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THE BORDER ADJUSTMENTS OF THE AUSTRALIAN CLEAN ENERGY PACKAGE

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Abstract

World Trade Organization — Clean Energy Package — border adjustments — emissions trading — taxation — climate change — emissions intensive trade exposed products

Climate change is a global challenge. For this reason, it has been suggested that a global solution is necessary. In Australia the Clean Energy Package has been introduced with a purpose of reducing Australia's greenhouse gas emissions inventory, and responding to international obligations. This Package contains the institutional framework for an emissions trading scheme. The Package also includes amendments for other existing legal arrangements. These arrangements include a greenhouse gas emissions price on certain imported products. With this in mind the purpose of this paper is twofold. First, to consider the border adjustments and import charges of the Clean Energy Package and determine whether these comply with the rules of the World Trade Organization. Second, to analyse whether a border tax adjustment could be included in the Package for emissions intensive trade exposed (EITE) products. This paper concludes that, although the existing arrangements appear to comply with the WTO legal requirements, a border adjustment on EITE products could not be implemented in a manner that would comply with these rules.

I. INTRODUCTION

The Clean Energy Package (the **Package**) was introduced in Australia in July 2011. The Package originally consisted of 18 acts of parliament.[1] This legislation includes the institutional framework for an emissions trading scheme (**ETS**). To complement the ETS, the Package introduces ancillary arrangements to reduce greenhouse gas (**GHG**) emissions by refining other existing legal arrangements. The underlying purpose of the Clean Energy Package is to reduce GHG emissions

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[1] The Package consisted of 18 acts of parliament, and the *Steel Transformation Plan Act 2011* (Cth). The Package measures have since been amended by three additional acts of parliament.

in order to respond to both the global challenge of climate change and the obligations of the international climate change regime.[2]

Climate change and the challenges associated with it are global issues. For this reason many commentators suggest that the only appropriate response involves a global reaction. This approach has spawned a significant volume of commentary that supports the use of the 'destination principle' of taxation.[3] The destination principle This principle requires that, irrespective of where a commodity is produced, it should be taxed in the country where it is consumed.[4] Commentators endorse this method on the basis that countries who refuse to implement emissions policies will face charges if they export products to a country with a border tax adjustment.[5] Some commentators suggest that a border tax adjustment is a favourable alternative to free allocation of allowances within emissions trading schemes to address competitiveness concerns faced by domestic entities.[6]

The purpose of this paper is twofold. First, to determine whether the border tax adjustments and other import charges included in the Package comply with the WTO law. Second, to analyse the compliance of a border adjustment for emissions-intensive trade-exposed (**EITE**) products.[7] A border adjustment on EITE products is hypothetical. It is currently not part of the Package. This hypothetical scenario is conceptualised to replace the Jobs and Competitiveness Program (the **JCP**) that currently operates as an assistance measure under the Package to support EITE industries. In this regard, this paper considers whether a border adjustment would be a more effective method for addressing

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Australian Government, Commonwealth of Australia, Securing a Clean Energy Future: The Australian Government's Climate Change Plan (2011) v; Clean Energy Act 2011 (Cth) s3.

[3] See, eg, Harry Clarke and Robert Waschik, 'Designing a Carbon Price Policy: Is the Australian Climate Plan Fair to Australia's Energy-Intensive, Trade-Exposed Industries?' (2012) 45(1) *Australian Economic Review* 105; Tristan Edis, *Lend Lease Innovation Highlights a Carbon Tax Flaw* (28 May 2012) Climate Spectator <http://www.climatespectator.com.au/commentary/lend-lease-innovation-highlights-carbon-tax-flaw>; John Daley and Tristan Edis, 'Restructing the Australian Economy to Emit Less Carbon' (Report No 2010-2, Grattan Institute, April 2010) 20; Christine Kaufmann and Rolf H Weber, 'Carbon-related border tax adjustment: mitigating climate change or restricting international trade?' (2011) 10(04) *World Trade Review* 497; R. Ismer and K. Neuhoff, 'Border Tax Adjustments: A Feasible way to Address Nonparticipation in Emission Trading' (CMI Working Paper No 36, University of Cambridge, 2004); Gavin Goh, 'The World Trade Organization, Kyoto and Energy Tax Adjustments at the Border' ' (2004) 38 *Journal of World Trade* 395.

[4] John Snape and Jeremy De Souza, *Environmental Taxation Law: Policy, Contexts and Practice* (Ashgate Publishing Company, 2006) 8; Felix Ekardt and andrea Schmeichel, 'Border Tax Adjustments, WTO Law and Climate Protection' in Jacqueline Cottrell et al (eds), *Critical Issues in Environmental Taxation* (Oxford University Press, 2009) 737, 739.

[5] See, eg, R. Ismer and K. Neuhoff, 'Border Tax Adjustments: A Feasible way to Address Nonparticipation in Emission Trading' (CMI Working Paper No 36, University of Cambridge, 2004); Tristan Edis, *Lend Lease Innovation Highlights a Carbon Tax Flaw* (28 May 2012) Climate Spectator <http://www.climatespectator.com.au/commentary/lend-lease-innovation-highlights-carbon-tax-flaw>; Peter Hannam, 'Call for Carbon Duty on Imports', *The Age* (online), 9 October 2012 <http://www.theage.com.au/business/carbon-economy/call-for-carbon-duty-on-imports-20121009-27asi.html> .

[6] O. Kuik and M. Hofkes, 'Border adjustment for European emissions trading: Competitiveness and carbon leakage' (2010) 38(4) *Energy Policy* 1741, 1742.

[7] These products would be those that result from EITE Activities that qualify for JCP Assistance. See EITE Expert Advisory Committee, Parliament of the Commonwealth of Australia, *Establishing the eligibility of emissions-intensive trade-exposed activities* (2011).

competitiveness concerns, in context of the Package's compliance with the WTO law.

To achieve these objectives this paper is presented in four parts. The first part provides important background and contextual information. The theories supporting the destination principle of taxation are explained. This part then summarises the law of the WTO that regulates border tax adjustments. To do so, this part draws on the WTO law contained in the *General Agreement on Tariffs and Trade 1994* (the **GATT**)[8] and the *Subsidies and Countervailing Measures Agreement* (the **SCM Agreement**).[9]

The second part of this article considers the border adjustment for synthetic greenhouse gas (**SGG**) that exists in Australia. This part examines the nature of the SGG border adjustment and explains why its compliance with the WTO law requirements is likely.

The third part of this paper examines two other import charges imposed by the Package, namely the import charge on aviation fuel and the carbon pricing mechanism (the **CPM**) liability imposed on non-transport gaseous fuel. These other examples introduce liability in a manner that is different from the SGG border adjustment.

The fourth part of this paper considers whether border tax adjustments could be implemented on EITE products in Australia to address competitiveness concerns. This part draws on the structure of the Package's liability framework to consider whether it is conducive to a border adjustment that complies with WTO law. This part also examines a second significant question, namely whether emissions trading schemes implement a form of taxation. This is examined as it is argued here that the WTO rules specify that border adjustments are to be in the form of a tax or a charge, rather than a regulatory requirement.

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A The Principles of Taxation within International Trade

1 A Comparison of Destination Versus Origin Taxation

[8] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A ('*General Agreement on Tariffs and Trade 1994*').

[9] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A *('Agreement on Subsidies and Countervailing Measures')*.

In international trade, there are two principles to guide the taxation frameworks for nation states. They are the origin principle and the destination principle.[10] The origin principle dictates that taxation should be imposed on goods in the country where they are produced. Destination based taxation requires that a product is taxed according to where it is consumed.[11] The result is that the destination principle ensures that all taxation revenue 'accrues to the jurisdiction where the supply to the final customer occurs.'[12]

A country may implement the destination principle of taxation with a border tax adjustment. The phrase 'border tax adjustment' describes a situation where a nation imposes a surcharge on imports. This surcharge ought not to exceed an internal tax or charge imposed on domestic like products. A border tax adjustment also includes a rebate for exported products. In theory, the export adjustment should not exceed the domestic taxes that have been incurred.[13] The expression 'border tax adjustment' is synonymous with the GATT and the rules of the WTO. Other terminology may also reference this type of taxation, such as 'tax frontiers, tax boundaries and tax barriers'.[14]

The two principles of taxation — that is origin and destination — are necessary in international trade to avoid either double or zero taxation.[15] This article must respond to the enquiry about which method of 'taxation' is more appropriate for the liabilities imposed by the Australia's Package.[16] To address this issue adequately, it is useful to review the appropriate theory concerning these principles.

Ricardo considered the theory underlying the destination principle in the 19th century. His rationale, which is set out below remains valid today:

> In the degree … in which [domestic indirect] taxes raise the price of corn, a duty should be imposed on its importation … and a drawback of the same amount should be allowed on the exportation of corn. By means of this duty and this drawback, the trade would be placed on the same footing as if it had never been taxed, and we should be quite

[10] Snape and De Souza, above n 4, 8.
[11] Ibid.
[12] Stéphane Buydens, 'Consumption Tax Trends 2010: VAT/GST and Excise Rates, Trends and Administration Issues' (Publication, Organization for Economic Cooperation and Development, 2011) 41.
[13] Ben J. M. Terra, 'Excises' in Victor Thuronyi (ed), *Tax Law Design and Drafting* (Kluwer Law International, 2000) 246, 249.
[14] Ibid.
[15] Buydens, above n 12, 41.
[16] The response to this question is not necessarily the same for all liabilities of the Package.

> sure that capital would neither be injuriously for the interests of the country, attracted towards, nor repelled from it.[17]

Where taxation of a product causes the cost of the product to increase and the burden to fall on the ultimate consumer of the product, that framework should levy taxation on a destination basis. Taxes of this type can be classified as indirect, or as a tax directly levied on a product.[18]

Alternatively, where a tax framework imposes a cost on a producer directly, and the intention is for the producer to bear the cost of that tax, the framework should employ the origin principle of taxation. Such taxes are categorised as 'direct'. John Stuart Mill explained the distinction between direct and indirect taxes:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.[19]

To distinguish taxes in this manner makes the application of either the destination or origin principle logical. Importantly, 'this distinction has been generally accepted as a basis for the WTO's disciplines on border tax adjustments with respect to both imports and exports.'[20]

II. THE WTO RULES FOR BORDER TAX ADJUSTMENTS

Border tax adjustments,[21] implemented alongside environmental taxes and charges, are not necessarily unconventional. The legitimacy of a border tax adjustment as a tax with environmental goals was explored by the *General Agreement on Tariffs*

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[17] David Ricardo, 'On Protection to Agriculture' in Piero Sraffa and M.H. Dobb (eds), *The Works and Correspondence of David Ricardo: Volume IV: Pamplets and Papers 1815 - 1823* (Cambridge University Press, 1951) 218 cited in Snape and De Souza, above n 4, 9.

[18] John Stuart Mill, *Principles of Political Economy* (Augustus M. Kelley Publishers, first published 1848, 1987 ed) 823.

[19] Ibid 823 cited in Snape and De Souza, above n 4, 7.

[20] *Taxes and Charges for Environmental Purposes - Border Tax Adjustment,* WTO Doc WT/CTE/W/47 (2 May 1997) (Note by the Secretariat) 7.

[21] The term border tax adjustment is used within this thesis, despite the ongoing dispute whether emissions trading schemes introduce a type of taxation. Border tax adjustment is the commonly understood term within the WTO law and therefore, it is used within this chapter.

and Trade 1947 (the **GATT 1947**)[22] Panel when they were asked to consider the compliance of the *Superfund Amendments and Reauthorization Act of 1986* (the **Superfund Act**) in the United States.[23] Within the Australian *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) there has been a border tax adjustment in place for a number of years for certain gases. Despite this, there are WTO barriers to implementing border tax adjustments in connection with taxes and charges imposed for the purpose of regulating GHG emissions and mitigating climate change.

The rules for border tax adjustments in the context of the WTO law can be traced to provisions within two different agreements.[24] The exception within the SCM Agreement allows adjustments on exported products.[25] The adjustment for imports is contained within the GATT, Articles II and III.

The provision contained within the GATT that allows border adjustments to be imposed upon imported products is contained within Article II:2. This article reads:

> Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product … a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part.[26]

The second paragraph of Article III considers the application of internal taxes and internal charges to imported products. Article III:2 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, *to internal taxes or other internal charges* of any kind *in excess of* those applied, directly or indirectly, *to like* domestic

[22] *General Agreement on Tariffs and Trade,* opened for signature 30 October 1947, 55 UNTS 194 (entered into force 29 July 1948)

[23] GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances,* GATT Doc L/6175 (5 June 1987, adopted 17 June 1987) GATT BISD 34S/136.

[24] Although there is a bilateral nature of border tax adjustments, there is no requirement within the WTO law to implement both sides of the combined policy instrument. Authority for this proposition is found in the individual articles authenticating the use of this type of measure. See *General Agreement on Tariffs and Trade 1994* Articles II:2, III:2, XVI and the *Agreement on Subsidies and Countervailing Measures* Annexes I and II.

[25] The *General Agreement on Tariffs and Trade 1994* Article XVI also allows tax adjustments on exported products in a similar manner to the SCM Agreement. The *Agreement on Subsidies and Countervailing Measures* provision is more specific and therefore only those rules are considered here.

[26] The *General Agreement on Tariffs and Trade 1994* Article II:2(a).

> products. Moreover, no contracting party shall otherwise apply *internal taxes or other internal charges* to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.[27]

Article III:1 states:

> 'The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.'[28]

Because of this, Article III:2 contains two distinct sentences with different associated requirements. The Appellate Body considered both of these sentences in the *EC – Asbestos* dispute.[29] The Appellate Body made a distinction between the two sentences asserting that each imposed separate obligations for separate classes of products. The reasoning of the Appellate Body relied on the text of the supplementary notes to Article III:[30]

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a *directly competitive or substitutable product* which was not *similarly taxed*.[31]

Therefore, this article contemplates two distinct scenarios. First, where products are so similar that they are 'like products', there can be no differential in taxation at all. [32] Second, where products are similar, but not so much that they are 'like products' then as long as there is no intent to 'afford protection to domestic

[27] The *General Agreement on Tariffs and Trade 1994* Article III:2.
[28] The *General Agreement on Tariffs and Trade 1994* Article III:1.
[29] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001)
[30] The *General Agreement on Tariffs and Trade 1994* Ad Article III.
[31] The legal status of the Ad Article was clarified in the *Japan – Alcoholic Beverages II* dispute. In this case the Appellate Body suggested that the Article itself and the Ad to the Article had equivalent legal status and that they must be read together to clarify the proper meaning of the second paragraph. See Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R. WT/DS10/AB/R, WT/DS11/AB/R (1 November 1996) DSR 1996:1 [241].
[32] Ibid [115].

production' the differential in taxation must be more than a *de minimus* standard to infringe this requirement. [33]

For this reason, any border tax adjustment must be applied to an imported product in an identical manner as a domestic 'like product'. Alternatively, where the two products are 'directly competitive or substitutable' the taxes must be imposed similarly.

The rule allowing border adjustments on exported products is contained in Footnote 1 to Article 1.1 of the SCM Agreement. It states:

> the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.[34]

This footnote is a recreation of the GATT *Ad* Article XVI.

The GATT provisions and the SCM Agreement provisions therefore allow border tax adjustments to be associated with taxes on products. These taxes are generally known as 'indirect taxes'. That taxes on products can be adjusted at a member's border is not disputed within either agreement. What is uncertain is precisely where the line is drawn between direct and indirect taxation in the context of the WTO law.

III. DIRECT AND INDIRECT TAXATION

The Working Party on Border Adjustments (the **Working Party**) that was established in 1970, attempted to clarify the meaning of Articles II:2 and III:2 of the GATT 1947 when it accepted the economic theory of destination and origin taxation.[35] The Working Party reinforced the idea that any participating nation to the GATT 1947 with taxes directly levied on products could adjust these taxes at the border. The Working Party suggested that taxes directly levied on products (indirect taxes) included specific excise duties, cascade taxes, sales taxes and value added tax (**VAT**).[36]

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33 Ibid.

34 *Taxes and Charges for Environmental Purposes - Border Tax Adjustment,* WTO Doc WT/CTE/W/47 (2 May 1997) (Note by the Secretariat).

35 This article was a part of the *General Agreement on Tariffs and Trade 1947*.

36 *Taxes and Charges for Environmental Purposes - Border Tax Adjustment,* WTO Doc WT/CTE/W/47 (2 May 1997) (Note by the Secretariat) [23].

The Working Party also noted that nations with taxes not directly levied on products could not adjust these at the border.[37] These taxes included social security charges and payroll taxes. [38] Interestingly, the Working Party did not declare whether taxes that fell within the category of taxes occultes[39] could be the subject of destination based accounting.[40] This 'process related' category includes taxes on energy,[41] advertising, machinery and transport.[42]

Since the establishment of the 1970 Working Party, WTO members have revisited the issue of 'process related taxes' for border adjustment. In the SCM Agreement process related taxes are addressed specifically in Annex II. This Annex states:

> Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on *inputs* that are consumed in the *production* of the exported product.[43]

In support of this, product inputs are defined within the agreement as:

> Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.[44]

Although the provisions of the SCM Agreement that address indirect taxes appear to include process based taxes, it is important to note that the WTO law does not specifically state which process taxes can be adjusted. What adds to this complication is that the border adjustment exception contained within the GATT does not address process related taxes at all.

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37 Hence there would be some difficulty in arguing that a charge imposed by way of an emissions trading scheme in the form that they exist would be a charge that is eligible for adjustment.

38 *Report of the Working Party on Border Adjustments,* GATT BISD 18S/97 (2 December 1970) [14].

39 The OECD defined tax occultes as 'as consumption taxes on capital equipment, auxiliary materials and services used in the transportation and production of other taxable goods. Taxes on advertising, energy, machinery and transport were among the more important taxes which might be involved.' See ibid [15].

40 Javier De Cendra, 'Can Emissions Trading Schemes be Coupled with Border Tax Adjustments? An Analysis vis-a-vis WTO Law' (2006) 15 *RECIEL* 131, 139.

41 F. Biermann and R. Brohm, 'Border Adjustments on Energy Taxes: A Possible Tool for European Policymakers in Implementing the Kyoto Protocol?' (2005) 74 *Quarterly Journal of Economic Research (Germany)* 249, 252.

42 This category of taxes has been controversial. Compare Charles E McLure, 'A Primer on the Legality of Border Adjustments for Carbon Prices: Through a GATT Darkly' (2011) 2011 *Carbon and Climate Law Review* 456, 458 with Snape and De Souza, above n 4, 18

43 *Agreement on Subsidies and Countervailing Measures* Annex II Paragraph I:1.

44 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A *('Agreement on Subsidies and Countervailing Measures')* Footnote 61.

The confusion within the WTO rules associated with energy taxes and inputs has been expressed by some members explicitly.[45] Interestingly, the WTO Secretariat ruled out border adjustments linked to 'process' related taxes in a 2004 publication:

> Under existing GATT rules and jurisprudence, "product" taxes and charges can be adjusted at the border, but "process" taxes and charges by and large cannot. For example, a domestic tax on fuel can be applied perfectly legitimately to imported fuel, but a tax on the energy consumed in producing a ton of steel cannot be applied to imported steel.[46]

However, this 2004 advice appears to be contradicted in a recent publication expressing the opinions of the WTO Secretariat:

> It has been argued by some that the word "indirectly" contained in Article III.2 may be interpreted as allowing the use of border tax adjustments on taxes that are charged on inputs used during the production process of a particular product, i.e. applied indirectly to products. According to this argument, a tax on the energy or fuels used in the production process or the CO2 emitted during production (neither of which are physically incorporated in the final product) could therefore be considered to be applied indirectly to products ...[47]

It has been acknowledged that the SCM Agreement allows adjustment on the basis of taxation calculated on product inputs. Product inputs are defined under this Agreement to include energy used in production.[48] In addition, Article II:2(a) of the GATT allows members to impose charges on imports as long as it is 'a charge equivalent to an internal tax'[49] applied 'directly or indirectly'[50] to like domestic products or applied to 'an article from which the imported product has been manufactured or produced in whole or in part.'[51]

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[45] *Promoting Mutual Supportiveness Between Trade and Climate Change Mitigation Actions: Carbon-Related Border Tax Adjustments,* WTO Doc WT/CTE/W/248 (30 March 2011) (Communication from Singapore) 2 – 3 (emphasis added).

[46] *Trade and Environment at the WTO* (23 April 2004) (Document by the Secretariat) 21.

[47] United Nations Environment Programme and the World Trade Organization, WTO Secretariat, *Trade and Climate Change,* (2009) 104.

[48] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A *('Agreement on Subsidies and Countervailing Measures')* Footnote 61.

[49] The *General Agreement on Tariffs and Trade 1994* Article II:2.

[50] Ibid Article III:2.

[51] Ibid Article II:2.

Although there is a degree of disparity between the GATT and the SCM Agreement,[52] there is one common thread to the respective 'border adjustment' provisions. That is, both agreements appear to accept that a tax on a 'product's inputs' is indirect. The Oxford English Dictionary defines inputs as, 'what is put or taken in by a system or process.'[53] This means that, to be properly classified as an input, a thing must be put into a product, or 'taken in' by its process. In other words, a product input has to either be part of the final product or used in the production process.

One final point to acknowledge in relation to border tax adjustments is that, to properly classify taxes, it is not only the object of taxation that is important. Although the WTO rules suggest that the object of taxation will determine the classification of a tax, there are categories of taxes that require additional examination to determine whether they are direct or indirect. The comments of John Stuart Mill support this proposition:

> Direct taxes are either on income, or on expenditure. Most taxes on expenditure are indirect, but some are direct, being imposed not on the producer or seller of an article, but immediately on the consumer. A house-tax, for example, is a direct tax on expenditure, if levied as it usually is, on the occupier of the house. If levied on the builder or owner it would be an indirect tax.[54]

This statement serves as a reminder that all taxes are ultimately borne by individuals.[55] It follows that legislators cannot impose an indirect tax on a product, but only on an individual or an entity in connection with a product. The connection with a product can only be established by the methods of calculation or the measure of liability.[56]

In this regard, it is fundamental that a liability must be capable of being traced to a product to be adjusted in accordance with the WTO laws. This is because the import charge, allowed by the GATT Article II:2, in accordance with Article III:2, requires that liability on imported products is not in excess of that imposed on 'like' domestic products. Similarly, the export rebate allowed by the SCM

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[52] 'What appears an incongruity between the import and export side rules has the effect of permitting countries considerable flexibility in implementing and adjusting for innovative climate policies that may not conform to the more restrictive fiscally-oriented character of the import-side measures.' Donald Feaver, 'Climate Policy and Border Adjustment Regulation: Designing a Coherent Response ' (2012) 13(2) *Melbourne Journal of International Law* (in press) 8.

[53] Catherine Soanes, Sara Hawker and Julia Elliot (eds), *Oxford English Dictionary* (Oxford Press, Sixth Edition ed, 2010) 390.

[54] Mill, above n 18, 823 cited in Snape and De Souza, above n 4, 7.

[55] J. Stiglitz, 'Tax Reform: Theory and Practice' in Bassam Harik (ed), *The Economics of Tax Reform* (Upjohn Institute, 1987)

[56] Terra, above n 13, 253 – 254.

Agreement does not allow remission of duties and taxes in excess of those incurred domestically. This means that liability must be capable of being apportioned to a product. If the liability is not traceable to a product it is impossible to determine the amount of allowable adjustment. For this reason, a 'process-based' tax should only be capable of adjustment where it has been calculated in connection with a quantity of product.

IV. THE SGG BORDER TAX ADJUSTMENT

The Package imposes a price on imported SGGs to reflect the equivalent liability imposed by the CPM.[57] The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) (the **Ozone Act**) establishes this equivalent price. Legislators originally enacted the Ozone Act to fulfil Australia's obligations as a signatory to the *Montreal Protocol on Substances that Deplete the Ozone Layer* (the **Montreal Protocol**).[58] Under the original version of the Ozone Act only two SGGs that are regulated by *The Kyoto Protocol to the United Nations Framework Convention on Climate Change* (the **Kyoto Protocol**) were the subject of obligations.[59] Two pieces of legislation introduced by the Package amended the Ozone Act: the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* (Cth) and the *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995* (Cth). Among other changes, this legislation extended the reach of the Ozone Act to cover the third SGG that is regulated by the Kyoto Protocol.

One of the principal roles of the Ozone Act is to impose a border adjustment on imported SGGs and derivative products.[60] In addition to this import levy, a person who imports or manufactures SGGs must obtain a controlled substances licence. Similarly, any entity that imports equipment containing SGGs is required to hold an Ozone Depleting Substances/Synthetic Greenhouse Gas (**ODS/SGG**) equipment licence.[61]

A. The Nature of SGGs

The Kyoto Protocol identifies three different types of SGG emissions. These are Hydrofluorocarbons (**HFCs**), Perfluorocarbons (**PFCs**) and Sulphur hexafluoride (**SF_6**).[62] The atmosphere had no trace of these SGGs until the 20th century.[63]

[57] Explanatory Memorandum, Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011, 8.

[58] *Montreal Protocol on Substances that Deplete the Ozone Layer,* opened for signature 16 September 1987, 26 ILM 1550 (entered into force 1 January 1989); Revised Revised Explanatory Memorandum, Clean Energy (Consequential Amendments) Bill 2011 (Cth) 97.

[59] Revised Explanatory Memorandum, Clean Energy (Consequential Amendments) Bill 2011 (Cth) 98.

[60] *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* (Cth) s3A.

[61] Ibid s3A; *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) ss13A – 14A.

[62] *The Kyoto Protocol to the United Nations Framework Convention on Climate Change,* opened for signature 16 March

Indeed, these types of SGGs can have an atmospheric lifetime in excess of 1000 years.[64] The Intergovernmental Panel on Climate Change (**IPCC**) suggests that even small emissions of these gases will contribute to 'radiative forcing over the next several millennia.'[65]

There are significant differences between SGGs and other GHGs. First, as the name implies, humans manufacture SGGs[66] and SGGs are 'normally trapped in the equipment in which they are installed.'[67] This equipment includes refrigerators, air-conditioners and electrical equipment.[68] Although the manufacture of these gases and the subsequent 'trapping' of them within equipment is commonplace, the emission of these gases into the atmosphere occurs mainly through leakage or as a 'by-product of industrial activity'.[69]

The Australian government suggests that the use of the existing levy structure for SGGs under the Ozone Act (rather than their inclusions under the CPM) will reduce compliance costs for entities that are subject to the levy.[70] This existing levy structure imposes a charge on SGGs directly. It is important to acknowledge that SGGs are products as well as being incorporated product inputs for particular equipment.[71] Carbon dioxide and other GHGs may also be classified as products in particular circumstances.[72] However, in general the liability obligations of the CPM and other charges of the Package are not imposed on the gases themselves, but on the *emissions or potential emissions* of these gases. This is an important difference between the SGG levy and other obligations included under the Package.

1998, 37 ILM 22 (1998) (entered into force 16 February 2005) Annex A.

63 Intergovernmental Panel on Climate Change, *Third Assessment Report: Climate Change* (2001): *Working Group I, The Scientific Basis*, 243.

64 Ibid 254.

65 Ibid.

66 Chris McGrath, 'Australia's draft climate laws' (2009) 26 *Environmental and Planning Law Journal* 267, 281.

67 Ibid.

68 Ibid.

69 Department of Sustainability, Environment, Water, Population and Communities, Australian Government, *Synthetic Greenhouse Gases* (2 May 2012) <http://www.environment.gov.au/atmosphere/ozone/sgg/index.html>. See Appendix H for sources of SGG emissions.

70 Revised Explanatory Memorandum, Clean Energy (Consequential Amendments) Bill 2011 (Cth) 98.

71 Carbon dioxide and other GHGs may also be products. However, in general the liability obligations are not imposed on the gases, but on the emissions or potential emissions. Therein lies the difference between this levy and the CPM.

72 Universal Industrial Gases, Inc., *Carbon Dioxide (CO2) Properties, Uses, Applications CO2 Gas and Liquid Carbon Dioxide* (2008) <http://www.uigi.com/carbondioxide.html>; *The International Convention on the Harmonized Commodity Description and Coding System,* opened for signature 14 June 1983, 1503 UNTS 167 (entered into force 1 January 1988) Chapter 28.

B. The Compliance Issues of the SGG Adjustment

The Package amendments to the Ozone Act implement both a charge and a licensing requirement on importers of SGGs and equipment containing SGGs. Although amendments to the legislation do not substantially alter what was an existing border adjustment, to consider this through the lens of the WTO law provides an important point of comparison to other border adjustments explored within this article. This charge must adhere to the obligations of Article III of the GATT.[73] At the same time the export rebate must fulfill requirements of the SCM Agreement. As a side issue, the licensing requirement must comply with import licensing requirements of the GATT and the Import Licensing Agreement.[74]

C. Controlled Substances Licences and ODS/SGG Equipment Licence

In Australia, a person who imports or manufactures SGGs must obtain a controlled substances licence. An importer of a piece of equipment or a product that contains Ozone Depleting Substances (**ODSs**) or SGGs is required to apply and hold a ODS/SGG equipment licence.[75] The requirement to obtain a licence to manufacture, import and export SGGs applies to imported products the same as it does to products manufactured domestically.[76]

Import licensing is defined within the Import Licensing Agreement as any 'administrative procedures ... requiring the submission of an application ... other than that required for customs purposes.'[77] The agreement requires that these procedures are not operated inappropriately,[78] and non-discriminatory in their application.[79] Therefore, the Import Licensing Agreement is only concerned with the *application* of the licensing requirements rather than the law itself.[80]

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[73] The licensing requirement may have to comply with Article III:4 of the *General Agreement on Tariffs and Trade 1994*.

[74] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A *('Agreement on Import Licensing Procedures').*

[75] Revised Explanatory Memorandum, Clean Energy (Consequential Amendments) Bill 2011 (Cth) 102; *Clean Energy (Consequential Amendments) Act 2011* (Cth) s425; *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s13(6A).

[76] *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* (Cth) s3A; *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s13A.

[77] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A *('Agreement on Import Licensing Procedures')* Article 1:1.

[78] Ibid Article 1:2

[79] Ibid Article 1:3

[80] Ibid Articles 1:1-1:3; The *General Agreement on Tariffs and Trade 1994* only considers import licensing generally in Article VIII. World Trade Organization, *Technical Information on Import Licensing* (2012) <http://www.wto.org/english/tratop_e/implic_e/implic_info_e.htm>. This provision imposes obligations on eight different types of import restrictions, with licensing just one of those. However, Import Licensing is addressed specifically in the *Agreement on Import Licensing Procedures*. Import licensing is defined within the Import Licensing Agreement as any 'administrative procedures ... requiring the submission of an application ... other than that required for customs purposes.'

The analysis of the application of the SGG licensing requirements is beyond the scope of this thesis. This is because these restrictions apply to the procedures associated with import licensing rather than the rules themselves.[81] An examination of the administrative operation of these laws does not form a part of this analysis. Therefore, the Import Licensing Agreement and the SGG licensing requirements are not considered here in any detail. This section concludes by noting that the requirement to obtain a licence in connection with SGGs applies to entities associated with imported and domestic products.

D. The Levy on Imported Products

The levy imposed on both importers and manufacturers of SGGs is identical. The *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* (Cth) (the **SGG Import Levy Act**)[82] and the *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995* (Cth) (the **SGG Manufacture Levy Act**)[83] both require that importers and manufacturers pay the SGG levy under the respective Acts based on the following calculation:

$$\left(\begin{matrix}\text{Number of tonnes}\\\text{of the carbon}\\\text{dioxide equivalence}\\\text{of the SGG}\end{matrix} \times \begin{matrix}\text{Applicable}\\\text{charge}\end{matrix}\right) + \left(\begin{matrix}\text{Number of}\\\text{tonnes}\\\text{of the SGG}\end{matrix} \times \begin{matrix}\text{Prescribed}\\\text{rate}\end{matrix}\right)$$

The Acts clarify that the legislation imposes a carbon charge through the calculation contained within the first parenthesis.[84]

The levy imposed upon entities when imported equipment contains SGGs is similar to the above SGG equation. The SGG Import Levy Act imposes the charge using the following calculation:[85]

ibid Article 1:1 The agreement requires that these procedures are not operated inappropriately, ibid Article 1:2 and are neutral in their application. Ibid Article 1:3.

81 *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) 736.

82 *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* (Cth) s3A(7).

83 *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995* (Cth) s3A(5).

84 Ibid s3A(8); *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* (Cth) s3A(10).

85 *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* (Cth) s4A(5).

$$\left(\begin{array}{c}\text{Number of tonnes}\\ \text{of the carbon}\\ \text{dioxide equivalence}\\ \text{of the SGG}\\ \text{contained in the}\\ \text{equipment}\end{array} \times \begin{array}{c}\text{Applicable}\\ \text{charge}\end{array}\right) + \left(\begin{array}{c}\text{Number of}\\ \text{tonnes}\\ \text{of the SGG}\\ \text{contained in the}\\ \text{equipment}\end{array} \times \begin{array}{c}\text{Prescribed}\\ \text{rate}\end{array}\right)$$

Equipment manufactured domestically is not the subject of a similar levy. However, the legislation imposes an equivalent charge on domestically manufactured equipment by virtue of the direct charge on SGGs. The WTO legal issues with this type of adjustment are considered further when the *Superfund* dispute is analysed.[86]

E. Refund Arrangements for Exports

The alternative side of the SGG border adjustment is the rebate offered to importers and manufacturers of SGGs and SGG containing equipment. Liable entities who export SGGs or SGG equipment may apply for a rebate for any SGG levy they have incurred. This is on the condition that the export of the product occurs within 12 months of its manufacture or the original import of the SGG.[87] The rebate applies the following calculation:[88]

$$\left(\begin{array}{l}\text{Number of tonnes}\\ \text{of the carbon dioxide}\\ \text{equivalence}\\ \text{of the SGG}\end{array} \quad \text{X} \quad \begin{array}{r}\text{Applicable}\\ \text{charge}\end{array}\right)$$

The remission of the levy applies equally to a purchaser of the product as it does to the original licensee.[89]

To evaluate these rebates and charges for compliance with the WTO law, the reasoning of the Panel in the *US - Superfund* dispute is vital.[90] The reasoning in

86 GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances,* GATT Doc L/6175 (5 June 1987, adopted 17 June 1987) GATT BISD 34S/136 . See section V

87 Commentary on Provisions, Clean Energy (Consequential Amendments) Bill 2011 (Cth) 93; *Clean Energy (Consequential Amendments) Act 2011* (Cth) s450; *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) ss69AA – 69AC.

88 *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s69AA(2).

89 Ibid ss69AA – 69AC.

90 GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances,* GATT Doc L/6175 (5 June

this dispute enables an understanding as to how the SGG border adjustment may be analysed by a WTO Panel if it was scrutinised today.

V. THE IMPORTANCE OF THE SUPERFUND DISPUTE REASONING

The *US - Superfund* decision builds on the jurisprudence that suggests members can impose border adjustments for taxes charged on process and production inputs. This dispute refers in particular to inputs incorporated in the final product.[91]

The *US - Superfund* dispute arose as a result of the charge of a border tax authorised by the *Superfund Amendments and Reauthorization Act of 1986* (the **Superfund Act**) in the United States. Among other things, the Superfund Act introduced: an excise tax on petroleum at higher rates than existing petroleum taxes, a tax on certain feedstock chemicals and a tax on certain imported substances produced or manufactured from the taxable feedstock chemicals.[92] These imported substances were derivative products similar to the equipment containing SGGs.

A central element of the *US - Superfund* dispute questioned whether a tax on the materials used for the production of a product is equivalent to a tax on the product itself and thus eligible for border adjustment. The Panel responded clearly to this element of the dispute:

> The principle to be applied in implementing the legislation was that the amount of tax to be imposed on the imported substances would equal the amount of tax that would have been imposed on the chemicals used in producing the imported substances if the chemicals had been sold in the United States for an equivalent use ... Substances of domestic origin bore a fiscal burden corresponding to the tax on the chemicals used in their production. Imported substances bore the same burden because the tax on certain imported substances was equal to the tax that would have been levied on the chemicals used in the production of the imported substances had they been produced in the

1987, adopted 17 June 1987) GATT BISD 34S/136.

91 United Nations Environment Programme and the World Trade Organization, WTO Secretariat, *Trade and Climate Change,* (2009), 104; Keith Kendall, 'Exports and Imports under a Carbon Tax' in Lin-Heng Lye et al (eds), *Critical Issues in Environmental Taxation* (Oxford University Press, 2009) vol 7, 477 482.

92 GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances,* GATT Doc L/6175 (5 June 1987, adopted 17 June 1987) GATT BISD 34S/136.

> United States. This form of border tax adjustment was explicitly foreseen in Article II:2(a).[93]

The Panel concluded that the tax imposed on certain chemicals was a tax directly imposed on products and therefore the legislators were within their rights to adjust the tax at the border.[94] It has been suggested that the analysis in this dispute did not make it clear whether the final product needed to incorporate the input.[95] However, the Panel only contemplated those inputs incorporated into the final product. The Panel referred to the reasoning of the GATT Legal Drafting Committee, which indicates inclusion into the product is necessary:

> if a [charge] is imposed on perfume because it *contains* alcohol, the [charge] to be imposed must take into consideration the value of the alcohol and not the value of the perfume, that is to say the value of the *content* and not the value of the whole.[96]

The Panel went on to put this reasoning into the context of the Superfund dispute:

> The tax is imposed on the imported substances because they are produced from chemicals subject to an excise tax in the United States and the tax rate is determined in principle in relation to the amount of these chemicals used and not in relation to the value of the imported substance.[97]

The reasoning of the Panel provides strong jurisprudential support that the border adjustment in Australia associated with SGGs will comply with WTO requirements. Just as the Superfund Act imposed a tax on chemicals as the products, the Package includes a tax on SGGs as the principal product. The derivative products in the Superfund dispute were ‘certain substances’ that used the chemicals in their production.

The *US – Superfund* dispute about ‘imported substances’ can be compared with the SGG derivative products regulated by the Ozone Act in Australia. Under the

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93 Ibid 7.

94 Ibid.

95 Frank Biermann and Rainer Brohm, 'Implementing the Kyoto Protocol without the USA: the strategic role of energy tax adjustments at the border' (2005) 4 *Climate Policy* 289 , 293; *Taxes and Charges for Environmental Purposes - Border Tax Adjustment,* WTO Doc WT/CTE/W/47 (2 May 1997) (Note by the Secretariat) [70].

96 GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances,* GATT Doc L/6175 (5 June 1987, adopted 17 June 1987) GATT BISD 34S/136 [3.2.6] quoted in Matthew Genasci, 'Border Tax Adjustments and Emissions Trading: The Implications of International Trade Law for Policy Design' (2008) 2008 *Carbon and Climate Law Review* 33, 35 (emphasis added).

97 GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances,* GATT Doc L/6175 (5 June 1987, adopted 17 June 1987) GATT BISD 34S/136, 19.

Australian legislation SGG derivative products have a carbon price equivalent charged in the same manner as if production of these products occurred in Australia. Therefore, as long as the levy calculations are the same for imported products and products of national origin, the SGG border adjustment will comply with the WTO law. To determine whether these calculations are the same, the charge associated with the SGGs, as the product input, must be compared.

These adjustments are allowed, as SGGs are both products themselves and product inputs. Therein lie the similarities to the chemicals and substances considered in the Superfund dispute.

VI. An Overview of Other Clean Energy Import Charges and Obligations

The Package ensures SGGs incur liability when they are physically incorporated into products, or when they are in a 'product' form. Other GHGs incur no such liability. It is the emission or potential emission of other GHGs that result in liability within the Package.

The Package includes import charges and obligations beyond the border adjustment for SGGs. These other charges present a comparison to a hypothetical border tax adjustment for EITE products. In the following sections two different types of import charges are examined. First, there is a tax on imported aviation fuel. This is imposed to reflect an internal excise tax introduced by the Package. Second, the obligation to surrender eligible emissions units imposed on importers of non-transport liquefied gas is examined.

F. Aviation Fuel Excise and Customs Duty

Prior to the introduction of the Package, aviation fuel was subject to a small excise or customs duty. The customs duty was applied when the fuel was imported and the excise was applied when the fuel was manufactured in Australia.[98] The Package amended this to increase the duties on aviation gasoline and aviation kerosene by imposing a levy that is equivalent to the liability that is imposed by the CPM.[99] This increase applies to both manufactured and imported aviation fuels.[100]

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[98] Explanatory Memorandum, Clean Energy (Fuel Tax Legislation Amendment) Bill 2011 (Cth) Clean Energy (Excise Tariff Legislation Amendment) Bill 2011 (Cth) Clean Energy (Customs Tariff Amendment) Bill 2011(Cth) 19.

[99] Ibid.

[100] Ibid 20.

Domestic airlines bear the increase in aviation fuel tax entirely. International aviation fuel is not subject to the Australian fuel tax regime and is therefore excluded from the above arrangements.[101] As a preliminary point, these arrangements appear to be a charge on a product, namely the aviation fuel.

The calculation of the import charge for aviation fuel is on the potential emissions of the fuel. A liable entity can calculate the tax payable by multiplying the volume of fuel either manufactured or imported by the carbon equivalent tonnage per litre, and then by the cost per tonne as prescribed by the legislation.[102] In other words, the calculation of the customs charge and the excise tax is directly associated with the volume of aviation fuel. This means that it is traceable to the final product of the fuel. The legislation refers to the additional amount as a 'carbon component rate'.[103] This amount is intended to reflect the costs associated with general liability under the CPM.[104] The charge can be represented as:

Excise or Customs Duty = PQ x EF x ETC

Where:

PQ = Product Quantity (the variable of the calculation)

EF = Emission Factor (specific to the product)

ETC = Emission Tonnage Cost[105]

The legislation links the customs charge to the excise duty. The Explanatory Memorandum to the Clean Energy (Fuel Tax Legislation Amendment) Bill 2011 (Cth)[106] notes the connection between the taxes implemented on manufactured and imported fuels:

> New section 19A in the *Customs Tariff Act 1995* will give effect to subsequent adjustments to these duty rates. Section 19A will link duty rates for these goods to the equivalent items in the *Excise Tariff Act*

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101 Ibid 10. Excise and customs duties are connected to the supply of the excisable product.

102 The amount of the fuel tax adjustment will be based in 2012-13, 2013-14 and 2014-15 on a carbon charge of $23.00 per tonne, $24.15 per tonne and $25.40 per tonne respectively. From 1 July 2015, the fuel tax adjustment will be based on the preceding six-month average carbon auction price.

103 *The Clean Energy Legislation Amendment Act 2012* (Cth) s76.

104 Explanatory Memorandum, Clean Energy (Fuel Tax Legislation Amendment) Bill 2011 (Cth) Clean Energy (Excise Tariff Legislation Amendment) Bill 2011 (Cth) Clean Energy (Customs Tariff Amendment) Bill 2011(Cth) 17. The relevant emission rate for aviation gasoline is 0.0022 tonnes of carbon emission per litre, and for aviation kerosene the relevant emission rate is 0.0026 tonnes of carbon emission per litre.

105 More detailed calculations can be sourced from Department of Climate Change and Energy Efficiency, Commonwealth of Australia, *Australian National Greenhouse Accounts: National Greenhouse Accounts Factors* (July 2012).

106 The long title is: Explanatory Memorandum, Clean Energy (Fuel Tax Legislation Amendment) Bill 2011 (Cth) Clean Energy (Excise Tariff Legislation Amendment) Bill 2011 (Cth) Clean Energy (Customs Tariff Amendment) Bill 2011(Cth).

> *1921* and will automatically adjust those duty rates when duty rates change in the *Excise Tariff Act 1921. ...* This mechanism will ensure that rates of customs duty for aviation fuels and CNG are the same as set out in the *Excise Tariff Act 1921*.[107]

As a result the imported liability is the same as the internal charge.

By all appearances, the fuel duty adjustment complies with the obligations prescribed by the WTO laws. The reason for this is that the legislation imposes a duty directly on the product itself: that is, the aviation gasoline and kerosene. The liability amount for the duty is based on a calculation that applies to both manufactured and imported products. This means there is no differential between the internal measure and the charge imposed on imported products.

G. Non-Transport Liquefied Natural Gas and Liquefied Petroleum Gas

The non-transport gaseous fuel arrangements changed over the course of the implementation of the Package. Originally, importers and manufacturers of gaseous fuel for non-transport use were to incur excise and customs duties.[108] This was similar to the abovementioned excise and customs duty on aviation fuel. However, from 1 July 2013, the importation of non-transport liquid petroleum gas (**LPG**)[109] or liquid natural gas (**LNG**)[110] will be directly liable under the CPM.[111]

The abovementioned liability is introduced by sections 36B and 36C of the *Clean Energy Act 2011* (Cth) (the **Clean Energy Act**). Where an entity imports an amount of LNG or LPG for home consumption,[112] they will incur an obligation to surrender eligible emissions units under the CPM. The legislation imposes this liability based on on the number of tonnes of potential GHG emissions embodied in the LPG or LNG.[113] Similar to the charge on aviation fuel, the liability on the LPG and LNG is directly traceable to the product of the LPG or LNG. Therefore,

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107 Ibid 27.

108 Explanatory Memorandum, Clean Energy Legislation Amendment Bill 2012, Clean Energy (Excise Tariff Legislation Amendment) Bill 2012, Clean Energy (Customs Tariff Amendment) Bill 2012, 36.

109 'Liquefied Petroleum Gas or LPG (also called Autogas) consists mainly of propane, propylene, butane, and butylene in various mixtures. It is produced as a by-product of natural gas processing and petroleum refining.' See Alternative Fuel Systems Inc. *What's the Difference Between CNG, LNG, LPG and Hydrogen?* <http://www.afsglobal.com/faq/gas-comparisons.html>.

110 Liquefied Natural Gas or LNG is natural gas stored as a super-cooled (cryogenic) liquid. See ibid.

111 *The Clean Energy Legislation Amendment Act 2012* (Cth) Schedule 2; *Clean Energy Act 2011* (Cth) Div 3A.

112 Note – there is no export remission, but the clean energy legislative package clearly states that the obligation is only imposed where the non-transport gaseous fuels are destined for household consumption. As export is inconsistent with household consumption we must assume there will be no need to include an export adjustment for any units already surrendered.

113 *Clean Energy Act 2011* (Cth) s19.

this is a charge imposed on potential emissions, directly traceable to a product. This can be represented simply as:

$$\textbf{Carbon Unit Liability} = \frac{PQ \times EF}{1000}$$

Where:

PQ = Product Quantity (the variable of the calculation)

EF = Emission Factor (specific to the product)[114]

This representation highlights the difference between this and the aviation fuel levy. The difference is in the liability to surrender units as opposed to a payment of the applicable tax. The WTO law obligations associated with this type of 'surrender obligation' adjustments are largely untested. This issue is addressed subsequently in this article in Section XI.

VII. A BORDER ADJUSTMENT ON EITE PRODUCTS

Thus far, this article has considered the border adjustments and import charges actually imposed by the Package. Because these adjustments are part of the Package, and have a narrow liability base there is no need to speculate on the broader structure of the legislation. This is not the case for the hypothetical CPM border adjustment applied to EITE products. This adjustment is conceptualised as an alternative to free unit assistance.[115] In particular, this adjustment could potentially replace the JCP, which is designed to support EITE industries.

A border adjustment for EITE products would be imposed upon finished products that are either exported from or imported into Australia. Although this adjustment is hypothetical, to accurately describe how it would be imposed requires an understanding of the impact of the CPM on EITE products.[116] For this reason, it is fundamental to this analysis to understand how liability is introduced by the CPM. This means that the emission calculation methodologies of the CPM must be examined.

[114] More detailed calculations can be sourced from Department of Climate Change and Energy Efficiency, Commonwealth of Australia, *Australian National Greenhouse Accounts: National Greenhouse Accounts Factors* (July 2012).

[115] Tony Wood and Tristan Edis, 'New Protectionism Under Carbon Pricing: Case Studies of LNG, Coal Mining and Steel Sectors' (Report No 2011-X, Grattan Institute, September 2011) 27.

[116] This is because the border adjustment exception provisions of the *Agreement on Subsidies and Countervailing Measures* and the *General Agreement on Tariffs and Trade 1994* require the adjustment coincides with domestic liability. See Section 0

The liability of the CPM and the hypothetical adjustment must be examined with four primary questions in mind to determine its compliance with the WTO law. The first question asks how the CPM assigns liability. The second question considers whether GHG emissions can be defined as product inputs. The third question involves a practical example of this border adjustment and evaluates whether the liability incurred by the domestic producer can be traced to a product to ensure the charge remitted upon export is 'not in excess of those which have accrued.'[117] Similarly, this question answers the matter of whether an import charge can be imposed on a 'like product' in an identical manner as it is on a domestic product.

The fourth and final question is whether the charges introduced by the CPM are a form of taxation.[118] This is raised here as some commentators have suggested that the obligation to purchase GHG units is a regulatory requirement as opposed to form of taxation.[119] This is a fundamental issue, as the SCM Agreement and the GATT border adjustment exception provisions specify that a measure must be a duty, levy or tax to be adjustable.[120]

VIII. Liability Under the CPM and the Measurement of Emissions

The Explanatory Memorandum to the Clean Energy Bill 2011 (Cth) notes that the CPM apportions liability predominately after persons release GHG emissions:

> To minimise costs to business and reduce administrative complexity, [therefore] only firms that *directly release large amounts of greenhouse gas emissions* or are natural gas suppliers[121] (and are responsible for potential greenhouse gas emissions embodied in the natural gas)[122] will pay the carbon price. It is expected that around 500 large polluters will be liable entities under the mechanism.[123]

[117] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A *('Agreement on Subsidies and Countervailing Measures')* Footnote 1.

[118] Explanatory Memorandum, Clean Energy Legislation Amendment Bill 2012, Clean Energy (Excise Tariff Legislation Amendment) Bill 2012, Clean Energy (Customs Tariff Amendment) Bill 2012 12 [1.6] the explanatory memorandum notes that the Commonwealth does not consider the issue charges are taxation because taxation is compulsory and it is not compulsory to surrender units.

[119] Charles E McLure, 'The GATT- Legality of Border Adjustments for Carbon Taxes and the Cost of Emissions Permits: A Riddle, Wrapped in a Mystery, Inside an Enigma' (2011) 11(4) *Florida Tax Review* 221 236 Footnote 23; Gary Clyde Hufbauer, Steve Charnovitz and Jisun Kim, *Global Warming and the World Trading System* (Peterson Institute for International Economics, 2009).

[120] The *General Agreement on Tariffs and Trade 1994* allows for domestic regulations to be imposed on imported products, but under Article III:4 as opposed to III:2. The *Agreement on Subsidies and Countervailing Measures* does have an equivalent provision and therefore it is important to understand whether the CPM is a form of taxation.

[121] This would now include potential emissions for LNG and LPG.

[122] This now includes potential emissions for other fuel types, namely 'designated fuels.' See *The Clean Energy Legislation*

For this reason, the *focus* of the CPM's liability is on persons responsible for facilities that *directly release* GHG emissions. However, in total there are 11 categories of liable entities under the CPM.[124] Of these, six are liable through releasing emissions directly while the remaining five include persons liable for the potential emissions of a 'designated fuel'.[125]

This provides an understanding of the CPM liability. The next issue to resolve is how the emissions, which are the basis of liability, are measured. The *National Greenhouse and Energy Reporting Act 2007* (Cth) (the **NGER Act**) establishes the methodologies for the measurement of emissions liability for the CPM.[126] However, the details of the measurement of emissions are contained in the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* (the **Determination**),[127] which are explained further in the annually released *National Greenhouse and Energy Reporting System Measurement: Technical Guidelines for the estimation of Greenhouse Gas Emissions by Facilities in Australia* (the **Technical Guidelines**).[128]

The Determination prescribes four methods for GHG emissions measurement.[129] Of these four methods, the first three estimate the emissions by reference to the chemical properties of products or inputs.[130] The first method uses a fuel-specific emissions factor for each type of fuel and greenhouse gas.[131] The guidelines suggest methods 2 and 3 aim to provide a more accurate estimate of a facility's GHG emissions by allowing 'corporations' to undertake additional measurements.[132] The final method is the direct monitoring method which facilities such as underground coalmines already employ.[133] These estimation methods are necessary only for actual GHG emissions rather than potential GHG emissions.[134]

Amendment Act 2012 (Cth) s24.

123 Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 46 quoted in Murray Wilcox and Michael Rennie, *Australian Emissions Trading Law* (Thomson Reuters, 2012) 86 (emphasis added).

124 Wilcox and Rennie, above n 123.

125 *The Clean Energy Legislation Amendment Act 2012* (Cth) s24. Thus the remaining 3 are liable for the supply of Natural Gas, LNG or LPG where there was no provision of an OTN; the receipt of the aforementioned gases and they quoted an OTN; or Opt-in to the scheme.

126 *Clean Energy Act 2011* (Cth) s30.

127 *National Greenhouse and Energy Reporting (Measurement) Determination 2008.*

128 Department of Climate Change and Energy Efficiency, Australian Government, *National Greenhouse and Energy Reporting System Measurement: Technical Guidelines for the estimation of Greenhouse Gas Emissions by Facilities in Australia* (June 2012).

129 *National Greenhouse and Energy Reporting (Measurement) Determination 2008* s1.4.

130 Department of Climate Change and Energy Efficiency, Australian Government, *National Greenhouse and Energy Reporting System Measurement: Technical Guidelines for the estimation of Greenhouse Gas Emissions by Facilities in Australia* (June 2012) 28.

131 Ibid 71.

132 Ibid 28.

133 Ibid 29.

134 As noted above, potential emissions are directly traceable to a product itself. Therefore, the tax is indirectly imposed on the

The measurement of emissions and liability imposed by the Australian CPM is limited to scope 1 emissions, and to *potential* emissions contained in designated fuels.[135] Scope 1 emissions are a 'direct result of an activity or series of activities.'[136] Scope 1 emissions sources include fuel combustion, fugitive emissions from fuels, emissions from industrial processes and waste emissions.[137] Importantly the Clean Energy Act defines scope 1 emissions as 'covered emissions' only when 'the greenhouse gas is released in Australia.'[138]

The CPM generally imposes liability for the GHG emissions that are released through an *activity or series of activities* that causes these emissions. This includes activities undertaken during the manufacturing processes. The measure of the emissions of an activity is not the products manufactured, but the inputs used in the course of manufacture. It is suggested here that this resembles a direct tax on a producer more so than an indirect tax that is imposed on products. This can be distinguished from the liability that the CPM imposes on fuels directly. When the CPM apportions liability on potential emissions in fuel the liability is indirect (or directly imposed on a product), as the fuel is a product.

On this basis, it is possible to divide the triggers for liability under the Package into three categories. First, there is liability calculated on the GHGs themselves. Second, there is liability for potential GHG emissions. This is demonstrated by the aviation fuel levy and the LNG and LPG surrender obligations. The liability in this case is calculated in accordance with the volume of product with the potential emissions as a factor of the calculation. Finally, the Determination and Technical Guidelines provide methodologies for estimating GHG emissions. These emissions are not linked to a particular volume of product. Rather the emissions are, in some instances, estimates based on the inputs associated with an activity.

IX. PRODUCT INPUTS AND GHG EMISSIONS

In section 0 it was concluded that for an adjustment to be compliant with the WTO law the original liability must be imposed on a product directly or indirectly. The indirect imposition includes a charge on product inputs. A product input must be either part of the final product or used in the production process.

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product.

135 *Clean Energy Act 2011* (Cth) ss30, 33, 36B-36D; Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 49.

136 Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 50; *National Greenhouse and Energy Reporting Regulations 2008* (Cth) reg 2.23.

137 Department of Climate Change and Energy Efficiency, Australian Government, *National Greenhouse and Energy Reporting System Measurement: Technical Guidelines for the estimation of Greenhouse Gas Emissions by Facilities in Australia* (June 2012) 24-25.

138 Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 49.

The ordinary meaning of input can be contrasted with the ordinary meaning of an emission. The definition of 'emission' includes 'that which is emitted; a discharge; an emanation.'[139] This means GHG emissions are a product's waste rather than a product's input. For this reason, classification of emissions as inputs is contrary to the ordinary meaning of the word.

It is possible to argue that the Technical Guidelines prescribe the calculation of emissions on the basis of product inputs. Because of this, it could be suggested that liability imposed by the CPM on GHG emissions is traceable to product inputs and therefore, by extension, indirectly imposed on a product. However, this argument is refuted here for two reasons. First, the CPM liability attaches not to product inputs but to GHG emissions *that may be estimated* from product inputs. Indeed, it is the release of emissions that is the taxable behaviour. Direct monitoring of emissions, for example, does not use a product input estimation technique. Second, the inputs on which emissions are estimated are not themselves traceable to a product. Rather, they are traceable to an activity.

The conclusion here is that GHG emissions, once released, are a waste product of the manufacturing process and not a product input. As demonstrated, the calculation of actual emissions is linked to the inputs of an 'activity' rather than a product. Importantly these emissions are difficult to trace to a particular quantity of finished product. Certainly, the methodologies for the estimation of emissions that are used for the CPM demonstrate the challenges associated with complying with the border tax adjustment rules under the WTO law with respect to the subject matter regulated by the CPM.

X. A PRACTICAL EXAMPLE OF AN EITE BORDER ADJUSTMENT

In order to demonstrate the difficulties associated with assigning liability on EITE products on the basis of GHG emissions using a border tax adjustment, a practical example is useful. The activity that offers a good illustrative example is 'Integrated Iron and Steel' manufacturing.[140] This activity produces 'solid carbon steel products'.[141]

A liable entity under the CPM responsible for the emissions associated with integrated iron and steel manufacturing will measure their emissions in accordance

[139] Macquarie Dictionary, *Australia's National Dictionary Online: Emission* (2012) <http://www.macquariedictionary.com.au>; Soanes, Hawker and Elliot, above n 53, 242.

[140] EITE Expert Advisory Committee, Parliament of the Commonwealth of Australia, *Establishing the eligibility of emissions-intensive trade-exposed activities* (2011) 54.

[141] Ibid.

with the methodologies set out in the Technical Guidelines.[142] The Technical Guidelines require liable entities to calculate emissions as 'a total of emissions released from the production of a metal and from all other emissions released from the operation of the activity.'[143] In this regard, the Technical Guidelines note:

> Metals such as iron, steel, lead and silicon may be produced in integrated metalworks where the metal and coke is produced on the same site. In this case it is difficult to identify emissions attributable to each part of the production process. In this case, emissions are estimated from the activity as a whole by estimating the inputs and outputs.[144]

If the CPM was to include a border tax adjustment on imported carbon steel products, an estimation of the emissions for the volume of product would be necessary. This is because the GATT rules require that the border adjustment exception is applied in a manner where the liability on imported products is the same as the liability on domestic products.[145]

It is possible that this estimation may closely resemble the liability that indirectly applies to carbon steel products that are produced domestically. However, the border adjustment exception contained within the first sentence of Article III:2 of the GATT[146] does not require that a *de minimis* standard is satisfied. Rather, as noted by the Appellate Body in the *Japan – Alcoholic Beverages II,* 'even the smallest amount of [tax] excess' is too much.[147] Therefore, a close estimate will not be good enough to comply with this requirement.

There is another potential difficulty with imposing liability on carbon steel products or other EITE products manufactured in another jurisdiction. These difficulties are associated with different methods of manufacturing employed globally. If these different methods cause greater (or less) emissions, they will potentially lead to different liability. To impose a charge that is different from a domestic charge potentially infringes both the national treatment and most favoured nation rules under the GATT. That is, unless these emissions are classified as product inputs. If emissions are accepted to be product inputs, then the

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142 Department of Climate Change and Energy Efficiency, Australian Government, *National Greenhouse and Energy Reporting System Measurement: Technical Guidelines for the estimation of Greenhouse Gas Emissions by Facilities in Australia* (June 2012).

143 Ibid 295 [4.64].

144 Ibid 299.

145 The *General Agreement on Tariffs and Trade 1994* Articles II:2 and III:3.

146 Article III:2 of the *General Agreement on Tariffs and Trade 1994* is linked to the border adjustment exception of Article II:2 through the words of Article II:2.

147 Ibid, [115].

calculation is allowed to be based on the input rather than the final product. The classification of GHG emissions as product inputs is not accepted here for the reasons noted above.

There are fundamental problems with including a CPM border adjustment on GHG emissions. These problems arise because the methodologies included in the Technical Guidelines do not enable an entity to trace the precise liability associated with a particular tonnage of carbon steel products. Further, the different processes of manufacture may lead to different liability. To impose different liability on a 'like product' may infringe the national treatment provision and possibly the most favoured nation provision.[148]

In other words the CPM imposes EITE liability for the most part not in connection with a product but on an activity.[149] The application of a border tax adjustment on the emissions produced from the activities of EITE industries differs from tracing the potential emissions associated with a specific volume of fuel. Certainly, it does appear that any charges imposed in connection with fuels, as the finished products, can be adjusted at the border whilst remaining compliant with the WTO rules. However, there remains one important legal issue to make this claim. That is, can a border adjustment accompany an emissions trading scheme? In other words, the question is whether an emissions trading unit surrender obligation is a type of taxation?

XI. IS AN EMISSIONS TRADING LIABILITY A TAX?

Some commentators have taken to refer to an adjustment associated with an emissions trading scheme as a border carbon adjustment (**BCA**).[150] It is possible that commentators have conceptualised this term simply through the perceived difficulties in labelling an obligation to surrender GHG units as a tax.[151] The question of whether an emissions trading scheme can include a border adjustment in the form of surrender requirements takes the analysis back to the GATT Articles

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[148] This is supported by methodologies for calculating steel emissions in other publications. See, Climate Leaders U.S. Environmental Protection Agency, 'Direct Emissions from Iron & Steel Production' (Climate Leaders, Greenhouse Gas Inventory Protocol Core Module Guidance, Draft for Comment, August 2003) 4.

[149] Department of Climate Change and Energy Efficiency, Australian Government, *National Greenhouse and Energy Reporting System Measurement: Technical Guidelines for the estimation of Greenhouse Gas Emissions by Facilities in Australia* (June 2012) 68.

[150] Lorand Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation' (2012) 23 European Journal of International Law 429; Peter Wooders, Aaron Cosbey and John Stephenson, 'Border Carbon Adjustment And Free Allowances: Responding To Competitiveness And Leakage Concerns' (Round Table Document No SG/SD/RT(2009)8, Organisation for Economic Co-operation and Development, 23 July 2009).

[151] Bartels, above n 151, 438.

and SCM Agreement that define the circumstances that permit *export* border tax adjustments.

The GATT Article XVI specifically permits the exemption from 'duties or taxes'.[152] The SCM Agreement refers repeatedly to taxation.[153] However, the SCM Agreement does note that the terms 'levy, duty and tax' are interchangeable within the agreement.[154] Therefore, the SCM Agreement intends that the definition of these terms is broad. However, it remains that the commonality of all provisions is the usage of the word 'tax'.

When the legitimacy of the import charges included in the Package is considered, the liability that the legislation imposes on imported aviation fuel is a form of taxation. The following analysis is relevant for any liability, imposed on importers through the CPM, to surrender carbon units in connection with imported products. The obligation on importers of non-transport LNG and LPG to surrender GHG units under the CPM is a clear example of this. Another example is the hypothetical border adjustment on EITE products conceptualised above.

It is important to note that, if it is concluded that an obligation to surrender GHG units is not a form of taxation, its adjustment at the border is not necessarily prohibited. However, if it is not considered taxation, it will not fall within the scope of the border tax adjustment exception. In this case Article III:4 and the subsidy definition in the SCM Agreement will be relevant.

H. What is a Tax?

In discussing this issue, it is important to acknowledge that the understanding of the term taxation may differ between legal frameworks. Here the meaning of tax must be considered for WTO law purposes.

In the GATT Panel Report *United States – Tobacco* the Panel resolved that any charge classified as a penalty would not be an 'internal tax or charge of any kind' but would fall within the scope of the WTO 'regulation' provisions.[155] The Panel clarified that they should seek guidance from the authors of the legislation to

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152 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A ('*General Agreement on Tariffs and Trade 1994')* Article XVI.

153 See, eg, *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A *('Agreement on Subsidies and Countervailing Measures')* Annexes I and II.

154 Ibid Footnote 51.

155 Peter Van Den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2nd Edition ed, 2008) 350.

understand which category the legislation classified as a particular charge.[156] Although the Panel first suggested the question they had to address was whether the legislation equalled a 'separate fiscal measure',[157] it clarified that the jurisdiction's own legal framework must guide their interpretation.

In the absence of WTO jurisprudence on the meaning of 'taxation', this article considers both the ordinary meaning and the legal definition within Australia as the jurisdiction in question.[158] The word 'tax' derives from the Latin word *taxare*, meaning to censure or charge[159] or assess.[160] The courts have reflected upon the meaning of taxation in many different jurisdictions. In the Canadian case of *Re Eurig Estate,*[161] the court clarified that four conditions must exist to satisfy the definition of taxation. First, a requirement (that is, the charge) must be legally enforceable. Second, the legislature must have the authority to impose the charge. Third, the charge must be levied by a public body. Finally, the collection is intended for a public purpose.[162]

These requirements are similar to those expressed by the High Court in Australia in the *Matthews v Chicory Marketing Board (Vict)* case.[163] In this case the High Court defined 'taxation' for the purposes of Articles 51 and 99 of the Australian Constitution to be the 'compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered.'[164] Therefore, the definition of taxes articulated by the Australian High Court and the Canadian Supreme Court are almost interchangeable. However, the supplementary reference to a 'fee for services rendered' by the High Court may prove to be important when clarifying whether an emissions trading scheme is a taxation framework.

A tax may be distinguished from a fee for service, a licence or a charge on the basis that the 'taxpayer' receives nothing directly in return for the payment of the tax. A decision of the High Court in *Air Caledonie International v Commonwealth*[165] clarified the difference between these two types of charges. In

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156 GATT Panel Report, *United States - Measures Affecting The Importation, Internal Sale And Use Of Tobacco,* GATT Doc DS44/R (12 August 1994, adopted 4 October 1994) 27 [75]. This is in clear contrast to the general proposition within the WTO law that a single legal framework is unlikely to influence a Panel or Appellate Body's decision-making process.

157 Ibid 27 [75].

158 The legal meaning in Australia may influence the meaning of taxation within the WTO law as was apparent in the *United States – Tobacco* dispute.

159 Soanes, Hawker and Elliot, above n 53, 778.

160 'A Short History of Taxation' (2008) October 2008(416) *New Internationalist* 16, 16.

161 *Eurig Estate (Re)*, [1998] 2 S.C.R. 565.

162 Ibid [15].

163 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263, 276.

164 Ibid.

165 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.

this case, the court resolved that a fee for services would not be a tax if there was a 'discernable relationship' between the amount paid and the thing acquired by way of service, privilege or property.[166] The language used by the judges in this case clarifies this resolution:

> [A] charge for the *acquisition or use of property, a fee for a privilege and a fine or penalty* imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterized as a tax notwithstanding that they exhibit those positive attributes. On the other hand, a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a "fee for services". If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax.[167]

Arguably the purchase of GHG units or credits is akin to the 'acquisition of property'. This is certainly the case if it is accepted that GHG units are capable of being owned as objects.[168] However, this does not prevent an emissions trading scheme, specifically the CPM, from imposing a form of taxation.

I. Does the CPM Impose Taxation?

The High Court explored a similar question to that posed here in the case of *Harper v Minister for Sea Fisheries* (the ***'Harper Case'***).[169] In this case the High Court examined whether a compulsory fee, calculated on the quantity of abalone taken, was a licence or a form of taxation.[170] Importantly, the harvesting of abalone was prohibited in the absence of this payment. In this case, Brennan J noted the following:

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166 Ibid cited in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (The Federation Press, 2006) 1068.

167 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 (emphasis added).

168 It is suggested that carbon units are objects of property as they are identifiable, transferable and may be controlled by the owner.

169 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

170 Ibid.

> When a natural resource is limited so that it is liable to damage, exhaustion or destruction by uncontrolled exploitation by the public, a statute which prohibits the public from exercising a common law right to exploit the resource and confers statutory rights on licensees to exploit the resource to a limited extent confers on those licensees a privilege analogous to a profit a prendre in or over the property of another.[171]

Dawson, Toohey and McHugh JJ made the following relevant observations when they agreed with Brennan J's conclusion that the licence was not a tax:

> Most important is the fact that it is possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence, namely the right to acquire abalone for commercial purposes in specified quantities. In discerning that relationship it is significant that abalone constitute a finite but renewable resource which can not be subjected to unrestricted commercial exploitation … if such an exaction otherwise exhibits the characteristics of a tax it will properly be seen as such. In particular if the exaction "has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceed that value, properly to be seen as a tax".[172]

Finally, the judges made the following important observation that 'what is otherwise a tax is not converted into something else merely because it serves the purpose of conserving a natural public resource.'[173]

The Package does not prohibit any entity from emitting GHGs. Therefore eligible emissions units cannot be considered to be licences. Rather, eligible emissions units represent a form of payment: a GHG currency of sorts. This is not to suggest that these units are not property. On the contrary, it is suggested here that flexibly priced carbon units may be classified as objects of property.

In light of the reasoning of the High Court in the *Harper Case*, the purchase of eligible emissions units for surrender does not initially appear to be a form of taxation. This is because the payment for the unit is a payment to acquire property, that is, the eligible emissions unit. However, to compare the circumstances of the CPM to the *Harper Case* enables the illustration of an important difference.

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[171] Ibid 335.
[172] Ibid 336-337 quoting *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.
[173] *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 337.

Here it is vital to distinguish between the liabilities imposed by the CPM and the rights associated with the eligible emissions units. Often these are collectively considered. It is suggested here that the liabilities imposed by the CPM are analogous to taxation. The difference between the CPM liability and most taxation frameworks lies in the satisfaction of the liability rather than in the liability itself. Certainly, the reasoning in the *Harper Case* may be distinguished on the basis that the liability under the CPM is not imposed because of the property acquisition. The property acquisition is *required* because of the liability.[174]

The conclusion that a charge imposed on an existing right is a form of taxation finds some support in the WTO jurisprudence. In the *US – Softwood Lumber III* dispute the Panel concluded that, because a levy was imposed on an existing right, then that levy was a tax.[175] The Panel made this clear when discussing stumpage charges:

> a "stumpage charge" is a levy on the exercise of an existing right to harvest timber. Stumpage charges are properly viewed as a form of revenue collection that is the economic equivalent of a tax.[176]

Recently, Advocate General Kokott in the EU specifically considered the question whether EU emissions trading was a form of taxation.[177] The Advocate General suggested that it was not, using the following reasoning:

> 'Charges' are levied as consideration for a public service used. The amount is set unilaterally by a public body and can be determined in advance. Other charges too, especially taxes, are fixed unilaterally by a public body and laid down according to certain predetermined criteria, such as the tax rate and basis of assessment[178] ... An emissions trading scheme such as the EU scheme, however, is a market-based measure ... The consideration for the latter allowances is not predetermined either and is governed solely by supply and demand. If emission allowances are subsequently traded in the market after their

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174 Arguably the purchase of eligible emissions units is not required if a liable entity paid the unit shortfall charge instead.

175 Panel Report, *United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada,* WTO Doc WT/DS236/R (27 September 2002).

176 Ibid [4.117].

177 *The Air Transport Association of America and Others (Advisory Opinion of the Advocate General)* (C-366/10) [6 October 2011] ECR I-1 I-59.

178 The basis for the Advocate General denying the status of 'tax or charge' to a requirement to surrender emissions allowances, is that the price is not fixed in advance and the availability of the allowances is linked to market forces. We should acknowledge that the definition of taxation used by the Advocate General aligned with the International Civil Aviation Organization (the **ICAO**). The ICAO defines taxes as 'levies to raise general national and local government revenues.' *ICAO's Policies On Taxation In The Field Of International Air Transport,* ICAO Res 8632 (24 February 1999).

> allocation by the competent authorities, the price will in that case also be governed by supply and demand and is not fixed in advance ... It would be unusual, to put it mildly, to describe as a charge or tax the purchase price paid for an emission allowance, which is based on supply and demand according to free market forces.[179]

Respectfully, it is submitted here that the Advocate General analysed the incorrect element of the emissions trading framework. Rather than looking at the liability framework introduced by emissions trading, the Advocate General reviewed the means to satisfy the liability. This is an important difference.

The structure of the legislation underpinning the Package may be the most persuasive evidence to suggest that the CPM may represent a form of taxation. Indeed, all of the 'charges' imposed by the Package are included in separate pieces of legislation.[180] The legislators have drafted the legislation accordingly to 'ensure compliance with section 55 of the Constitution.'[181] This section of the constitution 'requires that laws imposing taxation deal only with imposition of taxation and deal only with one subject of taxation.'[182] Therefore, although the legislation does not refer to the charges that the CPM imposes as taxation, the use of separate legislative instruments demonstrates clear evidence that the Australian legislators believe this legal status may apply.[183]

Nevertheless, the Explanatory Memorandum to the Clean Energy (Unit Shortfall Charge – General) Bill 2011 (Cth)[184] states that 'the Commonwealth does not consider that the issue charges are taxation because taxation is necessarily compulsory and it will not be compulsory to surrender units.'[185] There is no disputing that it is not compulsory to purchase and surrender carbon units.[186]

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[179] *The Air Transport Association of America and Others (Advisory Opinion of the Advocate General)* (C-366/10) [6 October 2011] ECR I-1 I-59.

[180] Charges bills include: Clean Energy (Unit Shortfall Charge General) Bill 2011 (Cth), Clean Energy (Unit Issue Charge Fixed Charge) Bill 2011 (Cth), Clean Energy (Unit Issue Charge Auctions) Bill 2011 (Cth), Clean Energy (Charges Customs) Bill 2011 (Cth), Clean Energy (Charges Excise) Bill 2011 (Cth), Clean Energy (International Unit Surrender Charge) Bill 2011 (Cth).

[181] Explanatory Memorandum, Clean Energy Legislation Amendment Bill 2012, Clean Energy (Excise Tariff Legislation Amendment) Bill 2012, Clean Energy (Customs Tariff Amendment) Bill 2012 8.

[182] Ibid.

[183] Explanatory Memorandum, Clean Energy (Unit Shortfall Charge – General) Bill 2011 (Cth), Clean Energy (Unit Issue Charge – Fixed Charge) Bill 2011(Cth), Clean Energy (Unit Issue Charge – Auctions) Bill 2011(Cth), Clean Energy (Charges – Customs) Bill 2011(Cth), Clean Energy (Charges – Excise) Bill 2011(Cth), Clean Energy (International Unit Surrender Charge) Bill 2011(Cth)12 [1.6] the explanatory memorandum notes that the Commonwealth does not consider the issue charges are taxation because taxation is compulsory and it is not compulsory to surrender units. One could counter this argument by saying that it is compulsory to pay either the unit charge or the shortfall charge, therefore this framework is a taxation framework.

[184] Ibid.

[185] Ibid 12 [1.6].

[186] This is on the basis that a unit shortfall fee can be paid instead.

However, the compulsory aspect of the legislation is the *liability* imposed by the CPM. The surrender of units is optional in as far as the payment of a shortfall charge presents a second option to satisfy this liability. Although other types of non-government revenue units may also be used to satisfy the CPM liability, the surrender of these units and credits can be compared to tax deductions, rebates and offsets available under most other taxation regimes.

As such, it is concluded here that the liability introduced by the CPM framework is a form of taxation. The legislators have designed the framework specifically to impose a charge on liable entities for GHG emissions or potential GHG emissions.[187] Further, it is a compulsory exaction of funds that the government must use for public purposes.[188]

XII. THE APPLICATION OF THE GATT EXCEPTIONS

Despite finding that emissions trading liability may be considered a form of taxation, the problems with a border adjustment for EITE products remain. That is, the associated liability imposed upon these products is not direct. Therefore, WTO rules do not permit its adjustment at the border. This necessarily leads to the GATT exception provisions.

It is crucial to note that in order to rely on the environmental exceptions contained in Article XX of the GATT, the discriminatory element of a measure itself must satisfy the requirements of the GATT exception. The exception contained in Article XX of the GATT includes two separate paragraphs that may excuse the hypothetical border adjustment for EITE products. The first paragraph is Article XX(b). This exception requires that the measure must:

- First, be designed to protect human, animal or plant life or health; and second,
- Be *necessary* to achieve the protection.[189]

The requirement that a measure is 'necessary' presents a stringent standard for members to demonstrate if they wish to rely on this exception.[190] To show that a discriminatory provision is 'necessary', a member must show that no reasonable

[187] Wilcox and Rennie, above n 123, 58.

[188] Explanatory Memorandum, Clean Energy Legislation Amendment Bill 2012, Clean Energy (Excise Tariff Legislation Amendment) Bill 2012, Clean Energy (Customs Tariff Amendment) Bill 2012 12 [1.6].

[189] Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS58/AB/R, (adopted 6 November 1998) 25.

[190] The burden of proof lies with the member who makes a positive assertion. See Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* WTO Doc WT/DS33/AB/R (adopted 23 May 1997) 14.

alternative is available.[191] Importantly, the policy objective of the provision must align with the objective of the exception provision.[192]

Considering this, Australian representatives may assert that a border adjustment imposes a cost on additional GHG emissions and therefore reduces the threat climate change poses to human, animal or plant life or health. Australian representatives may have difficulty in suggesting that the purpose of the border adjustment is the reduction of the nominated threat. The reason for this is that the purpose of any border adjustment for EITE industries will potentially reflect the purpose of the assistance measures that currently accompany the Australian CPM. These are devised to:

> Support Australian businesses to make the transition to a clean energy future, the Government has designed a number of assistance measures for the business community, from large industrial producers to small businesses. The Government will allocate around 40 per cent of revenue from the mechanism to help businesses and *support jobs*.[193]

If the purpose of free units is transposed on a border adjustment, it is unlikely that a measure with the consequence of reducing carbon leakage and pricing 'imported GHG emissions' would be classified by a Panel as necessary to 'protect human, animal or plant life or health.' This argument also applies for the second exception provision in paragraph (g) that concerns the conservation of exhaustible natural resources. However, the criteria for the second provision present a slightly less onerous standard to be satisfied.

To justify an incompatible provision under Paragraph (g) of Article XX, it must satisfy three requirements:

- The measure must *relate to* conservation;
- The conservation must be of an exhaustible natural resource; and,
- The measure must include similar domestic restrictions.[194]

The GATT and WTO dispute jurisprudence demonstrates that, for a measure to 'relate to' the conservation of an exhaustible natural resource, it must be 'primarily

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191 Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001) [175].

192 Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WTO Doc WT/DS246/R (adopted 20 April 2004).

193 Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 15 (emphasis added).

194 Van Den Bossche, above n 155, 634.

aimed at' an applicable goal.[195] This phrase was clarified further in the *US – Shrimp* dispute when the Appellate Body noted that 'relate to' required that a reasonable 'means and ends' relationship existed between the measure and the conservation.[196]

For Australian representatives to make the necessary claims to rely on this exception, the legislators must have designed a provision with conservation rather than protectionism in mind. As noted for the exception of Article XX (b) of the GATT, there may be some difficulties in this assertion. Even if these difficulties are overlooked, before this exception may be used the two other requirements of this provision must also be demonstrated. That is, that the conservation is of an 'exhaustible natural resource' and that the measure includes similar 'domestic restrictions.'

For both these requirements, Australian representatives may rely on the *US-Gasoline* dispute where both the Panel and Appellate Body agreed clean air is an exhaustible natural resource.[197] Second, to satisfy the 'similar domestic restrictions' requirement Australian representatives need only point to the liability to surrender eligible emissions units imposed on domestic entities under the CPM. Even if the domestic requirements do not mirror a border adjustment, this exception provision will remain applicable. As the Appellate Body determined in the *US – Gasoline* dispute, this condition does not require that the treatment of domestic and imported products is identical.[198]

Ignoring the protectionist objective, there is an argument that Australian representatives could rely on the exception contained in Article XX(g) of the GATT to justify a border adjustment that would otherwise contravene WTO requirements. However, this exception provision would only excuse a border adjustment on imports. The GATT exceptions will not apply for breaches of other agreements.[199] As any adjustment on exports is allowed, based on rules contained

[195] GATT Panel Report, *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD 35S/ 98 (22 March 1988) [4.6].

[196] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998) [141] – [142] quoted in *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) 279.

[197] In this particular dispute the measure in question was not justified under paragraph (g) because the Panel concluded that 'the less favourable baseline establishments methods' used by the measure were *not primarily aimed at* the conservation of exhaustible natural resources and thus fell outside the scope of Article XX(g). See ibid.

[198] Ibid.

[199] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A ('*General Agreement on Tariffs and Trade 1994'*) General Interpretive Note to Annex 1A, but see the analysis in Fernando Pierola, 'The Availability of a GATT Article XX Defence with Respect to a Non-GATT Claim: Changing the Rules of the Game?' (2010) 5 *Global Trade and Customs Journal* 172, 172.

within the SCM Agreement, any breach of this rule would not be excused by the exceptions contained in the GATT.

XIII. CONCLUSION

The purpose of this article has been to address three important issues. First, whether the SGG border tax adjustment is compliant with the WTO law. Second, to determine the compliance of other import charges and obligations included within the Package as it has been implemented in Australia. Third, to determine whether a border adjustment for EITE products complies with the law of the WTO.

This article concluded that the SGG liability arrangements under the Package will comply with the WTO law. This finding was based on the fact that the SGG levy can be traced directly to a final product and the calculation for imported products is the same as domestic.

The second substantial element of this article examined the import charges associated with aviation fuel and the surrender requirements for imported non-transport LNG and LPG. Here it was acknowledged that these import charges and requirements will comply with the law of the WTO. This type of adjustment is allowed by the law of the WTO because the original liability is calculated directly on a volume of product.

In addition, this article concluded that the liability imposed by the CPM is a form of taxation. Therefore, an import surrender obligation will comply with the border adjustment requirements of the SCM Agreement and the GATT. It follows that any WTO dispute settlement Panel is likely to uphold the legitimacy of the aviation fuel and LNG and LPG import charges under the WTO rules. The same can not be concluded in relation to the hypothetical border adjustment concerning EITE products.

A CPM border adjustment on EITE products has a number of legal hurdles to enable it to fulfill the requirements of the WTO law. The liability introduced by the CPM is not imposed directly on the EITE products. Further, the GHG emissions cannot be classified as an EITE product input and therefore this charge is not imposed indirectly on the EITE products. This means that the liability is not one deemed adjustable by the rules of the WTO. To support this argument further, the

Technical Guidelines recognise the difficulty in trying to determine accurately emissions based on volume of finished industrial product.[200]

For this reason, applying a border adjustment on imported or exported EITE products will be difficult to align with domestic obligations. This alignment is a fundamental requirement of any border tax adjustment. Therefore, a border adjustment on EITE products will not comply with the WTO requirements because of CPM liability methodologies. As such, a border adjustment on EITE products is not a viable alternative to the free allocation of eligible emissions units under the CPM.

The one avenue that remains to legitimately introduce a border adjustment of this kind is to rely on the Article XX exceptions of the GATT. The exception contained in Article XX(g) of the GATT in particular may justify the use of a measure designed to mitigate climate change that would otherwise infringe WTO obligations. However, to be able to rely on this exception the element of the measure that infringes the WTO obligations must have been conceptualised with the preservation of an exhaustible natural resource in mind. Certainly, the purpose of the preservation must be evident. As a CPM border adjustment would doubtless replace the free allocation of units to emissions intensive installations, the policy may be deemed protectionist rather than conservationist.

Conceptualising an appropriate and compliant border adjustment on EITE products for GHG emissions presents a number of difficulties for Australian legislators.[201] It is recognised that the free allocation of units and other assistance measures under the Package may present a number of WTO compliance issues of their own. However, if implemented appropriately, it is a better way to alleviate any liable entity competitiveness concerns.

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[200] Department of Climate Change and Energy Efficiency, Australian Government, *National Greenhouse and Energy Reporting System Measurement: Technical Guidelines for the estimation of Greenhouse Gas Emissions by Facilities in Australia* (June 2012) 299 [4.68].

[201] The border adjustments within the Australian CPM can be compared to those of the NZ ETS and the EU ETS. For a discussion of these other emissions trading schemes see Appendix J.