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CAN THE EU CARBON TAX THE U.S. IN RETALIATION?

Annum Rashedi

President-elect Trump emphasized pulling the United States of America (“U.S.”) out of the United Nations Framework Convention on Climate Change Paris Climate Agreement[hereinafter Paris Agreement]¹, despite the executive agreement ratification by President Obama earlier this year.² In fact, Trump called for a cease of all U.S. tax dollars payments to U.N. global climate change programs and a withdrawal from the Paris Agreement in his first 100 days in office.³ Contrary to Trump’s intentions, Article 28 of the Paris Agreement stipulates that a party which has ratified, as the U.S. did on September 3rd, 2016, may not withdraw from the Paris Agreement before four years.⁴ Article 28 was artfully designed to protect against potential withdrawal of support by changing Heads of States. In response to Trump, current French Presidential-nominee Sarkozy said he would demand France and the European Union (“EU”) place a one to three percent carbon tax at its border for all products coming from the U.S.⁵ The purpose of this paper is to determine whether the proposed carbon tax would be innovative, and if implemented by the EU, would it be a discriminatory measure for the carbon tax to solely be on U.S. imports.

A “NOVEL” CONCEPT

The notion of a carbon tax is not novel unless it is used as a trade sanction. In practice, a carbon tax would be considered a type of tariff or a border tax adjustment (“BTA”).⁶ Under the Kyoto Protocol talks in December of 2006, John Hontelez, Secretary General of the European Environmental Bureau stated, “[BTAs] might be the answer . . . EU firms would be protected against unfair, carbon-careless competition from outside.”⁷ In contrast, the EU Trade Commissioner Peter Mandelson hinted that a “specific ‘climate’ tariff on countries that have not ratified Kyoto . . . would be highly problematic under current [WTO] rules, and almost impossible to implement in practice.”⁸ Here, however, the Paris Agreement, unlike the Kyoto Protocol, has been ratified by the U.S. and the WTO rules are ambiguous when it comes to BTAs.⁹

BTAs are permissible under GATT’s Article III, “National Treatment” clause which allows for taxation on imports¹⁰ so long as the tax imposed on imported goods is no greater than the tax established for similar domestic products.¹¹ Nonetheless, such a BTA may not be permissible under GATT’s Article I, “Most Favored Nation” clause because it does not permit taxation to be levied on one state and not others, equally.¹² Thus, a carbon tax on U.S. imports could be framed as a WTO permissible ‘border adjustment’ of a domestic carbon tax but its success depends on other factors. Essentially, the EU would be using this BTA as a method of retaliation, a trade sanction for leaving the Paris

Agreement after ratification, in order to protect the environment, incentivize “greening,” and make a statement to demonstrate the importance of the Paris Agreement.

ARGUMENTS BEFORE THE PANEL

Although BTAs are designed with the intent of maintaining economic competitiveness, the carbon tax on U.S. imports could be non-discriminatory if the EU could successfully argue that it falls under one of the exemptions of GATT Article XX. Specifically, the EU would likely argue that the carbon tax falls under two exemptions to the GATT, Article XX (b) “for measures necessary to protect human, animal, or plant, life or health”¹³ and GATT, Article XX (g) “for measures relating to conservation of exhaustible natural resources”¹⁴ because such a carbon tax would protect human, animal, and plant, life and health while endeavoring to cut CO2 emissions, slowing and eventually reversing climate change.

In response, the U.S. would argue an Article I:1 claim because the EU is clearly discriminating only against the U.S. and not other WTO members.¹⁵ Additionally, the U.S. could argue that the carbon tax does not fall under the exemptions embodied in GATT Article XX because the carbon tax discriminates against its imports as compared to EU domestic products or imported goods from other countries. Moreover, the WTO stands by two non-discrimination principles that stipulate a member shall not discriminate, (a) between “like” products from different trading partners¹⁶ and (b) between its own and like foreign products.¹⁷ These two principles safeguard the world’s liberal free trading system from discriminatory measures, especially protectionist measures. Here, the proposed carbon tax would cover all U.S. imports entering the EU, so the definition of “like” products would have to be greatly expanded to include carbon footprints.

The EU could advance the argument that any product emitting one ton of carbon would be considered a “like product” akin to any other product similarly emitting one ton of carbon.¹⁸ When it comes to BTAs and “like” products, WTO jurisprudence has consistently applied the recommendations of the Working Party on BTAs¹⁹ which determines “likeness” by (1) the product’s end-uses, (2) consumers’ tastes and habits, and (3) the product’s properties, nature and quality. A uniform carbon tax affecting all U.S. imports into the EU would not be reasonably attributed “like” product(s) status even if the policy objectives for such a

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tax were considered legitimate environmental policy goals to address climate change.²⁰

While a carbon tax may be a successful form of retaliation to the U.S. abandoning the Paris Agreement, it may not be the most efficient use of a carbon tax since this tax would not comply with the EU's international trade obligations under the WTO. There is no doubt that such a tax would greatly affect the U.S. in its trade and economy due to its close trading relationship with the EU. The U.S. greatest concern would be leakage — carbon-intensive industries being encouraged to move out of the U.S. to countries where they will not be subjected to such a carbon tax — as this would be damaging to the U.S. economy.²¹ While, the EU could have a short-term gain, both economies would suffer long-term, and the ultimate goal of reducing greenhouse gas emissions would be undermined. A successful carbon tax does not aim to discriminate or openly act as a form of retaliation.²² For example, if the EU levied carbon taxes on all steel manufacturers, imports and exports alike, it would be

non-discriminatory. The WTO would not likely find discrimination where a carbon tax is structured to follow domestic climate policy objectives, and does not discriminate in favor of domestic producers or favor imports from certain countries over others.²³

Nonetheless, the chances of such a carbon tax surviving a WTO panel is unlikely. The EU could not successfully impose a carbon tax only on U.S. imports because such a carbon tax would be openly discriminatory and obviously targeted at one trading partner. The EU would have to narrow the application of the carbon tax to be levied on certain products made under certain conditions or lacking sustainable or “green” elements. Further such a carbon tax would have to equally apply to all imports of that product, not only U.S. products being imported. The WTO aims to prevent discriminatory measures that restrict the flow of trade, such a carbon tax while implemented for the greater good, combatting climate change, nevertheless, would ultimately fail.



ENDNOTES

¹ See Paris Climate Agreement to the United Nations Framework Convention on Climate Change [UNFCCC], Conference of the Parties, Rep. on its Twenty-First Sess. Annex, Art. 2, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> [Hereinafter Paris Agreement]; see also Paul Reynolds, *Kyoto: Why did the US pull out?*, BBCNews (Mar. 30, 2001, 9:21AM), <http://news.bbc.co.uk/2/hi/america/1248757.stm>; Avaneesh Pandey, *Donald Trump Wants To 'Cancel' The Paris Climate Deal — Here's How He Could Do It*, IBTIMES (Nov. 9, 2016, 6:46 AM), <http://www.ibtimes.com/donald-trump-wants-cancel-paris-climate-deal-heres-how-he-could-do-it-2444026> (withdrawing from the Paris Agreement would likely cause other countries to follow suit and “that global emissions of greenhouse gas, which were projected to keep rising even if all the signatories to the Paris deal stuck to their pledges, would continue to skyrocket unabated, all but ensuring that the target of keeping the rise in average global temperatures “well below” 2 degrees Celsius (3.6 degrees Fahrenheit) above the pre-industrial levels is not met.”).

² Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITEHOUSE.GOV (Sept. 3, 2016, 10:41 AM), <https://www.whitehouse.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement>.

³ *An America First Energy Plan*, DONALDJTRUMP.COM (May 26, 2016), <https://www.donaldjtrump.com/press-releases/an-america-first-energy-plan>.

⁴ Paris Agreement, *supra* note 1, art. 28 (“(1) At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depository [and] (2) Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depository of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.”).

⁵ Brian Love, *I'll tax U.S. goods if Trump reneges on trade deals, says France's Sarkozy*, REUTERS, (Nov. 15, 2016, 9:31AM), <http://www.reuters.com/article/us-france-election-idUSKBN13A1RO> (referencing Sarkozy, former French President, threatening a 1-3% carbon tax on all U.S. imports).

⁶ U.N. Env't Programme & the WTO, Trade and Climate Change, WTO Doc. DTI/1188/GE ii, xviii-xix, 100 (2009), https://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf

⁷ John Hontelez, *Viewpoint*, BBCNEWS (Apr. 5, 2007), <http://news.bbc.co.uk/2/hi/science/nature/6524331.stm>

⁸ *Id.*

⁹ *Obama Criticizes Border Tax Adjustments in House Climate Bill*, 13 BRIDGES 24, INT'L CTR. FOR TRADE & SUSTAINABLE DEV., (July 1, 2009) <http://www.ictsd.org/bridges-news/bridges/news/obama-criticises-border-tax-adjustments-in-house-climate-bill>.

¹⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (amended by General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Annex 1A, 33 I.L.M. 1154 (1994)) [hereinafter GATT].

¹¹ *Id.* art. III:2 (“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall apply internal taxes . . . to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”); *id.* art. III:1 (providing that internal taxes “should not be applied to imported or domestic products so as to afford protection to domestic production.”); *id.* art. XVI app. (“The exemption of an exported product from duties or taxes born by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed a subsidy.”).

¹² *Id.* art. I.

¹³ See *id.* art. XX(b) (recognizing that the word “necessary” in the article holds a higher threshold and would be more difficult to bring a successful claim).

¹⁴ *Id.* art. XX (g).

¹⁵ *Id.* art. I:1.

¹⁶ *Id.* art. I (giving them equally “most-favoured-nation” treatment).

¹⁷ *Id.* art. III (giving them “national treatment”).

¹⁸ See Daniel McNamee, *Climate Change, the Kyoto Protocol, and the World Trade Organization: Challenges and Conflicts*, SUSTAINABLE DEV. L. & POL'Y 41, Winter 2006, 29, 31 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1484&context=sdlp>.

¹⁹ GATT Working Party on Border Tax Adjustments, *Report of the Working Party on Border Tax Adjustments*, L/3464 1, 5 (Dec. 2, 1970), https://www.wto.org/gatt_docs/English/SULPDF/90840088.pdf.

²⁰ See Sanford Gaines, *The WTO's Reading of the Ga Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L L. 739, 843, 852 (2001) (discussing the legitimacy of PPMs and the “just say no” attitude against PPMs by most WTO members) <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1307&context=jil>; see also, Report of the Panel, *United States — Taxes on Automobiles*, DS31/R (Oct. 11, 1994), (shifting away from PPM to likeness tests look at policy objectives).

²¹ Jennifer Hillman, *Who's Afraid of the WTO?*, GERMAN MARSHALL FUND 3 (July 2013), http://www.gmfus.org/sites/default/files/files/1374767060Hillman_CarbonTaxes_Jun13_web.pdf.

²² *Id.* at 1, 3.

²³ *Id.* at 1 (“[A] non-discriminatory tax enacted in good faith to address climate change should pass muster with the WTO.”).