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### Climate Change, the Kyoto Protocol, and the World Trade Organization: Challenges and Conflicts

Daniel McNamee


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# CLIMATE CHANGE, THE KYOTO PROTOCOL, AND THE WORLD TRADE ORGANIZATION:

## CHALLENGES AND CONFLICTS

by Daniel McNamee\*

### INTRODUCTION

As the eyes of the environmental community turned to Montreal last November in the expectation, or perhaps faint hope, of a stronger Kyoto Protocol (“Protocol”) capable of addressing climate change beyond 2012, the question again arose as to whether a system with stronger economic enforcement mechanisms would be legally viable under the current international economic system. Although the Protocol has yet to conflict with the international rules of the World Trade Organization (“WTO”), critics note that such disputes may be inevitable.<sup>1</sup>

This article seeks to address one possible domestic step that State Parties to the Kyoto Protocol may take to reduce emissions, the additional measure which must be taken to address the international competitiveness of the effected industries, and the compatibility of these measures with WTO obligations. In particular, the article will address the use of a tax based on the amount of carbon or energy used during the production process. While such a tax may effectively reduce harmful emissions, it will also increase costs for domestic industry, thereby reducing international competitiveness. Therefore, governments may seek to implement a border tax adjustment in order to maintain the international competitiveness of domestic industry. Both measures, however, present potential conflicts with the obligations of WTO members to maintain free and non-discriminatory international trade. While the WTO case law regarding these issues provides only minimal guidance, such conflicts will inevitably be placed before the WTO’s Dispute Settlement Body. The outcome of such conflicts will have enormous ramifications for national and international climate change policy. As such, this article will focus on the challenges of implementing an energy or carbon tax in light of WTO regulations, and will argue that a multilateral tax agreement between Member States may provide a more stable foundation for environmentally conscious measures implicating WTO obligations.

### LEGAL FRAMEWORK OF THE KYOTO PROTOCOL AND THE WTO

The Kyoto Protocol is an international agreement on climate change, whereby industrialized nations and nations with economies in transition (together called “Annex I” countries), have agreed to reduce or restrict their greenhouse gas (“GHG”) emissions. Article 2 of the Kyoto Protocol calls on Annex I States to implement policies, including those concerned with tax structures, which will address sustainable development and GHG emissions.<sup>2</sup> State Parties should implement such policies

in a manner which will minimize adverse effects on the economy and international trade.<sup>3</sup> The Protocol, therefore, addresses both the reduction of GHG emissions and the sustained health of the international economy.

The WTO is an international economic organization comprised of 150 member governments that addresses trade rules and disputes between member nations. The WTO is responsible for administering various trade agreements, including the General Agreement on Tariffs and Trade (“GATT”), a multilateral agreement to encourage free trade among nations by reducing trade barriers.

The Preamble of the Agreement Establishing the WTO calls for an expansion of global trade “in accordance with the objective of sustainable development” as well as the protection and preservation of the environment.<sup>4</sup> Despite this rhetorical recognition of environmental objectives, such measures have consistently been

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found to violate the principles of free and non-discriminatory trade. Fundamentally, Article I of the GATT requires that any trade opportunities extended to one Member State must be extended to all Member States.<sup>5</sup> This Most Favored Nation (“MFN”) requirement governs the relationships between all Member States. Article II of the GATT provides that parties have the right to impose a charge on any product “from which the imported product has been manufactured in whole or in part” if the tax is consistent with other articles.<sup>6</sup> Article III of the GATT, or the national treatment provision, further requires that Member States afford equal treatment to domestic and imported products.<sup>7</sup>

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Environmental regulations imposed by a Member State of the WTO are often challenged under the MFN or national treatment provisions.<sup>8</sup> Article XX of the GATT provides exceptions to these obligations by allowing for the implementation of measures “necessary to protect human, animal or plant life or health” or “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”<sup>9</sup> WTO panels and Appellate Bodies have, however, interpreted the General Exceptions of Article XX extremely narrowly and have ruled that the great majority of domestic measures are not acceptable under this Article.

### **ENERGY TAXES AND BORDER TAX ADJUSTMENTS: THE HYPOTHETICAL EUROPEAN UNION EXPERIENCE**

#### **THE HYPOTHETICAL MEASURE**

The European Union, in an attempt to meet more stringent post-Kyoto reductions that could not be achieved through less controversial measures, implements a significant energy tax on all domestic industries. The domestic tax is complemented by an additional border tax, intended to protect the environmental aims of the domestic tax on all products that are similarly produced in the EU and imported from industrial states.<sup>10</sup>

#### **ENERGY TAXES AND BORDER TAX ADJUSTMENTS GENERALLY**

The implementation of an energy tax by the EU will facilitate emissions reductions by increasing the cost of energy needed to manufacture products.<sup>11</sup> Increased costs will result in decreased competitiveness for European producers as they will either internalize the costs or pass them on to consumers.<sup>12</sup> These producers will be effectively shut out from foreign markets, such as the United States, where no such tax exists, and will be undercut in their home market by imported products.<sup>13</sup> European producers will thus have an incentive to employ more efficient practices that will, in turn, reduce the overall emission of GHGs.

Numerous European countries currently employ energy or carbon taxes that have greatly increased energy prices for European countries in relation to the prices found in the United States.<sup>14</sup> These same countries, however, have exempted energy intensive industries from these taxes in order to maintain international competitiveness.<sup>15</sup> Although these exemptions thwart domestic emissions reductions, price differentials in tax and non-tax countries may result in an industry migration to non-tax states with no actual emissions reductions.<sup>16</sup>

Such exemptions sacrifice the goals of these taxes and also place higher costs on individual consumers instead of the large producers which account for far greater proportions of emissions.<sup>17</sup> As Kyoto or post-Kyoto agreements become more stringent, governments will inevitably revisit energy taxes as a necessary means of emissions reductions. However, these governments will continue to face stiff opposition from domestic industries and will be forced to develop measures that ensure the competitiveness of these industries.

### **BORDER TAX ADJUSTMENTS AS A VIABLE ALTERNATIVE**

Border tax adjustments (“BTAs”) are one viable option for implementation in conjunction with the hypothetical EU energy tax.<sup>18</sup> A BTA attempts to rectify domestic price differentials by taxing imported products at the same level as those produced domestically. In the event that these products are exported, the tax placed on the products would be refunded to the producer. The international economic community has sought to address the issues raised by BTAs and formed a Working Party on Border Tax Adjustments in 1968.<sup>19</sup> The Working Party created the following definition for BTAs, which has also been adopted by the WTO Committee on Trade and Environment:<sup>20</sup>

[A]ny 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 taxed 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).<sup>21</sup>

#### **POSSIBLE ISSUES BETWEEN BTAS AND GATT ARTICLES I, II, AND III**

The MFN and national treatment obligations of the WTO represent two of the most litigated and fundamental hurdles for any domestic measure affecting international trade. These hurdles would be seemingly sidestepped if the BTA was equally

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applied both to imported products from all industrialized Member States and to domestic and imported goods. Unfortunately, the current interpretation of WTO obligations is unclear as to whether such a tax is acceptable.

As noted above, Article II concerns the rights of Member States to impose internal taxes that satisfy the national treatment requirement while targeting materials from which the imported product was manufactured. However, this Article provides no information as to whether nations may tax materials that are not found in the final product, such as the energy or carbon consumed during production.<sup>22</sup> The 1970 Working Party on Border Tax Adjustments attempted to classify “process-related” taxes

but was unable to find a consensus on the acceptability of such measures in terms of border tax adjustments.<sup>23</sup>

The case law regarding process-based taxes is similarly murky and incomplete. In 1986, the United States implemented a tax on certain chemicals used in the processing of other chemical products.<sup>24</sup> The Panel found that border taxes on imported “like” products may take “chemicals used as materials in the manufacturing or production of the imported substances” into account.<sup>25</sup> The Panel’s findings did not address the issue of whether the chemicals used must be physically incorporated into the final product or simply used to make the product, as is the case for fuel and expended carbon.

The distinction between measures concerning products and those concerning processes was further discussed in the Tuna/Dolphin<sup>26</sup> and Shrimp/Turtle cases.<sup>27</sup> Although the measures at issue in these cases were process-based regulations and not process-based taxes, the cases serve to establish the fairly firm principle that process-based regulations on trade are prima facie violations of other WTO obligations. Commentators have often noted that, while the Shrimp/Turtle decision may have relaxed the prohibition on trade restrictive measures founded on process standards,<sup>28</sup> the product-process doctrine has generally held firm for process regulations.<sup>29</sup> However, the WTO has never ruled on whether process-based taxes, such as an energy tax, are also prima facie violations.<sup>30</sup>

#### POSSIBLE ARGUMENTS FOR IMPLEMENTING AN ENERGY TAX AND BORDER TAX ADJUSTMENT IN LIGHT OF GATT OBLIGATIONS

In the event that process-based taxes are acceptable under WTO obligations, the EU would inevitably be forced to defend its measure against claims that the tax discriminates between domestic and imported goods. For example, consider a situation where EU producers of plastic containers are able to adopt production methods that are less energy intensive. While such technology may initially result in higher costs for domestic producers, the costs will presumably decrease in the future as energy efficient technology advances and becomes more available. In such a scenario, U.S. producers of plastic containers using energy intensive methods would continue to be taxed according to the energy used, regardless of the cost of production in the EU. Although such a tax may not initially benefit domestic producers of plastic containers because of the cost associated with adopting new technology, EU producers may be able to bring cheaper products to the market in the future. Therefore, while this energy tax and BTA serve the climate change goals of the EU, it may, however, also directly violate Article III of the GATT.

In the event that U.S. producers of plastic containers convince the United States to file a claim with the WTO concerning the BTA, the EU would be forced to defend the measure. The BTA raises a number of complex issues that have not been clearly decided. First, the EU must argue that plastic containers produced in an energy efficient manner are not sufficiently “like” those which are produced in an energy intensive manner. According to previous WTO decisions, the EU may find that distinguishing the products for the purposes of Article III is difficult.

In a case concerning French restrictions on cancer-causing forms of asbestos, a WTO Appellate Body determined that asbestos containing carcinogenic materials and asbestos that did not containing such materials were not “like” products for the purposes of Article III and could therefore be regulated differently.<sup>31</sup> The decision noted that differences in the physical characteristics, end use, consumer preferences, and tariff classifications of the products were important factors for determining “likeness.”

While EU consumers may show a significant preference for energy efficient goods, the actual physical characteristics of such goods will generally be the same. Therefore, the EU may be forced to argue that, due to disparate processes through which these goods are produced, they are not “like” products.

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*As Kyoto or post-Kyoto agreements become more stringent, governments will...revisit energy taxes as a necessary means of emissions reductions.*

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However, this argument again encounters the problematic product-process doctrine. Given the current interpretation of WTO law regarding this doctrine, it is unlikely that differences in production methods would be sufficient to provide room for disparate regulatory treatment.<sup>32</sup>

If, as expected, the WTO found that the EU BTA discriminates against imported goods, or that such process-based taxes are not allowed under Articles II and III, the EU may still argue that the tax is acceptable as an Article XX(g) exception. In doing so, the EU must initially show that the measures are “primarily aimed at” the “conservation of exhaustible natural resources.”<sup>33</sup> Given the broad international recognition of climate change issues as expressed in the United Nations Framework Convention on Climate Change (“UNFCCC”), it is likely that the EU would be able to satisfy the threshold requirements of an Article XX exception.<sup>34</sup> WTO jurisprudence has also established three additional requirements for Article XX concerning the discriminatory effects of a narrowly construed measure that impacts trade.<sup>35</sup> It is possible, however, that the EU measure might be implemented in a manner that sufficiently minimizes discrimination so as to satisfy Article XX.

A finding that the EU’s energy tax and BTA are accepted under Article XX will require the EU to establish a formal and flexible process to provide for the potentially different circumstances in affected states. This is critical as the WTO is often wary of domestic regulations that extend beyond the borders of the implementing Member State.<sup>36</sup>



Despite the current reluctance to acknowledge the legitimacy of environmental regulations under Article XX, the EU may find a more receptive audience in a WTO Panel or Appellate Body due to the international nature of climate change regulations and the fact that the United States has previously recognized the issue and signed the UNFCCC.<sup>37</sup>

## CONCLUSION

Although the discussion above is useful in understanding the current relationship between WTO and Kyoto obligations, the larger question is whether the WTO is properly equipped to handle such issues and whether Member States would be best served by an EU victory in this hypothetical.<sup>38</sup> The WTO is a body charged with ensuring the stability and expansion of free trade between Member States. Environmental regulations aimed at stemming climate change will inevitably affect international economic activity. While the WTO is firmly established and supported by the industrialized world, the issue of climate change and the measures necessary to address it are highly charged and controversial. Member States such as the United States and China, both of whom are reluctant to implement domestic climate change measures, will vigorously resist the use of the WTO to attain environmental objectives. Considering the current influence and significance of the U.S. economy, along with the forecasted clout of the Chinese economy, it will be difficult for the WTO to evolve against the will of these states. In the worst-case scenario, the current protectionist tendencies found on Capitol Hill may find an ally in the industry executives who are unwilling or unable to conform to climate-focused policies.<sup>39</sup>

Conversely, economic growth is, in large part, dependent on environmental stability both because natural resources are vital for all economies and because increased understanding of environmental issues by consumers influences consumer choice. The Kyoto Protocol represents an initial step by some Member

States to address climate change issues and the Protocol will inevitably be followed by stronger action. If the WTO continues to stifle domestic implementation of environmental measures pursuant to international agreements, the WTO may find that other important players in the Organization are unwilling to participate in a purely economic organization. Such states may demand the flexibility noted in the Kyoto Protocol to address those issues mentioned in the WTO Charter.

The WTO must actively pursue, through international negotiations but not necessarily international consensus, an understanding providing room for domestic action that does not directly violate the MFN or national treatment obligations. Energy taxes and companion BTAs will inevitably create certain trade obstacles, such as higher costs or increased regulation, but may be implemented in such a way as to impose these costs equally on domestic and foreign producers. The current use of the product-process distinction and the strict interpretation of Article XX effectively prohibit the use of such measures that are best suited to address climate change regardless of whether implementation frustrates or advances the goals of the WTO.

Further, international negotiations will serve several important functions. First, measures developed through such negotiations are far more likely to satisfy the WTO's consistent demand for multilateral solutions to environmental issues.<sup>40</sup> This multilateral solution will also serve to harmonize process-based tax systems.<sup>41</sup> Without such harmonization, the proliferation of unilateral action will effectively cripple the WTO by allowing Member States to condition access to their markets on requirements that may differ from those in other Member States.<sup>42</sup> A multilateral agreement allowing for environmentally related measures that do not establish discriminatory trade practices will ensure both the stability of the WTO as well as the pursuit of climate change policies.



## ENDNOTES: Climate Change and the WTO

<sup>1</sup> Steve Charnovitz, *Trade and Climate: Potential Conflicts and Synergies*, in BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE, Pew Center on Global Climate Change (Dec. 2003), at 142, available at <http://www.pewclimate.org/docUploads/Beyond%20Kyoto.pdf> (last visited Jan. 4, 2006).

<sup>2</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change ("UNFCCC") (1997), art. 2(1)(a)(v), available at <http://unfccc.int/resource/docs/convkp/kpeng.html> (last visited Jan. 4, 2006).

<sup>3</sup> Kyoto Protocol, art. 2(3); see also, Zhong Xiang Zhang & Lucas Assuncao, *Domestic Climate Policies and the WTO* (Dec. 2001) at 4, FEEM Working Paper No. 91, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=288273](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=288273) (last visited Jan. 4, 2006) [hereinafter Zhong Xiang Zhang]. This sentiment previously appeared in the UNFCCC, *id.* at art. 3.5 (requiring that "[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade"), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited Jan. 4, 2006). This language further resembles language found in the WTO Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted Nov. 6, 1998), available at <http://www.ejil.org/journal/Vol110/No1/sr4.rtf> (last visited Jan. 4, 2006) [hereinafter WTO Shrimp/Turtle].

<sup>4</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), Preamble, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.doc](http://www.wto.org/english/docs_e/legal_e/04-wto.doc) (last visited Jan. 4, 2006).

<sup>5</sup> General Agreement on Tariffs and Trade ("GATT") (1947), art. I [GATT 1947], available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm) (last visited Jan. 4, 2006). There are, however, significant exceptions to this rule, including provisions recognizing the different situations for developing countries and the need to ensure the national security of Member States.

<sup>6</sup> GATT, *id.* at art. II(2)(a).

<sup>7</sup> GATT, *id.* at art. III(1).

<sup>8</sup> Many environmental measures are also challenged under Article XI. This article, however, is not significant for this discussion as the measure at issue involves a tax, not a regulation as such, and Article XI applies only to regulations.

<sup>9</sup> GATT, *supra* note 5, at art. XX(b), art. XX(g).

<sup>10</sup> The idea that a BTA may discriminate between industrialized and developing nations reflects the notion of common but differentiated responsibilities noted in the 1992 Rio Declaration on Environment and

Development. Such discrimination is also reflected by a number of GATT articles. See FRANK BIERMANN AND RAINER BROHM, IMPLEMENTING THE KYOTO PROTOCOL WITHOUT THE UNITED STATES: THE STRATEGIC ROLE OF ENERGY TAX ADJUSTMENTS AT THE BORDER, GLOBAL GOVERNANCE 15-16 (Working Paper No. 5, Jan. 2003), available at <http://glogov.org/upload/public%20files/pdf/publications/working%20papers/workingpaper5.pdf> (last visited Jan. 4, 2006).

<sup>11</sup> See BIERMANN, *id.* at 12. See also AARON COSBEY, INT'L INSTIT. FOR SUSTAINABLE DEV'TMENT, THE KYOTO PROTOCOL AND THE WTO (SEMINAR NOTE), at 3-4, available at <http://www.iisd.org/pdf/kyoto.pdf> (last visited Jan. 5, 2006); see also Zhong Xiang Zhang, *supra* note 3, at 17.

<sup>12</sup> See Zhong Xiang Zhang, *supra* note 3, at 17-18.

<sup>13</sup> Zhong Xiang Zhang, *supra* note 3.

<sup>14</sup> Zhong Xiang Zhang *supra* note 3, at 18-19; see Biermann, *supra* note 11, at 12.

<sup>15</sup> Biermann, *supra* note 11, at 11.

<sup>16</sup> Biermann, *supra* note 11 at 12.

<sup>17</sup> Such taxes increase costs for consumers who are thus responsible for paying higher gas and energy prices.

<sup>18</sup> Charnovitz, *supra* note 1, at 147.

<sup>19</sup> GATT Working Party on Border Tax Adjustments (1970) (L/3464), available at <http://www.worldtradelaw.net/reports/gattpanels/bordertax.pdf> (last visited Jan. 5, 2006).

<sup>20</sup> WTO COMMITTEE ON TRADE AND ENVIRONMENT, TAXES AND CHARGES FOR ENVIRONMENTAL PURPOSES: BORDER TAX ADJUSTMENT. NOTE BY THE SECRETARIAT (1997), WTO Doc. WT/CTE/W/47 (May 2, 1997), available at [http://docsonline.wto.org/gen\\_home.asp?language=1&\\_1](http://docsonline.wto.org/gen_home.asp?language=1&_1) (last visited Jan. 6, 2006).

<sup>21</sup> GATT Working Party on Border Tax Adjustments 1970, *supra* note 19, at ¶ 4; see also Biermann, *supra* note 11, at 17.

<sup>22</sup> See Biermann, *supra* note 11, at 19-20.

<sup>23</sup> Biermann, *supra* note 11, at 20.

<sup>24</sup> GATT Report of the Panel, *United States-Taxes Petroleum and Certain Imported Substances*, L/6175 (Jun. 5, 1987), available at <http://www.sice.oas.org/dispute/gatt/87superf.asp> (last visited Jan. 6, 2006). While WTO jurisprudence does not follow the principle of stare decisis, previous WTO decisions may be influential. GATT decisions such as this case, however, are far less influential and only function as sources of information for WTO panels and appellate bodies.

<sup>25</sup> GATT Report of the Panel, *id.*

<sup>26</sup> GATT Report of the Panel, *United States- Restrictions on Imports of Tuna* (Sept. 3, 1991), GATT Doc. DS21/R. B.I.S.D. 39S/155. The GATT dispute settlement system which prevailed before the inception of the WTO required consensus before Panel reports were adopted. This report did not receive consensus. Therefore, although WTO Panels and Appellate Bodies are never bound by previous opinions, the Tuna/Dolphin report carries significantly less weight.

<sup>27</sup> WTO Shrimp/Turtle, *supra* note 3.

<sup>28</sup> See Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 494 (2002).

<sup>29</sup> But see Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW at 93 (Marco Bronckers & Reinhard Quick eds., 2000). Hudec argues that, while there is "fairly broad approval of the product-process doctrine as a matter of policy," the doctrine is not firmly rooted in proper legal reasoning. Despite this unstable foundation, the product-process doctrine has been consistently upheld and used to invalidate environmental regulations.

<sup>30</sup> See Robert Howse & Donald Regan, *The Product/Process Distinction-An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, EJIL (2000), Vol. 11 No.2, 249, 251, available at <http://ejil.oxfordjournals.org/cgi/reprint/11/2/249.pdf> (last visited Jan. 6, 2006). The authors note that previous process based measures were found to lie outside the scope of Article III, and instead were found to directly violate Article XI. These regulations were then defended under the exceptions found in Article XX. The analysis would be significantly different for a BTA, however, as a BTA is clearly a process based *tax* that would not implicate Article XI.

Therefore, if such taxes were found to fall outside of Article III because of the product-process distinction, it may be difficult to place them under another article. The Article III and Article XI analysis would, for example, be more relevant if the European Union were to implement a regulation that no plastic container may be sold if the product was produced with an excess of a certain amount of energy. In this case, the regulation would be found to fall outside of Article III and be a prima facie violation of Article XI.

<sup>31</sup> Rpt. of the Appellate Body, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (adopted Apr. 5, 2001) at 70, available at [http://www.worldtradelaw.net/reports/wtoab/ec-asbestos\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-asbestos(ab).pdf) (last visited Jan. 5, 2006).

<sup>32</sup> Gary P. Sampson, *WTO Rules and Climate Change: The Need for Policy Coherence*, in INTER-LINKAGES BETWEEN THE KYOTO PROTOCOL AND OTHER MULTILATERAL REGIMES (Joint Project of the United Nations University, Institute of Advanced Studies, and Global Environment Information Centre), at 35, available at <http://www.geic.or.jp/climgov/04.pdf> (last visited Jan. 5, 2006). ("The manner in which a foreign product is produced is not a basis on which WTO rights and obligations are established. An imported product can not be discriminated against only because the production process was energy intensive, for example." [emphasis added]).

<sup>33</sup> See WTO Shrimp/Turtle, *supra* note 3, at 4(b). The EU may also seek to defend the measure under Article XX(b). This exception, however, requires that the measure be "necessary" for the protection of human or plant life. Such a showing is far more difficult as Article XX(b) is interpreted more narrowly than Article XX(g).

<sup>34</sup> As noted, "primarily aimed at" is a lower standard than "necessary" and it is likely that the tax would be sufficient for Article XX(g) purposes.

<sup>35</sup> In U.S.-Shrimp/Turtle, *supra* note 3, the Appellate Body stated that if the measure is acceptable under on of Article XX's exceptions, it must also satisfy the chapeau of that Article. The chapeau concerns the manner in which the measure is implemented. Therefore, the measure must not be implemented in an unjustifiably or arbitrarily discriminatory manner and may not present a disguised obstacle to trade. The Appellate Body in U.S.-Shrimp/Turtle found that the measure satisfied the requirements of Article XX(g), but was implemented in an unjustifiably and arbitrarily discriminatory manner. The finding noted that the measure basically required all countries to have U.S.-style standards regardless of unique circumstances in other Member States. The Appellate Body also noted the lack of information regarding the certification process.

<sup>36</sup> Sampson, *supra* note 32, at 35.

<sup>37</sup> But see Biermann, *supra* note 11, at 28. Article XX exceptions are extremely fact specific and the particular determination in this hypothetical may depend entirely on the manner in which the European Union implements the BTA. In doing so, the European Union may be best served by seeking a multilateral solution as often desired by WTO Panels and Appellate Bodies.

<sup>38</sup> See Biermann, *supra* note 11, at 28. The authors note some significant drawbacks to the use of a "like products" and Article XX defense in such a situation: "[T]hese options also came with a price: The general opening of the term "like products" or of article XX GATT to all kinds of process-related standards—beyond energy—would seriously impair the integrity of the trade system and would harm, in particular, developing countries, which act on the world market rather as standard-takers than standard-setters."

<sup>39</sup> Significant press has been given to the global rise of protectionism. For a discussion on this movement in the United States, see The Economist, *Stemming the Tide: Can Rob Portman stop America from turning its back on trade?*, Jun. 16, 2005, available at: [http://www.economist.com/people/displayStory.cfm?story\\_id=4079425&no\\_na\\_tran=1](http://www.economist.com/people/displayStory.cfm?story_id=4079425&no_na_tran=1) (last visited Jan. 5, 2006).

<sup>40</sup> Zhong Xiang Zhang, *supra* note 3, at 24.

<sup>41</sup> Biermann, *supra* note 11, at 28.

<sup>42</sup> Howse, *supra* note 28, at 497-498.