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and their Possible Contribution to Toxic Trade
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Editorial

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 *Aírton 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'.

In 'Convergence with the Water Framework Directive in the Context of the European Neighbourhood Policy', *Claire Dupont* and *Gretta Goldenman* look at the differences between approximation and convergence processes in the light of EU water legislation, drawing on interesting practical experiences gathered in Moldova and Georgia.

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

From a broader perspective *Stefan Scheuer* provides a critical analysis of the repercussions of the EU Water Framework Directive in 'The Phase-Out of Hazardous Substances in Troubled Waters'.

Furthermore, *Hanna D. Tolsma* 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/

WTO Compatibility of Border Tax Adjustments as a Means for Promoting Environmental Protection

Rike U. Krämer

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[1] (not yet enacted)[2] 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.[3] 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.[4] 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.[5] 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.

1 For an overview of the drafts and their WTO compatibility, see H. van Asselt, T. Brewer and M. Mehling, Addressing Leakage and Competitiveness in US Climate Policy: Issues Concerning Border Adjustment Measures, Climate Strategies Working Paper 2009.

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.

3 P. Demaret and R. Stewardson, Border Tax Adjustments under GATT and EC Law and General Implications for Environmental Taxes, Journal of World Trade 1994, pp. 5-65: 7.

4 J.-C. Hourcade, D. Demaill, K. Neuhoff und M. Sato, Differentiation and Dynamics of EU ETS Industrial Competitiveness Impacts, Climate Strategies 2007, p. 13f.

5 For example, for CO_2 emissions see WTO UNEP Report, Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization, 2009: p. 98.

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.[7]

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;

6 Emphasis added. See TWN Bonn News Update "Unilateral trade measures to protect climate change violate climate treaty—say developing countries," August 13, 2009, http://www.twnside.org.sg/title2/climate/bonn.news.4.htm [last accessed on 22.08.2010].

7 Euractiv from 27.05.2010, Hedegaard backtracks on EU climate goals, http://www.euractiv.com/en/climate-environment/hedegaard-backtracks-eu-climate-goals-news-494533 [last accessed on 22.08.2010].

8 Bridges Weekly Trade News Digest, Volume 13, Number 39, from 11th November 2009, Copenhagen Countdown: Border Carbon Adjustment, http://ictsd.org/i/news/bridgesweekly/59235/ [last accessed on 30.08.2010].

9 OECD definition cf GATT Working Party (1970), para 4.

10 Demaret und Stewardson, Border Tax Adjustments under GATT and EC Law and General Implications for Environmental Taxes: p. 6.

11 None of these possibilities arre analysed in depth in this paper. The paper addresses the general questions regarding BTAs.

(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.[12] All these mechanisms can have either positive or negative impacts on the level of environmental protection.[13]

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), fulfil 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[15] the inclusion of requirements for the production process in unilateral regulations has been established as discriminatory under WTO law.[16] 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 Reagon, an interpretation of Art. III GATT of this kind would lead to the exclusion of some protectionist measures from the coverage of WTO law.[17] The question remains as to whether 'like products' are only those products which are alike in their physical properties, irrespective of whether they

12 M. Stilwell, Trade and Environment in the Context of Sustainable Development, in: Gehring/Cordonier Segger (Hrsg.), Sustainable Development in World Trade Law, 2005, pp. 33-72 (p. 37) UNEP, Reference Manual for the Integrated Assessment of Trade-Related Policies, 2001: p. 26 et seq.

13 Stilwell, Trade and Environment in the Context of Sustainable Development, : p. 37 UNEP, Reference Manual for the Integrated Assessment of Trade-Related Policies: p. 26 et seq.

14 E.g. C. Pitschas, GATT/WTO Rules for Border Tax Adjustment and the Proposed European Directive Introducing a Tax on Carbon Dioxide Emissions and Energy, Georgia Journal of International and Comparative Law 1995, pp. 479-500 (p. 485).

15 United States Restrictions on Imports of Tuna (Tuna I), Report of the Panel, 3 September 1991, DS21/R-39S/155 (not adopted); United States-Restrictions on Imports of Tuna (Tuna II), Report of the Panel, 16 June 1994, DS 29/R (not adopted); United States Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, 15 May 1998, WT/DS58/R.

16 R. Howse und D. Reagon, The Product/Process Distinction - An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy, European Journal of International Law 2000, pp. 249-289 (p.251f). For an overview of the arguments brought forward against the inclusion of the production process see C. Tietje, Process-related Measures and Global Environmental Governance, in: Winter (Hrsg.), Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law, 2006, pp. 254-274 (p. 257).

17 Howse und Reagon, The Product/Process Distinction - An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy: p. 256f.

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.*"[18]

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.[19] 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.[20]

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.[21] For Goh it is questionable whether the consumer differentiates "*on the basis of embodied taxes or energy*"[22]. 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)[23] and (h)[24] SCM 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.[25] Generally, such taxes fall under Annex I (g) because they are not prior stage cumulative indirect taxes[26] as required by Annex I (h) SCM.[27] 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*"[28]. 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*"[29]. 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

18 European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appealte Boda, 12 March 2001, WT/DS135/AB/R, para 90.

19 European Communities, *supra* note 18, para 101.

20 European Communities, *supra* note 18.

21 A. Hoerner und F. Müller, Carbon Taxes for Climate Protection in a Competitive World, A Paper Prepared for the Swiss Federal Office for Foreign Economic Affairs 1996, pp. 1-47 (p. 29).

22 G. Goh, The World Trade Organization, Kyoto and Energy Adjustments at the Border, Journal of World Trade 2004, pp. 395-423 (p. 408).

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 levied 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.

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'*".[31]

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 case[37] 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]

30 F. Biermann und R. Brohm, Implementing the Kyoto Protocol without the USA: The Strategic Role of Energy Tax Adjustments at the border, Climate Policy 2005, pp. 289-302 (p. 296f).

31 Report of the Appellate Body, WT/DS339/AB/R, para 143.

32 Demaret and Stewardson, *supra* note 25, p. 17f. WTO UNEP Report, Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization: p. 103.

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.

35 WTO UNEP Report, Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization: p. 104. For the debate on "like products" see above.

36 Pitschas, GATT/WTO Rules for Border Tax Adjustement and the Proposed Europena Directive Introducing a Tax on Carbon Dioxide Emissions and Energy: p. 493.

37 United States - Taxes on Petroleum and Certain Imported Substances [Superfund], Report of the GATT Panel, 17 June 1987, BISD 34S/136.

38 United States, *supra* note 37, para 5.2.8.

39 See also Biermann und Brohm, Implementing the Kyoto Protocoll 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.[40] 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).[41] 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[42]. 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.

P.-E. Veel, Carbon Tariffs and the WTO: An Evaluation of Feasible Policies, Journal of International Economic Law 2009.

40 See e.g. E. Vranes, Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory, 2009: p. 256 ff.

41 N. Meyer-Ohlendorf und C. Gerstetter, Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?, Dialogue on Globalization 2009: p. 36f; J. Pauwelyn, U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law, Working Paper Nicholas Institute for Environmental Policy Solutions 2007: p. 33 ff.

42 E.g. R. Ismer und K. Neuhoff, Border Tax Adjustment: A Feasible Way to Support Stringent Emission Trading, European Journal of Law and Economics 2007, pp. 137-164.

43 Euractiv vom 27.05.2010, Hedegaard backtracks on EU climate goals, http://www.euractiv.com/en/climate-environment/hedegaard-backtracks-eu-climate-goals-news-494533 [last accessed on 22.08.2010].

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sofia

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 oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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elni

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 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.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing 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 researches, 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

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
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