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Border Adjustments, WTO Law, and Climate Protection

(Critical Issues in Environmental Taxation 2008, p. 737)

I. Environmental Costs, Competitiveness, and WTO Law

The law aims at resolving conflicts between people with colliding interests. Accordingly, law is the instrument that makes politics binding; but at the same time, it is also the normative framework, the "Ought", which has to be respected by politics. As many social conflicts in the globalised world cannot be resolved at a national level, the law is becoming not only more and more European, but also more and more international. This is especially true for environmental law. Notwithstanding, the impact of international environmental law, which mostly does not set ambitious goals or even appropriate enforcing mechanisms for the existing goals (e.g. the Kyoto Protocol)[2], is limited. More important is the potent international trade law. A complex network of liberalisation agreements has emerged[3], culminating in the foundation of the World Trade Organisation (WTO) as an international organisation encompassing the vast majority of states, with the most important agreement being the General Agreement on Tariffs and Trade (GATT 1947 and 1994).[4] These agreements aim at a free, i.e. liberalized market for goods, services etc. Even though the hierarchy of norms between international economic law, European and national law is controversial and unclear[5], it can be said that world trade law may impose binding and quite extensive rules on national states and the EU. This challenges comprehensively the ability of nation states to enact policies according to their own agendas, as far as this is at all conceivable in a global economy. This impacts national and European economic instruments of climate policy in particular.

Despite much ecological rhetoric, the industrial states continue to emit vast amounts of greenhouse gases.[6] Regrettably, the developing countries rarely reconsider their often uncritical imitation of western energy-intensive development paths. The Kyoto Protocol and subsequent global climate protection law have so far not been ambitious enough to change this.[7] Is this not a reason to take more severe national measures to protect the climate? High (rather than merely symbolic) national or European energy taxes – or similar economic instruments – de-

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[2] Kyoto Protocol to the Framework Convention on Climate Change (1998), 37 I.L.M. 1998.

[3] E.g. the Treaty founding the the European Economic Community (EEC) 1957, North American Free Trade Agreement 1994, Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Bangkok Declaration 1991 (MERCOSUR), the Association of South East Asian Nations 1967 (ASEAN), alongside multiple bilateral agreements.

[4] General Agreement on Tariffs and Trade 1994, contained in the Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (1994), 33 I.L.M. 1994.

[5] Compare for the relationship between GATS and EC law Opinion 1/94 (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty), ECR I-5267, (ECJ 15/11/1994).

[6] Cp. Climate Change 2007: Synthesis Report (2007).

[7] Cp. for a description of the Kyoto Protocol Mechanisms DAVID FREESTONE & CHARLOTTE STRECK (2005), Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work, Oxford: Oxford University Press and FELIX EKARDT, DAVOR SUSNJAR & LARISSA STEFFENHAGEN (2008), WTO und Umweltvölkerrechtsverträge: Komplementäre oder sich blockierende Wirkung? Am Beispiel von Verstößen gegen das Kyoto-Protokoll, Jahrbuch des Umwelt- und Technikrechts, p. 277.

riving from the polluter pays principle[8] are arguably the most effective measures to protect the climate, and yet raise concerns of competitive disadvantages for domestic industry. If major European emitters of greenhouse gases (GHG) relocate abroad in order to escape high energy taxes and continue to emit climate gases there, little will be gained for the global climate: Emission levels will rise in third countries and thereby potentially increase global emissions (carbon leakage). Therefore, a strict European climate policy seems to be neither economically attractive, nor ecologically helpful.

An interesting solution could be an ambitious EU energy tax or an extended EU Emission Trading Scheme (EU ETS)[9] combined with border cost adjustment.[10] For a border adjustment, a tax or the overall costs of climate policy instruments are at least partly refunded when goods are exported, while imported goods are subject to an energy levy. Border adjustments thus implement the destination principle.[11] It would prevent competitive disadvantages of European companies caused by lesser efforts to protect the climate in e.g. the USA or the newly industrialised countries such as Brazil, India or China and at the same time enable an effective climate policy, providing these countries with an important example of combining climate protection and economic welfare. In Germany for instance, there is already an eco-tax on electricity and petroleum ("Ökosteuer")[12], but foreign companies do not always incur a corresponding charge for their products or a corresponding ETS for their industrial plants. This could be compensated for by a system of border adjustments. Border adjustment should therefore be an essential element of national and European climate policy, which should primarily work with economic instruments.

As worldwide environmental standards do not exist, such national and European trade restrictions for environmental reasons initially seem to be a sensible means of environmental protection in liberalised world trade. Lower standards usually result in lower production costs and therefore competitive advantages for the producing state, turning high production standards into a competitive disadvantage. But traditional national and European measures, such as import bans for environmentally detrimental process and production methods (PPMs), have only partly remedied the situation: Even when e.g. the EU factually forces the USA via import

[8] GAVIN GOH (2004), The World Trade Organization, Kyoto and energy tax adjustments at the border, Journal of World Trade, p. 395; FELIX EKARDT (2006), Verursacherprinzip als Verfassungsgebot? Das Junktim von Freiheit und Verantwortlichkeit, Jahrbuch des Umwelt- und Technikrechts, p. 63.

[9] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (2003), OJ 2003 L-275/32. Member states set Commission approved national emission caps (National Allocation Plan, NAP). In phase I (2005-2007), emission allowance certificates were (generously) allocated to large emitters of CO_2 ("grandfathering"). Part of the emission allowance has to be surrendered each year. Besides the initial allocation on a plant-to-plant basis, operators may also trade certificates among each other. In phase II (2008-2012), the scope of the EU ETS shall be expanded including another greenhouse gas: nitrous oxide (N_2O), the possible inclusion of the aviation sector from 2011, and the participation of the EEA-Member states Iceland, Lichtenstein, Norway and Switzerland. Certified Emission Reductions (CERs) from the Clean Development Mechanism (CDM) and Emission Reduction Units (ERUs) from Joint Implementation (JI) as foreseen in the Kyoto Protocol are recognised as equivalent to emission allowances through the "linking directive" 2004/101/EC. A greater proportion of emission allowances is auctioned rather than allocated. The current Commission proposal suggests amendments from 2013 (phase III): it suggests among others European instead of national caps, further expansion of emission allowance auctions (only auctions in the power sector) and the inclusion of further sectors and greenhouse gases.

[10] Differing terminology includes "climate cost adjustment" and "ecological cost adjustment". "Border tax adjustment" does not fit anyway as it refers only to the adjustment of taxes.

[11] Report of the Working Party on Border Tax Adjustment. No. BISD 18S/97, pt. (1970).

[12] For its compliance with WTO law, cp. SUSANNE DRÖGE et al. (2004), National climate change policies and WTO law: a case study of Germany's new policies, World Trade Review, p. 161.

bans to enact environmental policy measures, the export-orientated European economy remains under cost pressure. If US-companies expand their presence in other markets (e.g. Africa) as a result of European trade restrictions, the EU companies subsequently lose their market share in Africa. This creates the danger of a ruinous worldwide competition of states for the lowest environmental (and also social and corporate tax) standards in order to relieve the domestic companies in globalised competition ("race to the bottom"). The *main* effect of WTO-law for environmental policy is therefore not its rules on national barriers to trade, but rather that it creates a global competition, thus putting social and ecological dumping problems on the political agenda. And this pressure affects *all* environmental policy measures.

As we mentioned earlier, border adjustment could be introduced relating to an extended EU ETS, where certificates could be handed in or refunded at the border within the framework of a border adjustment system.[13] In the EU ETS which is designed as a cap and trade system, companies are allocated a certain (yearly degressive) emission allowance ("grandfathering") or have to buy certificates at auction. Certificates may also be traded. The cost of a certificate adds to the price of a product. In this way market forces are instrumenalised to mitigate the cost of climate change. An optimized EU ETS would be a more pragmatic alternative to an ambitious European energy tax, given that ETS is extended to all climate-relevant sectors, since its costs are paid by all consumers in the end and hence, it functions very much like an "energy tax".[14] But the EU ETS (with or without extension) also reduces the competitiveness of European goods.[15] Besides remedying this, an ecological border adjustment would potentially trigger climate policy in other countries whose companies wish to maintain their market share in Europe. This would add to the global impact of a European climate policy. The recent Commission proposal for a directive amending the current Emission Trading Scheme (EU ETS)[16] suggests indeed an extension of ETS and a full auction of emission allowances for 2013 for electricity and CO_2 storage, and in 2020 for all sectors (Art. 10a). The proposal also considers steps for the case that no ambitious follow-up agreement to the Kyoto Protocol including developing countries and major emitters of greenhouse gases (e.g. USA, China) is concluded in order to prevent "carbon leakage plus competitive disadvantages": In this case, the proposal restricts the use of CERs and ERUs and wants to assess further steps no later than 2011. One possible solution could be to postpone the full auction of emission allowances and issue up to 100% free allowances to sectors where companies are unable to pass through the cost of required allowances in product prices without significant loss of market share to installations outside the EU not taking comparable action to reduce emissions. Naturally, this would undermine the climate political effects of the EU ETS. The suggested possibility of an ecological cost adjustment seems therefore preferable: As an alternative, the Commission suggests an "effective carbon equalisation system" (Art. 10b). Such a system could equalize the ecological requirements for foreign and European companies, for example by requiring third-country importers of goods to surrender allowances at the European border – even

[13] For the permissibility of the remission for exports under the Agreement on Subsidies and Countervailing Measures 1994, see e.g. ROLAND ISMER & KARSTEN NEUHOFF (2007), Border tax adjustment: a feasible way to support stringent emission trading, European Journal of Law and Economics, p. 137; EKARDT, SUSNJAR & STEFFENHAGEN (2008).

[14] The cost of a certificate acts like a GHG levy, but where the amount of the charge is fixed by market forces.

[15] Cp. for the effects on competitiveness up to date EU ETS Review - Report on international competitiveness. pt. (2006).

[16] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community (2008), COM 2008, 16 final.

though companies from Third Countries (such as the US, India or China) technically do not participate in the European ETS.[17]

Beyond taxes and emission trading, the compensation of other costs of climate policy at the EUs outer borders should be considered. Especially national mechanisms to promote renewable energies have to be mentioned in this context. The German Renewable Energy Act (Erneuerbare-Energien-Gesetz, EEG) created a sort of "subsidy" for renewable energies that is to be paid by the electricity providers and then passed on to the consumers, including energy consuming companies, similar to a "tax". This consequently creates, similar to an energy tax, a cost of climate policy all over the country. Beyond the question of compliance with the Agreement on Subsidies and Countervailing Measures (SCM-Agreement)[18] and beyond special questions of bioenergy, renewable energy subsidies could be questionable under WTO law if a cost adjustment takes place at the border.

Therefore, the discussion on "WTO and the environment" should not be narrowed to the three most famous relevant cases at the WTO dispute settlement system. The Tuna/ Dolphin cases I[19] and II[20] concerned US-American trade restrictions for tuna that was not caught with dolphin-protecting fishing methods. In the Shrimp/ Turtle case[21], the USA introduced an import ban on shrimps that had not been caught with turtle-protecting techniques. These cases have a certain mobilising potential in the western public: dolphins and turtles are popular animal species, and the cases concern a form of environmental policy that seemingly does not affect the familiar western standard of life. At the same time, westerners can maintain the popular self-image of being a role model when it comes to environmental protection. But this view tends to blank out the fact that the rich classes still consume round 80% of the world's resources while only representing 20% of the world's population (even if the rich elites in the newly industrialised countries have a growing share of these classes). Western way of life can neither be kept up, nor expanded globally. We may already have environmental policy instruments etc., but in reality they are not very daunting so far (without a radically extended EU ETS etc.). The EU may have higher standards on toxic substances and safety than many developing countries, but then the total environmental impact of our standard of life per capita is much higher.

Competitive disadvantages and carbon leakage due to effective eco-taxes or an extended EU ETS as potentially the most important climate policy measure could be avoided through the described cost adjustments at the EU-borders. If products from countries with a less "cost intensive" climate policy would then be imported to Europe, these products would incur a supplementary tax. Inversely, if Europe exports goods, the domestic companies would be reimbursed the higher eco-tax or ETS costs paid in Europe. *Despite some politicians and companies frequently claiming otherwise, this approach would be compatible with world trade law,*

[17] The overall question of WTO compatibility of ETS arises on the one hand for goods that can only be imported in conjunction with emission allowances and on the other hand, for the emission allowance themselves. At first sight, emission units appear as a means of payment for doing detriment to the climate. They are, though, tradeable between privates and therefore to be considered as goods; cp. CHRISTINA VOIGT (2008), WTO law and international emissions trading: is there potential for conflict?, Carbon and Climate Law Review 52, p. 52. Relevant for border adjustment is only the first alternative.

[18] Agreement on Subsidies and Countervailing Measures (1999), 1867 UNTS.

[19] United States - Restrictions on imports of tuna (I), DS/21/R, 30 ILM 1594, (GATT Panel 3/9/1991).

[20] United States - Restrictions on import of tuna (II), DS/29/R, 33 ILM 842, (GATT Panel 16/6/1994).

[21] United States - Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/RW, (Appellate Body 22/10/2001).

as we will show in this contribution. Border adjustments do not discriminate against anybody in global free trade, but on the contrary ensure equal treatment and fair competition. If the EU introduced ambitious eco-taxes or ETS reforms (better more ambitious than the EU Commission proposal) combined with border adjustments, it could demonstrate to countries such as China that climate protection and economic development are not mutually-exclusive.

II. The National Treatment Principle as WTO Measure for Border Tax Adjustments (Art. II, III, VI GATT)

But are border cost adjustments permitted under international economic law? Already such a limited step towards environmental protection appears to be in danger of being prohibited under WTO law.[22]

The preamble of the WTO Agreement formulates the fundamental goals of the WTO. Accordingly, the WTO aims include "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services". But equally, the WTO members aim to "assure the optimal use of the world's resources in accordance with the objective of sustainable development" i.e. an enhanced inter-generational and global justice, and the protection and preservation of the environment. In contrast, free trade through the reduction of tariffs and non-tariff barriers (NTBs) is only mentioned as an *instrument* to achieve those goals. – The aim of norms serves as an interpretation guideline and has to be borne in mind for the following argument (teleological interpretation).

The GATT as the core of the WTO contains a number of liberalisation obligations. Art. III:4 and III:2 GATT prohibit especially the discrimination of foreign goods through state (and European) regulation. Art. XI GATT prohibits export- and import-bans for goods, except by tariffs. The scope of application of Art. III is difficult to distinguish from the scope of Art. XI. If a state enacts for example a general marketing ban on products that are produced in an environmentally detrimental way, a quasi import ban for the same products follows from this legislation. According to the prevalent opinion, Art. III GATT prevails when the import ban is

[22] With regard to the subjects of this section, see also United States - Restrictions on imports of tuna (I), DS/21/R, (United States - Restrictions on import of tuna (II), DS/29/R, (United States - Import prohibition of certain shrimp and shrimp products, (European Communities - Measures affecting asbestos and asbestos-containing products, WT/DS 135/AB/R, (Appellate Body 5/4/2001); OLE KRISTIAN FAUCHALD (1998), Environmental taxes and trade discrimination, New York: Kluwer Law International; STEVE CHARNOVITZ (2002), Solving the Production and Processing Methods (PPMs) puzzle, in: Kevin P. Gallagher & Jacob Werksman (Eds.), The Earthscan reader on international trade and sustainable development, London: Earthscan Publications, p. 229; MANOJ JOSHI (2004), Are eco-labels consistent with World Trade Organization Agreements?, Journal of World Trade, p. 69; KAREN T. SAMIR R. GANDHI (2005), Regulating the use of voluntary environmental standards within the World Trade Organization legal regime: Making the case for developing countries, Journal of World Trade, p. 855; GABRIELLE MARCEAU (2001), Conflicts and norms and conflicts of jurisdictions: The relationship between WTO Agreements and MEAs and other treaties, Journal of World Trade, p. 1081; FELIX EKARDT & NINA NEUMANN (2008), Liberalisierter Welthandel und Umweltschutz, Zeitschrift für Umweltpolitik und Umweltrecht, p. 183; OLIVIER GODARD (2007), Unilateral European Post-Kyoto climate policy and economic adjustment at EU borders. Working paper; SHU YU (2006), The Kyoto Protocol and International Trade Law, in: Rodi, Michael (Ed.), Environmental Policy Instruments in Liberalized Energy Markets, Berlin: Lexxion, p. 205; FRANK BIERMANN & RAINER BROHM (2005), Implementing the Kyoto Protocol without the USA: The strategic role of energy tax adjustments at the border, Climate Policy , p. 289; REINHARD QUICK & CHRISTIAN LAU (2003), Environmentally motivated tax distinctions and WTO law: The European Commission's Green Paper on integrated product policy in the light of the "like product" and "PPM" debates, Journal of International Economic Law, p. 419.

only an annex to the general marketing ban (e.g. for asbestos).[23]

Despite discussions raised by WTO dispute settlement decisions, measures (i.e. tariffs, obligations and prohibitions) concerning PPM, incorporated into the product or not, should fall within the scope of this norm – even though Art. III GATT only addresses "products" because they also have a direct impact on the import of the products, e.g. insofar as goods produced in a certain manner fall within the import ban. Moreover, Art. III GATT is more appropriate to assess e.g. environmental policy measures than Art. XI GATT, as it also concerns "like products"[24] and thereby allows distinguishing between barriers to trade rooted in environmental policy from merely protectionist barriers to trade. According to the WTOs aims to "generating wealth by liberalisation" and "sustainable protection of resources", this distinction is desirable, since it serves both aims at once.

But are border adjustments admissible under Art. III GATT? (Art. XI GATT does not apply as this norm does not prohibit tariffs like adjustments, and does not prevail over Art. III GATT, as the adjustment is only an annex of a national/ European regulation on energy tax or EU ETS.) Art. III:2 GATT prohibits the discrimination of *like* foreign products through financial burdens (not where discrimination is based on PPM-related obligations and prohibitions as in the cited catching-method cases). According to this norm, imported products must not be subject to "internal taxes or other internal charges of any kind in excess of those applied […] to like domestic products".

Financial burdens can take e.g. the form of taxes or other internal charges. First, it is important to point out that the border cost adjustments can be described as a charge in itself. And in our opinion, it is the border adjustment and not the climate protection instrument (energy tax, ETS, EEG) which is to be discussed with regard to Art. III GATT as long as the instruments in itself are not discriminating.[25] But even if one refers not to the "tax or internal charge quality" of border adjustment itself, but to the instrument, we would nevertheless be looking at a tax or a charge in this case:

Taxes on energy or on products where energy was consumed during production (i.e. all products) are a straightforward tax. But what about energy certificates required as an accompaniment of products? And what about other environmental policy costs, such as for the promotion of renewable energies? The ETS has been imposed by a public authority; the return from auctioning allowances is at least partly to be used to combat climate change in the interest of a wider community (Art. 10 (3) of the EU directive proposal). Traditionally, though, a tax would be levied by the state and definitely contribute to state revenue. Under the ETS scheme, certificates do not have to be auctioned publicly, but may also be traded between private entities. As all permits are originally bought in a state auction (and constitute state revenue at that point), this aspect could be neglected. Alternatively, ETS certificates can also be considered as charges whose scope is, according to the wording (tax or other charges), wider than a tax and may therefore cover charges imposed by law, but not levied by a public authority. Economically, taxes and cap and trade systems have the same effect: Both instrumentalize

[23] European Communities - Measures affecting asbestos and asbestos-containing products.

[24] See United States - Standards for reformulated and conventional gasoline, WT/DS2/R, (Appellate Body 20/05/1996); Japan - Taxes on alcoholic beverages (Alcoholic beverages II) , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (Appellate Body 01/11/1996).

[25] There *are* possible Art. III questions of the EEG, but since this paper deals with border adjustments, we leave this open here.

price mechanisms to implement climate policy (and in the end, the consumer has to face the costs not only of a tax, but also of the EU ETS). ETS allowances are therefore to be considered as internal charges.

Art. III:2 addresses, consistent with the destination principle, indirect taxes or charges, i.e. taxes "levied on" or "borne by" products. As the certificates are bought by the producer or importer, they could be a direct tax.[26] The ETS allowance is not a direct charge on the product. Art. III:2 does, though, stipulate that an imported product "...shall not be subject, directly or indirectly, to internal [...] charges..." But it does indirectly add to the price of a product by taking into account the energy consumed in the production process. It is therefore assimilated to an indirect charge and is subsequently covered by Art. III:2.

But do the costs induced by support for renewable energy qualify as internal charges, too? Under the Renewable Energy Act (EEG), feed-in tariffs are paid by distribution system operators (DSO) and finally born by transmission system operators (TSO) and then at least partly passed on to consumers. It also increases the cost of energy and production processes, and therefore also increases prices, similar to the ETS allowance or an energy tax. On the other hand, one could say: Legislation on energy efficiency or on sustainable forestry practices *also* raises product prices by introducing environmental standards. It seems practically impossible to level all costs that are induced by environmental standards. Nevertheless, both ETS and EEG contain a mechanism where at some point a certain levy is paid, be it through the purchase of ETS allowances or as a feed-in tariff combined with a distribution mechanism. This is different to "general energy efficiency standards", where certain conditions have to be met which are more expensive to achieve. The described cases resemble rather more an indirect charge on a product which is levied indirectly and therefore covered by the scope of Art. III. It is a different question, how the increase in cost or respectively the consumption of energy is measured, especially for ascertaining the amount of a border adjustment.

Taxes and charges respectively border adjustments may not differentiate between "like" national and foreign production (as long as only Art. III GATT is taken into account). But can products be considered alike when one is e.g. produced by means of a low carbon-processing method? Following the Asbestos case, a threefold test is employed to determine the "likeness": Properties, nature and quality of the product have to be assessed, the possible end uses established and finally, consumer perception and behaviour have to be considered.[27] But this seems problematic, because when it comes to physical properties, energy is neither clean nor dirty. Green electricity is not physically different from conventionally produced electricity. And referring to consumer preferences might lead to the result that Art. III GATT would lose most of its scope of application. According to the prevailing opinion, PPMs (including consumer preferences) therefore should generally *not* be considered when determining "likeness", when they are not incorporated in the final product ("taxes occultes"), as this would be a hidden gateway to protectionism.[28] A distinction between energy-intensive and less energy-intensive goods would therefore not be acceptable "to escape from Art. III". If any products in question are considered to be "alike", they may therefore not be treated differently.

[26] According to footnote 58, Annex I to the Agreement on Subsidies and Countervailing Measures 1994, direct taxes include "taxes on wages, profits, interests, rents, loyalties and all other forms of income, and taxes on the ownership of real property".
[27] European Communities - Measures affecting asbestos and asbestos-containing products.
[28] Kyoto Protocol to the Framework Convention on Climate Change.

But a European energy tax combined with border adjustment would burden national and foreign producers equally, provided the adjustment is designed carefully. The same goes for the obligation to hand in ETS allowances when importing products. Border cost adjustments would only serve as a mechanism to level the tax or ETS burden on internal and imported products and not subject imports to a higher tariff burden. And the formulation "originating or destined for" in Art. I GATT suggests that imports and exports be treated the same way when it comes to taxes and other charges. Furthermore, there seems to be an explicit authorisation for *import-related* Border Adjustment. Art. II:2a) GATT seems to allow explicitly such a border adjustment, insofar as this ensures a uniform tariff scheme of "like" domestic and foreign products.[29] Similarly, as regards *export-related* adjustments, Art. XVI:4 allows rebates on exports as long as the rebate does not exceed the charges that were imposed in the first place. Art. II:2a) does also not stand in the way of a cost adjustment by ETS allowances when it allows tax on inputs to the production. Emissions are an undesirable by-product, not an input. But emissions are also a direct corollary of energy consumption during the production process.

US Superfund Tax[30] and US Ozone Depleting Chemicals (ODC) tax[31] also point towards the permissibility of border cost adjustments (even if, as in both cases the taxed element is incorporated, it does not shed light on the permissibility of "taxes occultes"). The (modest) US Superfund tax aimed at raising revenue for a trust fund devoted to the clean-up of contaminated toxic waste sites where individual responsible parties could not be identified. Other than the Superfund tax, the ODC tax was intended to influence behaviour through a price system that raised the price of taxed chemicals or products containing them and thereby discouraged from their consumption. In both cases, the tax was combined with border tax adjustment, so that tax is imposed on import, while tax rebates are granted on export under a system of waivers and proof requirements.[32] The GATT Panel found that the superfund tax, which was imposed on national as well as imported products manufactured with taxable chemicals, did not treat those goods differently than similar goods produced in the United States.[33] When assessing this case, it has though be taken into account that the Superfund tax addressed chemicals that were incorporated into the product.[34] Generally, though, it has to be stated that the existence of a judgement does not imply its lawfulness. Judgments are not per se correct or valid, but only decide on an individual case. In all subsequent cases, the law applies – not the outcome of any former cases. This is at least true for the continental legal tradition, in contrast to the common law systems. Maybe it seems to remain unclear, which legal tradition is retained in international law. For reasons of separation of power, in the end the continental system may appear more plausible (as long as judges are not as in the US directly elected, as general rules should be legislated by a lawmaker who is as democratic as possible).[35]

[29] The same result as with border tax adjustments can be achieved (but only for the import, which should be too little) with registered tariffs. Only is this not an appropriate solution, as the general tendency is directed at the further abolition of these tariffs.

[30] United States Code Annotated (USCS) §§ 4611 to 4672,US — Taxes on petroleum and certain imported substances (Superfund), BISD 34S/136, (GATT Panel 17/6/1987).

[31] USCS §§ 4681-4682, cf. Montreal Protocol on Substances that Deplete the Ozone Layer.

[32] The refund seems incoherent as harm in the superfund tax, as the damage to the soil is not reversed by export.

[33] US — Taxes on petroleum and certain imported substances (Superfund), BISD 34S/136.

[34] Cp. RICHARD G. TARASOFSKY (2008), Heating up international trade law: challenges and opportunities posed by efforts to combat climate change, Carbon and Climate Law Review, p. 7 (11).

[35] Cp. EKARDT (2008); see also FELIX EKARDT (2007), Wird die Demokratie ungerecht? Politik in Zeiten der Globalisierung, München: C.H. Beck.

As regards *export-related* adjustments, it is to be stated that Art. VI:4 GATT cannot be brought forward against border adjustments. On the contrary, Art. VI:4 GATT shows that a border adjustment especially for exports would comply with WTO rules, as this norm prohibits countermeasures *against* border adjustments. (In conjunction with Art. II:2 a) GATT), this leads to the conclusion that imports and exports of goods may be levelled to existing taxes, but may not be subjected to a penalty tariff or something else. This is reinforced again by footnote 61 of Annex II to the GATT. Export-related adjustments are, leaving aside their compliance with the SCM-Agreement[36], the less problematic issue, so that the following text focuses on imports.

Ecologically, an export adjustment is not an ideal solution anyway, as it reduces the ecological steering effect of a national and European climate policy, which should be protected by Border Tax Adjustments, for exported products. Economically, though, export adjustments are necessary in order to achieve the aim of border adjustments, which is to avoid competitive disadvantages.

III. Justification of Border Tax Adjustments according to Art. XX GATT[37] as exception to Art. III GATT in relation to the protection of the environment

Even if one assumes that the scope of Art. II GATT does not cover border adjustments, a violation of Art. III GATT could still be justified under Art. XX GATT., for barriers to trade aiming at the protection of the environment, Art. XX lit. b and lit. g. The exception of Art. XX lit. b allows "measures necessary to protect human, animal or plant life or health". According to Art. XX (g), also measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" are justified. Exhaustible natural resources include not only mineral, but also living resources. Examples from the WTO-jurisprudence are dolphins[38], herrings, turtles[39] and clean air[40]. This is convincing even without referring to sustainability as an overall goal of the WTO: renewable resources are also "exhaustible", even though this tends to be forgotten (e.g. in the context of the current hype over bioenergy). The climate, which border adjustments aim to protect, is obviously important for the survival of human kind etc. According to the IPCC report, human activities are dangerously saturating the atmosphere's GHG absorption capacity, increasing global temperature and damaging the environment as our basis of life.

However, the details of the threat to the climate are still uncertain. The WTO jurisdiction is problematic insofar as it tends toward a restrictive line on so-called precautionary cases, i.e. cases where an adverse effect to environmental goods is generally uncertain or will at least not occur within the foreseeable future (or where it is generally impossible to make statistical statements as to the potential risk of an activity). It does not acknowledge risk without extensive scientific evidence. So the precautionary principle is apparently only partially accepted within the WTO jurisdiction. Three strong arguments can be brought forward to consider Art.

[36] See MAGNUS LODEFALK & MARK STOREY (2005), Climate measures and WTO rules on subsidies, Journal of World Trade, p. 23.
[37] The question of multilateralism (the chapeau of Art. XX GATT) will be discussed in Chapter VI of this article.
[38] United States - Restrictions on imports of tuna (I), DS/21/R.
[39] United States - Import prohibition of certain shrimp and shrimp products.
[40] United States - Standards for Reformulated and Conventional Gasoline, WT/D52/AB/R, (Appellate Body 20/5/1996).

XX GATT as a sufficiently strong anchor for the precautionary principle: (a) uncertainties are typical for environmental cases, (b) the WTO addresses environmental matters and long-term perspectives with the principle of sustainability, and (c) awaiting "certain findings" often triggers irreversible damage. This would be even more unequivocal if (d) multilateral environmental agreements, which often avow themselves openly to the precautionary principle, could be integrated more consequently into the interpretation of the WTO regimes.

However, it is problematic – as regards Art. XX GATT – to argue in favour of the rebate scheme which benefits exports from the EU. Increasing the cost of high energy or GHG emissions by cost adjustments will discourage their consumption. This is not true for goods where the charge is refunded on export. Only the taxation of imports could be deemed consistent with Art. XX GATT. It has, though, to be taken into account that unilateral introduction of climate policies would, especially without an ambitious follow-up to the Kyoto Protocol, be tantamount to "suicide" without a rebate mechanism. This means, either the EU does not commit to climate policy at all, or it introduces a border adjustment in order to avoid competitive disadvantages. Only the latter solution may suitably address climate change and has therefore to be considered necessary under Art. XX (b) GATT.[41]

As the climate does not constitute a "territorial" good for the EU, the question (which has been answered contradictorily in WTO-jurisprudence) naturally arises as to whether Art. XX GATT only allows the protection of "domestic" environmental goods. This interpretation is, however, unlikely to be correct. Firstly, such a limitation is not contained in the wording of the norm. Secondly, the concept of sovereign nation states behind such a limitation to "national goods of protection" is problematic in light of the principle of sustainability which is the goal of WTO (and sustainability means the broadening of law and morals towards more intergenerational and global justice).

Art. XXXVII:1c) GATT also does not imply a prohibition of border adjustments, as they do not, as the norm requires, hamper the "consumption" in developing countries, but concern the export/ import from these countries. The prohibition in Art. XXXVII:1b) GATT on raising custom duties on products currently or potentially of particular export interest to developing countries does not change this. In cases where a product is at all affected, the norm contains a justification for the industrialised countries by allowing exceptions for "compelling reasons".

IV. Justification of Border Adjustments Relating to the Environment by the Notion of "Avoiding Subsidies by Externalization of Costs"?

Furthermore, one could try to justify barriers to trade like import-related border adjustments for environmental policy reasons other than by Art. XX, II:2a) GATT by another approach: According to Art. XVI GATT (and the SCM Agreement) any income or price support is in danger of prohibition, whenever it "operates directly or indirectly to increase exports of any product [...], or to reduce imports of any product". According to Art. 1 SCM Agreement, a subsidy (in the framework of the WTO prohibition of subsidies) is defined as a financial contribution or income support by a WTO Member which confers a benefit to a specific recipient (e.g. a company).[42] It is not necessary that the public body incurs costs, as for the SCM

[41] PAOLO AVNER (2007), Border Adjustment: A tool to reconcile climate policy and competitiveness in Europe. A legal and economic assessment, Université Paris X Nanterre; EKARDT & NEUMANN (2008).

[42] Extensively on the details of the definition of the subsidy CHRISTIAN PITSCHAS (2003), Das Übereinkommen

Agreement the ultimate distortion of competition is relevant.[43] Hence, the concept of subsidy in WTO law is wider than the concept of a subsidy under European Law, as the European Court of Justice uses it, e.g. in its assessment of remuneration systems for renewable energies.[44] Ergo, exemption subsidies without direct cost burden for the state are subsidies under the WTO regime. Whether this would be export subsidies or other so-called actionable subsidies does not need to be answered. If the latter is assumed, the complaining state would have to demonstrate the expected adverse effect on the competition.

The WTO discussion so far has overlooked that e.g. the lack of blame for environmental damage (e.g. energy companies are up to now not liable for forest and climate damage caused by the use of coal for electricity) also represent an indirect subsidy. So when a state is accused of infringing free trade for environmental reasons, one could in this sense rather ask whether the foreign state which does not have environmental production standards is the one distorting competition – because it does actually subsidise its industry by not subjecting it to external costs, and therefore a subsidy exists which is generally prohibited under the WTO regime (Art. XVI GATT). It is not the case that this obligation to internalise would only exist if a legal rule "explicitly stipulates" it. In fact, the obligation stems from (a) the wide notion of subsidy in the WTO, and (b) the aim of sustainability of the WTO. Additionally, (c) the 'polluter pays' principle is contained in the human rights notion of freedom: it is part of the autonomy of man that one does not displace the negative effects of one's actions onto somebody else.[45] Though many (at least lawyers, less so the economists) will find this thought disturbing, as the fact that we continuously by our everyday commercial and personal behaviours create very real costs in the form of environmental damage does not feel very comfortable. Nonetheless, in the light of sustainability, it will in the long run be impossible to avoid internalising the previously externalized costs of the western lifestyle (which is ever-more adopted by an elite in the newly industrialised countries).[46] If in this way "prices tell the truth", it is possible that many cheap products will be less attractive on the world market than currently the case.

It is clear that a wide internalisation of external costs will not be desired by many countries. This is, however, also the case for other fundamental requirements of the human rights principle of freedom, which stay true against this often-missing "de facto consensus". This is even truer as due to the destruction of the environment, (especially future) damage concretely threatens to inflict harm upon other humans. It must be taken into account that the 'polluter pays' principle (as any aspect of freedom) may be subject to weighing and balancing, and therefore to limitations. These may however not put the principle concerned entirely out of effect.

über Subventionen und Ausgleichsmaßnahmen, in: Hans-Joachim Prieß & Georg M. Berrisch (Eds.), WTO-Handbuch, München: C.H. Beck, p. 429.

[43] This has been clarified by the WTO-jurisprudence in the proceedings Canada - Measures affecting the export of civilian aircraft, WT/DS70/AB/R, (Appellate Body 20/08/1999).

[44] C-379/98 (PreussenElektra), I-2099; on this topic e.g. also JÖRG NIEDERSBERG (2001), Das Gesetz für den Vorrang erneuerbarer Energien (Erneuerbare-Energien-Gesetz, EEG), Neue Zeitschrift für Verwaltungsrecht, p. 21; TIM MAXIAN RUSCHE (2007), Die beihilferechtliche Bewertung von Förderregelungen für die Stromerzeugung aus erneuerbaren Energiequellen: Ein Überblick über die Entscheidungspraxis der Europäischen Kommission, Zeitschrift für Neues Energierecht, p. 143.

[45] EKARDT (2006); see also EKARDT (2008) and EKARDT, SUSNJAR & STEFFENHAGEN (2008) on human rights as foundation of the WTO. In this direction now also T-306/01 (Yusuf and Al Barakaat), ECR II-3544, (CFI 11/12/2005).

[46] For a new definition of subsidies (except in EC law) see also CHRISTIAN KOENIG (1996), Möglichkeiten und Grenzen von Zertifikatsmärkten als Steuerungsmedien im Umweltrecht, Die Öffentliche Verwaltung, p. 943; EKARDT & NEUMANN (2008).

When a prohibited subsidy is established, the question of a justification of barriers to trade by Art. XX GATT may not need to be asked anymore. However, similar to the EC subsidies regime, this raises questions as to what extent precisely the prohibition of subsidies and Art. XX interact. One must assume that the dispute settlement system would first consider the existence of a subsidy and that only in the next step could one ask if a justification under Art. XX GATT is to be recognised or not. This permits pressure in the direction of a more sustainable world trade. In any case, a border adjustment which reimburses a national eco-tax to companies and the cost of emission certificates or other charges (e.g. for renewable energies) when exporting goods to a country without such mechanisms does not constitute a prohibited subsidy. In our opinion, this is not only true for import-related but also for export-related aspects of border adjustments.[47]

In contrast, a prohibited subsidy cannot be construed under Art. VI:1 GATT. This norm does prohibit dumping in the way that states may not arrange for the sale of goods in export under their "normal" value. This means that the "normal" value of the products on the market is not affected by the environmental incompatibility of a production method.

V. Details of Border Adjustments

Nonetheless, the cost adjustment has to be carefully designed to avoid discrimination[48]. The greatest problem for the justification of adjustments is likely to be that the EU would have to indicate the energy intensity and climate relevance of the products concerned (and the quality of the political measures against climate change of other countries) with some precision in order to secure equal treatment. According to the WTO jurisprudence it could be sufficient if the EU carries out plausible approximations which would be treated as valid as long as the importing countries do not unambiguously prove their inaccuracy. Nonetheless, differentiations will for instance be necessary between different countries (the US, China, India etc.), as the necessary border adjustment will vary according to state of export. The ratification (or non-ratification) of the Kyoto Protocol could also be taken into account (compare in this respect also the obligation to take other international law into account, Art. 31 (3) (c) Vienna Convention on the Law of Treaties 1969).[49]

Moreover, a carbon tax or an emission requirement that was imposed by the state of export has to be taken into account and "deducted". Furthermore, to avoid any discrimination e.g. in emission trading, enough allowances need to be available for importers to purchase, which might even involve favouring them over domestic operators. This may be controversial, as the availability of certificates is to be limited. Provided all that the border adjustment is carefully designed and PPMs that are not incorporated in products are accepted, adjustments do not discriminate and do not therefore violate the GATT.

VI. Environmental Protection by WTO Law? North-South Conflicts, Frictions of a Free

[47] See also LODEFALK & STOREY (2005); EKARDT & NEUMANN (2008).

[48] See for the discussion of some more details MATTHEW GENASCI (2008), Border Tax Adjustments and Emissions Trading: The Implications of International Trade Law for Policy Design, Carbon and Climate Law Review, p. 33; JOCHEM WIERS (2008), French Ideas on Climate and Trade Policies, Carbon and Climate Law Review, p. 18.

[49] Vienna Convention on the Law of Treaties (1969), 8 ILM 679.

Some may react to all this by asking if it is just and legal when industrialised states – which have to date contributed much more to the global non-sustainability than the developing countries – want to force the latter (e.g. the newly developed countries) via border adjustments to comply with "high" EC climate protection standards. Even the WTO jurisdiction partly sometimes expresses criticism of its "unilateralism" in cases where some states set certain environmental rules. This applies even more so "since the WTO, as a trade liberalisation regime, may not be paralyzed through other policy goals".

Of course, multilateral agreements between all involved states would seem sensible (which would then again lead to the question as to whether these "agreements" would have to be part of the WTO regime or if they could be included in international environmental treaties).[50] The factor "multilateralism" is very often seen as a further precondition within the framwork of Art. XX GATT (so-called chapeau). However, the international community has long searched for multilateral climate solutions, but only found insufficient solutions. We will later demonstrate this finding in detail for the Kyoto Protocol. Even if one presumes that ecological border adjustments can only be considered once negotiations for multilateral agreements fail, efforts have already been made accordingly; it cannot be held against the states resorting to border adjustments that in many areas, such as climate policy, no agreements have been concluded that tackle the problem suitably. Moreover, the existence of the Kyoto Protocol does not "prove" that further climate policy is unnecessary, as simultaneously the UN Framework Convention on Climate Change aims at preventing "dangerous antropogenic inferference with the climate system" (Art. 2) The international community has explicitly accepted this goal, but to date not done much to attain it. Border adjustments could help close this gap. Furthermore, the WTO regime considers, when interpreted correctly, environmental concerns and is not stymied by this fact.

Further, the so-called developed states do not really play a leading role in environmental protection, when one considers the total use of resources and climate per capita. Developing countries do not therefore have to see themselves in a situation where they face environmentally-fixated developed states. The wealth-induced and (smaller but nonetheless important) poverty-induced destruction of the natural resources on which life depends worldwide should be replaced with an awareness that all national and transnational political levels of the world share a common obligation to save resources and especially the global climate, once the principle of sustainability is accepted as a binding legal principle. This obligation exists in the common interest of mankind worldwide, current and future. If in this regard no sufficient international agreements can be concluded, it should be welcomed when single states take a lead, rather than be criticised as unilateralism. This is even more so as to demand a multilateral agreement worldwide is at best an ambivalent project, given the undemocratic nature of many states. Apart from this, there has been an intensive effort to conclude an ambitious international agreement, especially concerning climate protection.

Now we must briefly return to the questions of global governance hinted at above; within a global competition induced by the WTO (which may also be – for a short time – a competi-

[50] On the inclusion of international treaties into the WTO regimes by the member states, e.g. through resolutions on specific interpretations of the WTO law, see also DETLEF BUCK & RODA VERHEYEN (2002), Nationale Klimaschutzmaßnahmen und Welthandelsrecht: Konflikte, Synergien und Entwicklungsperspektiven, Zeitschrift für Umweltrecht, p. 89; EKARDT, SUSNJAR & STEFFENHAGEN (2008).

tion for the least-costly environmental standards), to what extent can a serious environmental policy in North *and* South be expected? How can, in addition, the poverty problem be solved? And what effectiveness does public international law have at all in its current form? The WTO aims for lightly-regulated competition and free trade, because according to an established opinion in economic science only free trade can create a worldwide increase in welfare. This may – when external costs are not taken into consideration – have created a growing prosperity in the industrialised states, and also for the consumer elites in the newly industrialised countries. For the majority of human beings worldwide, it is actually the other way round. The opening of the market may hinder industrial development in the developing countries through overwhelming foreign competition.[51]

This general situation cannot be remedied by sparing the developing countries from some so-called new "western" climate standards, at the long-term expense of life worldwide. Firstly, this effect would be unduly limited. Secondly, non-economic interests such as climate protection are important policy areas which are easily lost from sight when concentrating on purely economic matters; the climate does not have a market value. Free trade threatens to exacerbate environmental and social dumping through competition on the lowest standards, which in the long term serves neither the citizens of the industrialised nor those of the developing countries. National instruments, as addressed at the beginning of this paper, will only oppose this in a limited manner.

Unlike other national barriers to trade, border adjustments (e.g. combined with considerably increasing European energy taxes in an energy tax directive[52] – or combined with an extended EU ETS) – would at least present a real beginning with a possible role-model effect on countries like China or India. If one does not only impose border adjustments for climate-detrimental imports from outside, but also inversely reimburses the European companies the domestic energy taxes – then the European companies would truly not have *any* disadvantages on the world market (as compared to other product-induced barriers to trade according to WTO law). This would not completely solve the global resource and climate problems, but would certainly be a very important step in the right direction. However, border adjustments might also be a danger for a cooperative atmosphere in international relations. Neither would it lead to elimination of the global poverty problem. This aside, it is still necessary to determine whether the judiciary would really accept the border adjustments. If the returns from the border tax adjustments could be redistributed to the developing countries with regard to certain socio-ecological goals, this could represent the first step in the direction of a world contract idea (as a label for an ecologically and socially expanded WTO, which we want to analyse now).

The starting point for the impending scenario, which globally is more or less already reality, is: The developed states do not sharpen their environmental law in a way that could induce a sustainable standard of life; and the developing states mostly disregard environmental regulation from the start, and imitate blindly the western path of progress. It must be understood that trade as free as possible also leads to low prices e.g. for industrial goods and therefore potentially increases consumption. The higher use of resources, eventually with the aim of world-

[51] Therefore, e.g. Germany and Japan introduced in the 19th century a temporary protection of their domestic industries through protective tariffs to enable becoming established on the market. The same states now, in the negotiations on the further development of the WTO, want to prohibit this for the developing countries.

[52] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (2003), OJ L-283/51.

wide imitation of the western standard of life, is presumably not sustainable as it is neither possible to stand, nor is it expandable to a global level, on a resource and climate policy basis.[53] Unlike in social policy, as the voters and consumers living today in North and South may not feel the effects of the climate problem personally, democratic pressure cannot be relied upon to solve this problem of its own volition, especially as national democratic arenas are not really suitable as a medium for solving problems of a global scale.[54]

Border adjustments cannot be seen as "western cultural/ ecological imperialism". Whoever wants to enable the countries of the South to eliminate their poverty at the price of harming every current and future inhabitant of the earth does a disservice to all involved. Moreover, a successive rapprochement to a system of global environmental, social and taxation standards would be necessary. Such a global political framework for the globalised economy would cease the global social-ecological "race to the bottom" and give back to politics the ability to act in the face of economic imperatives. This could enable and preserve environmental- and possibly social-statehood, and could at the same time take the driving force from the globally imminent "clash of cultures" and with social statehood possible could carry also democracy and human rights more effectively into the world than currently the case. This system can – and must, as is especially visible with the otherwise unaffordable social standards – be conceived in such a way that developing countries need only comply with reduced and successively rising standards during a transitional period. Above all, co-finance of standards in the South by the industrial states must be considered; this is how Eastern European countries are integrated into the EU today.[55] Not until such standards are established can we reach at a global level what has been achieved globally in the western states in the middle of the twentieth century: Capitalism became an advantage for most people.[56] For all this, as the current occidental lifestyle is unsustainable, *more severe* environmental standards (possibly different to social standards) have to be established in the developed world. It is not sufficient, as has perhaps been thought up to now, to expand western standards worldwide. "Standards" can in this context also mean the conclusion of a demanding *Kyoto II Protocol* – including its integration in WTO law – which imposes emission reduction goals on developed and developing countries combined with financial compensation for the developing countries. This could follow e.g. the global principle of equal emission rights per capita ("one human – one emission right") which would lead to western states having to buy emission certificates in developing countries as westerners consume more per capita than inhabitants of the southern hemisphere. This would therefore – at the same time – be a very important global social standard.

That no consensus has been reached by egoistic nation states on global environmental stan-

[53] This has been documented many times; cp. Wuppertal Institut (2005), Fair Future, München: C.H. Beck.

[54] All this, though, is not considered by ELMAR RIEGER & STEPHAN LEIBFRIED (2002), Grundlagen der Globalisierung: Perspektiven des Wohlfahrtsstaates, Frankfurt a.M.: Suhrkamp.

[55] A total finance would sure enough already be inappropriate as even though the industrial states with a colonial history have a share in the misery of the South and would moreover profit themselves from the realization of social states and environmental protection, on the other hand corrupt governments in the South etc. have their share in the current situation. – On the entire idea of the "Global Marshall-Plan" see FRANZ J. RADERMACHER (2004), Global Marshall Plan: ein Planetary Contract – für eine weltweite ökosoziale Marktwirtschaft, Wien: Ökosoziales Forum Europa; EKARDT (2007).

[56] This last point is too little taken into account by RIEGER & LEIBFRIED (2002). Even if one were to incidentally think that the global free trade promotes *welfare* "by itself and without regulation" (which already contradicts the national experiences with the social state), would it be, after what has been said, not at the same time be a "self seller" for environmental protection. Welfare itself generates a rather technical safety law, but not a low consumption of resources (even if the doubtful formula of "environmental protection through economic growth" suggests this.)

dards which are strong in content and enforcement, be it in the WTO or in separate international environmental agreements (and therefore border adjustments as a first step are very important), illustrates very clearly the limited power of international law so far – in the absence of a kind of "global EU" with global standards, majority votes, integrated WTO-climate law etc. Even if e.g. the most famous international environmental agreement, the so-far existing *Kyoto I Protocol* were to be executed completely (which is currently very improbable), it would in 100 years only avoid less than one tenth of a degree Celsius of the average global warming.[57] This is only due in a minor part to missing greenhouse gas obligations by the newly-developing countries: Currently the Occident with its lifestyle is the primary global climate damager. Since 1990 worldwide greenhouse gas emissions have increased by 40 % or even more. Western nations will fall short of their Kyoto I protocol targets to reduce emissions by 5 % by 2012 (which is in itself not far-reaching enough). Instead, emissions increased by 10% in the OECD countries despite the collapse of Eastern European industries in 1990. Germany will if anything fall short of its Kyoto I protocol target to reduce emissions by 21%, despite a 14% reduction being already achieved by the collapse of the German Democratic Republic (DDR). As a resounding global climate agreement (Kyoto II) seems unlikely, steps towards a pioneering European climate policy (including border adjustments) should be taken as soon as possible. How difficult this is to change can be inferred by the fact that, despite the potential benefit of the system for all involved, powerful nation states will try to bar themselves from a new development like Kyoto II. Moreover one could object that a real global cooperation should initially assert basic principles of freedom and democracy in many more states than at present. This must be true, insofar as we do not naïvely consider a world state, but rather how to integrate global standards into the WTO itself. In the same way, border adjustments could, as has been said, be a first step in that direction, which would allow single countries to act as role models for other countries and induce those (without economic disadvantage) to follow suit. This, though, does not spare the western societies from the necessary lifestyle debate: Border adjustments protect the domestic economy, but the energy (or whatever is to be regulated) will nonetheless increase in price. Even on a national level, this has potential socio-political effects, e.g. not everybody will be able to drive a car anymore, and remains a constant problem in the acceptance of a challenging environmental policy.[58]

However, only the argument (enacted elsewhere[59]) universally justifying the concept of the autonomy of all humans long term and globally can demonstrate that the idea behind global- and generation-spanning freedoms (but also the requirement that freedom cannot just be "automobility" anymore) is not merely western cultural imperialism (or "eco-imperialism"). If rules and institutions exist to serve freedom (i.e. human rights), then they do have to exist and be of a shape that optimally serves freedom – including the physical pre-conditions of freedom such as a stable global climate and a basic nutritional provision, without which no freedom is possible. But if protection of such a freedom on the national level is only possible within limits, one must consider strengthened global rules and institutions to enable political decisions and effective enforcement beyond national egoism. Only such rules and institutions are capable of protecting freedom where it is threatened today – beyond classical state fron-

[57] According to the opinion of the Wissenschaftlicher Beirat Globale Umweltveränderung (German advisory council on global change) of the German government.

[58] All these effects would not be void in case of a defeat at the WTO judicial bodies, because such a defeat is usually followed by further negotiations; therefore the idea of border tax adjustments would not simply fail.

[59] See EKARDT (2008) and EKARDT (2007).

tiers and, following the modern economic-technical possibilities, beyond borders of time and generation.[60]

At least the WTO exhibits certain elements which could predestine it to be a relatively potent legal regime and therefore also a place of global standards including Kyoto II (compared to international environmental law) which could make border adjustments unnecessary one day: independence of organisational bodies, beginnings of separation of power, comparatively detailed legal body of law, binding effect also on unwilling nation states, sanctioning mechanism through effective judiciary. But so far, even the WTO is not free of the typical problems of public international law – without room here to set them out in more detail – such as (a) the power-political compromise character of the WTO through many sub-agreements containing exceptions etc., (b) its limited enforcement ability compared to powerful national states which do not always comply with WTO rules, (c) the necessity of unanimity of national states in the further development of the WTO which often results in deadlock, (d) the thus-far insufficient account taken of environmental concerns, (e) human rights and democratic deficit in that the WTO is also carried and designed by undemocratic and human rights violating states. These problems, usually ignored by the conventional economic and nationally-limited concepts of law, will inevitably have to be discussed sooner or later.

[60] Cp. to the previous points (that humans and governments tend to egoism; that the protection of freedom and its preconditions in the wide sense, and this also global and intergenerational, is the duty of national and transnational politics, that this is valid universally and not relative to a specific culture) EKARDT (2007) and EKARDT (2008), also on the point that global standards can often not be replaced by national or transnational acts of self-regulation of (multi-)national companies: The present Corporate Governance measures etc. in the environmental sector are biased in their tendency towards under-ambitious aims and, moreover, weak enforcement, to be able to replace political action, which is not surprising considering the egoism of the economic actors; not seen by GEERT VAN CALSTER (2008), Against Harmonisation – Regulatory Competition in Climate Change Law, in: Carbon & Climate Law Review, p. 89 – who does not realize that free markets alone will lead to a race to the bottom in climate policy as people, politicians, and business men are egoistic; climate damage is "invisible" and "far away" from the individuals; the climate has no price; acting as a single state leads to problems with competitiveness and so on and so forth. (this may be different in transnational consumer law; cp. GRALF-PETER CALLIESS (2006), Grenzüberschreitende Verbraucherverträge: Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz, Tübingen: Mohr Siebeck). Naturally, it is not certain whether human egoism will eventually motivate humans globally to pressure the governments that these (on their part egoistic and orientated towards their own re-election) become orientated towards sustainability and initiate global politics. In any case this is the normative sense of politics, i.e. that the individual does not have to think he is acting “climate-friendly” as the only one.