ambitious emission trading scheme another option would be the exclusion of sensitive sectors where the shifting of the production process is more likely from this emission trading scheme. Since the first option cannot always be achieved, as illustrated by the outcome of COP 15, and the last option does not lead to a high standard of environmental protection, BTAs are seen as a possible outcome of this dilemma.

2 It is almost certain that the US congress will not enact a climate bill during 2010, “Climate: Congress down but not out on climate debate next session”, Greenwire, 18 October 2010.
4 J.-C. Hourcade, D. Demaillé, K. Neuhold und M. Sato, Differentiation and Dynamics of EU ETS Industrial Competitiveness Impacts, Climate Strategies 2007, p. 13f.
In the long run, proponents of BTAs defend their use by arguing that they will eventually result in an increase internationally of the environmental regulation level and facilitate an international agreement on environmental standards. However, developing countries have raised strong concerns about BTAs. Before the COP 15 meeting, India and China opposed BTAs and tried to introduce a provision into the draft text preventing the establishment of BTAs, which was supported by many developing countries. The provision reads as follows:

“Developed country Parties shall not resort to any form of unilateral measures including countervailing border measures, against goods and services imported from developing countries on grounds of protection and stabilisation of climate. Such unilateral measures would violate the principles and provisions of the Convention, including, in particular, those related to the principle of common but differentiated responsibilities (Art. 3, paragraph 1); trade and climate change (Art. 3 paragraph 5); and the relationship between mitigation actions of developing countries and provision of financial resources and technology by developed country Parties (Art. 4, Paragraphs 3 and 7).” 6

However, the main output of the COP 15 – the Copenhagen Accord – does not include any provision prohibiting the establishment of BTAs. Overall, because of the lack of legally-binding provisions the Copenhagen Accord has been considered a failure while the question of BTAs has surfaced again as another option for creating a level playing field. The EU Climate Action Commissioner, Connie Hedegaard, still conceives of BTAs as an option for EU climate policy.

But why are developing countries so strongly opposed to BTAs? Three arguments against their use have been tabled:

1. “the use of BCAs [BTAs] is a prima facie violation of the spirit and letter of multilateral trade principles and norms that require equal treatment among equal goods;”
2. “[…] BCAs [BTAs] are a disguised form of protectionism; and
3. “[…] BCAs [BTAs] undermine in practice the principle of common but differentiated responsibilities.” 8

As shall be seen, the first and the second argument cannot generally sustain legal consideration, at least with respect to WTO obligations. The question of differentiated treatment and justice in climate change protection is clearly the most convincing one. However, this specific issue will not be addressed in greater detail in this article, the focus of which is more overarching.

3 The definition of Border Tax Adjustment measures

In the context of WTO and GATT, a commonly referred to definition of BTAs is provided by the OECD. Here, border tax adjustments are understood as:

“any fiscal measures 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)”. 9

To sum up, BTAs consist of two parts: (1) taxes on imports and (2) refund or exemption of taxes for exports. Hence, BTAs implement the destination principle according to which products should be taxed only in the country of consumption. 10 By contrast, following the origin principle, products would be taxed only in the country of production. Applying the destination principle should, in theory, lead to the possibility of every country implementing its own tax regime and concurrently giving rise to the possibility for products from all countries competing in the international trade market on similar competitive terms. Additionally, the destination principle should prevent double taxation of goods or competing advantages through favourable domestic tax regimes.

Border measures can encompass different types of environmental taxes, e.g. carbon taxes, energy taxes or measures in relation to emission trading schemes. 11

4 WTO law and Border Tax Adjustment

The goal of the WTO is to establish international markets through liberalisation, and thereby produce economic growth. Such an opening-up of markets and expansion in the level of economic activity can have an impact on the aim to achieve environmental protection. Five effects or mechanisms have been developed in the literature through which the liberalisation of markets can affect environmental protection: (1) by new products being invented and produced as a result;
(2) by transferring new production technologies across borders; (3) by raising the overall level of economic activity; (4) by changing the structure of a country’s economy; and (5) by affecting the room to manoeuvre of environmental regulatory options. All these mechanisms can have either positive or negative impacts on the level of environmental protection. In the following this paper will concentrate on the last mechanism, i.e. the change of possible policy choices. At 153 members, the WTO has an impressive number of countries, accounting for over 97% of world trade. The question thus arises: Are BTAs in conformity with WTO law and what room to manoeuvre or policy space is left at the regional or national level? Any breach of WTO obligations could be challenged in a dispute settlement procedure and ultimately lead to the imposition of trade sanctions or countervailing duties. Hence, insecurity about legal conformity might have an effect on the policy choice or the investors’ choice. After all, a situation of insecurity can also lead to carbon leakage.

As seen above, the creation of an international level playing field by means of BTAs necessitates the implementation of two measures: (1) tax refunds for exports and (2) tax adjustments on imports. At WTO level BTAs on exports are regulated by the Agreement on Subsidies and Countervailing duties (SCM) while requirements for BTAs on imports are provided in the GATT. The GATT and the SCM have in common that only indirect taxes (e.g. value added taxes) are eligible for BTAs. In contrast, direct taxes – i.e. taxes imposed on the producer and not the product (e.g. corporate tax) – are prohibited by WTO law for tax adjustment. 14

4.1 Refunds for exports

With respect to refunds for exports the crucial question is whether this measure is a prohibited form of subsidy according to WTO law. The WTO requirements for subsidisation are laid down in the SCM. Generally, export subsidies are prohibited (Art. 3 SCM); however, Footnote 1 to the SCM states:

“In accordance with the provisions of Art. XVI of GATT 1994 (Note to Art. XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess, shall not be deemed to be a subsidy.”

Accordingly, BTAs are permitted under the SCM as long as they are borne by the ‘like product’ (1), fulfill the provisions of Annexes I-III (2), and do not go beyond the scope of the national tax in question (3).

(1) Taxes imposed directly on a final product are surely ‘borne by’ it and hence are justified for adjustment at the border. With respect to taxes imposed on inputs to a domestic product such as taxes on energy, materials or transport the answer of whether such taxes are ‘borne by’ the like product is less clear. Thus the question here is whether it is possible to refund environmental taxes at the border, e.g., the amount of emission allowances consumed in the production process of the product. For decades there has been controversy in the corresponding literature about the formulation ‘like product’; and not only in the context of BTAs. From identical Panel and Appellate Body decisions, contrary conclusions have been drawn. It is agreed that like products are products alike in their overall characteristics, e.g., a tax on like fuels. Yet it is still disputed whether it is possible to treat products differently according to their impact on the environment in the production process, e.g., a product produced with green power or with electricity generated by nuclear power. Consequently, at the core of the ‘like product’ discussion is the product/process distinction. Due to the well-known Tuna-Dolphin and Shrimp cases the inclusion of requirements for the production process in unilateral regulations has been established as discriminatory under WTO law. However, this was not the central issue of the cases above. Instead, the applicability of Art. III GATT was questioned for processes, leading to the conclusion of the panel that such processes are not included in Art. III GATT but rather are handled in Art. IX GATT. As argued by Howse and Reagan, an interpretation of Art. III GATT of this kind would lead to the exclusion of some protectionist measures from the coverage of WTO law. The question remains as to whether ‘like products’ are only those products which are alike in their physical properties, irrespective of whether they

differ in their production process. Generally ‘like’ means:

“(h)aving the same characteristics or qualities as some other... thing; of approximately identical shape, size, etc., with something else; similar.”

In the asbestos case the Appellate Body further states that no approach will be appropriate for all cases; instead a decision has to be made on a case-by-case basis. Four criteria are set out to assist the task of sorting and examining the relevant evidence:

– the physical properties, nature and quality of the products;
– the end-uses of the products;
– consumer tastes and habits; and
– the tariff classification of the products.

From this list it is not clear whether different production processes can be used to distinguish products. Here, the gateway is the consumer taste. Referring to the Tuna-Dolphin case, Hoerner and Mueller state that due to the public awareness of the dolphin-tuna connection in the US, dolphin-safe tuna and tuna which involved the capture and killing of dolphins were not regarded as “like products” by consumers. For Goh it is questionable whether the consumer differentiates “on the basis of embodied taxes or energy”. But Goh’s question is not posed correctly. It would be more accurate to ask: Does the consumer differentiate between products where the price of carbon used in its production is included and products where it is not included? Consumer awareness of climate change is increasing worldwide; therefore it can be assumed that they increasingly differentiate between these two types of products. As a result, taxes accrued in the production process could be included in BTAs.

(2) The second requirement of Footnote 1 of the SCM is the fulfilment of the provisions laid down in the Annexes. Of Annexes I–III, only Annex I (g) and (h) are relevant in the case of BTAs. Since

Annex I (g) and (h) SCM establish different requirements, the question to be addressed is whether indirect environmental taxes fall within category (g) or (h). Environmental taxes will often be specific taxes either on inputs or processes. Generally, such taxes fall under Annex I (g) because they are not prior stage cumulative indirect taxes as required by Annex I (h) SCM. As a consequence, it would be unclear whether taxes on substances not physically incorporated in the final product are eligible for border adjustments since the wording of Annex I (g) remains silent on this question.

However, it is stated that environmental taxes generally “should be subject to the same rules as prior stage cumulative taxes as the same rationale seems to apply, namely that it is very difficult, if not impossible, to calculate the amount of prior stage tax (whether cumulative or specific) which a particular final product bears”. Therefore Annex I (h) would be applicable. Following this line of argumentation, adjustments for taxes not physically incorporated in the product, sometimes referred to as ‘taxes occultes’ or ‘hidden taxes’ (e.g. taxes on transport), would fall under Annex I (h) and would be eligible. Because Annex I (h), which allows tax remission for ‘inputs’, has to be read together with Footnote 61 of Annex II, which specifies inputs as inputs physically incorporated as well as energy, fuels and oil “used in the production process” and catalysts which are “consumed in the course of their use to obtain” the exported product.

However, this clear wording was introduced in the SCM through “a gentleman’s agreement” in the Uruguay Round negotiations. The parties came to the understanding “that the reference to taxes on energy inputs was to be solely for the benefit of a limited number of countries which still apply a system of cumulative indirect taxes, and would not be used by other countries, at least with respect to carbon taxes”. Therefore it is argued that the definition of inputs is not generally applicable but rather only applies to the small number of countries referred to in the gentleman’s agreement. Interpreting the wording of Annex I (h) together with Footnote 61 of Annex II

19 European Communities, supra note 18, para 101.
20 European Communities, supra note 18.
23 The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.
24 The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are

levered on inputs that are consumed in the production of the exported product (making normal allowance for waste). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II. See Demaret and Stewardson, supra note 25, p. 23.
25 Demaret and Stewardson, Border Tax Adjustments under GATT and EC Law and General Implications for Environmental Taxes, p. 21f.
26 Prior stage cumulative taxes are defined in Footnote 58 of the SCM: “Cumulative” indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production. The turnover tax system common in the EC before the change to VAT was an example for such a cumulative indirect tax. See Demaret and Stewardson, supra note 25, p. 22.
27 Hoerner and Müller, Carbon Taxes for Climate Protection in a Competitive World: p. 34.
28 Demaret and Stewardson, supra note 25, p. 23.
29 Demaret and Stewardson, supra note 25, p. 30.
in accordance with the rules of interpretation laid down in the Vienna Convention of the Law of the treaties (VCLT), especially in Art. 31, it can be concluded that the quite unambiguous wording cannot be confined, as intended by the party, as a reference to a small number of member states only.30 Hence, the footnote is generally applicable to all member states, which leads to the possibility of taxes on substances not physically incorporated in the final product (e.g. energy) being adjusted.

In summary, to refund the amount of taxes paid by the producer during the production of the product is eligible according to WTO law if the product is exported and (3) as long as the refund does not go beyond the scope of the domestic tax in question.

4.2 Taxes on imports

Taxes on imports are regulated by the GATT. The first question is whether a BTA is a custom duty, according to Art. II: 1 GATT - in which case a higher level of custom duties would be prohibited - or as a charge ‘equivalent to internal tax’ generally permitted in Art. II: 2a GATT. For the distinction between charges or custom duties the Panel, upheld by the Appellate Body, stated in the case of China – Measures Affecting Imports of Automobile Parts that:

“the first sentence of Art. II:1(b) contains a ‘strict and precise temporal element’ and that, if the obligation to pay a charge does not accrue based on the product at the moment of its importation, such charge cannot be an ‘ordinary customs duty’”.

The criterion for the distinction is, therefore, the ‘taxable event’. Thus it must be determined whether the condition for the application of BTAs is the importation of products or rather the use of those products within the destination country. The last is true for BTAs. BTAs are related to national taxes and the taxable event is thus the use of the product within the destination country.32

By qualifying BTAs as charges, two GATT provisions are of importance: Art. II.2 (a)33 and Art. III.2.34 GATT. The latter contains the principle of non-discrimination. According to this principle, member states shall not tax products, directly or indirectly, in excess of those applied, directly or indirectly, to like domestic products. In short, like products have to be taxed alike. However, as discussed above, opinions about the definition of the term ‘like products’ differ with regard to the question of whether physically identical products produced differently are ‘like products’.

Art. II.2 (a) distinguishes between two charges that could be imposed on imported products: (1) charges imposed on the imported product in respect of the like domestic product and (2) charges imposed on the imported product in respect of an article from which the imported product has been manufactured or produced in whole or in part. The first option could be applicable, for instance, to “charges imposed on domestic fuels and imported ‘like’ fuels.”35 The meaning of the second option, especially the term ‘article’ and the possibilities or restrictions that arise thereof are much less clear. Likewise, it is questionable whether Art. II.2 only restricts or allows the adjustment of taxes of inputs physically incorporated in the final product. Pitschas states that the wording of Art. II.2 – ‘from which’ and not ‘with the help of which’ – excludes the adjustment of taxes not physically included in the product, such as energy taxes.36

The analysis of the litigation provides evidence that this statement is open to criticism. In the superfund case37 the panel dealt with complaints about the US Superfund Act, which imposed a tax on particular chemicals as well as on imported products which were produced using this chemical. The panel held that the tax on the imported product was eligible for border tax adjustments.

“The tax on certain imported substances [products] equals in principle the amount of the tax which would have been imposed under the Superfund Act on the chemicals used as materials in the manufacture or production of the imported substance if these chemicals had been sold in the United States for use in the manufacture or production of the imported substance.”38

This suggests that inputs included in the production process could also be eligible for BTAs.39

33 2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: (a) 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.
34 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.
38 United States, supra note 37, para 5.2.8.
39 See also Biermann und Brohm, Implementing the Kyoto Protocol without the USA: The Strategic Role of Energy Tax Adjustments at the border: p. 295. Veel comes to the conclusion that there might be a potential conflict
4.3 Exceptions in Art. XX GATT

Additionally, violation of the GATT rules can be justified under the exception clause, i.e. Art. XX GATT. Since Art. XX GATT is discussed broadly in the corresponding literature, only the main requirements are laid down here. Art. XX GATT is only applicable if the measure is impermissible under other GATT provisions. Assuming that BTAs are not permissible under GATT Art. III:2 as a means of environmental protection, such measures may be justified pursuant to Art. XX (b) or (g). Therefore BTAs must either be “necessary to protect human, animal or plant life or health” (Art. XX (b) GATT) or relate “to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” (Art. XX (g) GATT). Additionally, the chapeau of Art. XX, requires that BTAs “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.” All this depends heavily on the specificity of the tax that is adjusted at the border. In particular, the necessity of the tax and the extent to which the tax supports one of the policy goals must be analysed.

The SCM does not contain an exception clause. Thus by assuming that BTAs are not permissible under the SCM agreement, a justification under an exception clause would not be possible at first glance. Despite any reference to the exception clause of Art. XX GATT, analogue Art. XX GATT is still applicable. One argument for an analogue application of Art. XX GATT is the history of the SCM. Until the foundation of the WTO in 1994 the subsidy regulations were part of the GATT, Art. XVI, VI and III:8 GATT, all of which are still in force. The SCM only interprets and clarifies these GATT articles. Therefore the GATT exceptions are applicable to the SCM.

In conclusion adjustment measures of imports and exports could be justified with regard to Art. XX GATT, if they are aimed at protecting the environment.

5 Conclusion

The scope for BTAs in policy is generally not reduced by the WTO law. However, for any particular BTA measure another assessment of WTO rules needs to be carried out. Furthermore, implementation problems also arise. As EU Climate Action Commissioner Connie Hedegaard has stated that it would be ‘extremely difficult’ to create a BTA system without placing a ‘huge bureaucratic burden’ on industries.43 Besides these practical questions, BTAs and their function of promoting environmental protection and their compatibility with WTO law are not an exceptional case in the trade and environment debate. Beyond their permissibility under the SCM, the legal debate on BTAs exemplifies typical questions that are repeatedly discussed in the trade and environment debate. Alongside the scope of Art. XX GATT, recurrent questions are the products/process distinction and the more general question of how to define ‘like products’. These questions hint at the more general issue of the relationship between national or regional measures to protect the environment and WTO law.

However, it needs to be emphasised that by introducing a BTA system to enhance environmental protection another vitally important question that needs to be addressed besides WTO compatibility is the question of justice, especially regarding developing countries.


Environmental Law and Policy at the Turn to the 21st Century

Umweltrecht und -politik an der Wende zum 21. Jahrhundert

Gedenkschrift / Liber amicorum Betty Gebers

Thomas Ormond/Martin Fuhr/Régine Barth (eds.)

The present environmental law in Europe has been essentially produced in the last 20 years, and current environmental policy is still based on the courses set in this time. One of the actors in this process was the environmental lawyer Betty Gebers, until her premature death in September 2004. Her life achievements but also the current status in the many fields where she was active are examined in this book. The combination of retrospective and present-day analysis forms also the basis of an outlook how environmental law and policy in Europe could further develop in the next decades of this century.

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Editors in charge of the current issue: Martin Führ and Nicola Below
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We invite authors to submit manuscripts to the Editors as files by email using an IBM-compatible word processing system.

The elni Review is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): € 52; private users, students, libraries: € 30. Non-members can order single issues at a fee of € 20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.

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If you want to join the Environmental Law Network International, please use the membership form on our website: [http://www.elfi.org](http://www.elfi.org) or send this form to the elni Coordinating Bureau, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is € 52 per year for commercial users (consultants, law firms, government administration) and € 21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

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The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available to the public.

The institute’s mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development. The institute’s activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:
The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practice-oriented academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The Institute for Environmental Studies and Applied Research (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The institute fulfills its assignments particularly by:
• Undertaking projects in developing countries
• Realization of seminars in the areas of environment and development
• Research for European Institutions
• Advisory service for companies and know-how-transfer

Main areas of research
• European environmental policy
• Research on implementation of European law
• Effectiveness of legal and economic instruments
• European governance
• Environmental advice in developing countries
• Advice for legislation and institution development
• Know-how-transfer

• Companies and environment
• Environmental management
• Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo economicus institutionalists, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover
• Product policy/REACH
• Land use strategies
• Role of standardization bodies
• Biodiversity and nature conversation
• Water and energy management
• Electronic public participation
• Economic opportunities deriving from environmental legislation
• Self responsibility

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elní

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elní) in 1990 to promote international communication and cooperation worldwide. Since then, elní has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elní is a registered non-profit association under German Law.

elní coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elní Review

The elní Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elní encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elní Conferences and Fora

elní conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elní fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series


elní Website: elni.org

On the elní website www.elni.org one finds news of the network and an index of articles. It also indicates elní activities and informs about new publications. Internship possibilities are also published online.

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