

The Interaction Between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments

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Abstract

The proposal of carbon-related border tax adjustments (BTAs) has raised a strong objection among the targeted States, mostly developing countries. The BTAs are claimed not only to violate the law of the World Trade Organization (WTO), but also to conflict with the principle of ‘common but differentiated responsibilities’ (CDR principle) enshrined in the *United Nations Framework Convention on Climate Change*. This study attempts to determine the extent to which the CDR principle could color WTO legal disputes concerning the climate-related BTAs. Here, WTO law is analyzed as a multi-objective legal system, pursuing to promote, *inter alia*, free trade and environmental protection while respecting the special concerns of less developed countries via the Special and Differential treatment (S&D). In this context, relevant WTO provisions to the climate-related BTAs are interpreted. This article concludes that the S&D bears no legal obligation and the non-discrimination principle tenaciously reigns within the WTO legal system. The CDR principle could therefore have a very limited impact on WTO law, even in the *chapeau* of Article XX of the *General Agreement on Tariffs and Trade* leaving the fairness of international climate change law vulnerable within the WTO legal system.

A. Introduction

Climate-related border tax adjustments (BTAs) are a fiscal measure introduced by the European Union in 2008 to cope with the additional production costs resulting from internal climate measures. Their aim is to offset those additional costs on imported products originating from countries without comparably stringent climate measures. Seemingly targeting at developing countries, the proposal of carbon-related BTAs has been opposed by the targeted States, claiming that the BTAs would violate the law of the World Trade Organization (WTO), as well as contradict the principle of ‘common but differentiated responsibilities’ (CDR principle) of the climate change regime, which imposes differentiated obligations to States in response to the climate change.

The legality of climate-related BTAs under WTO law has been widely debated.¹ Nevertheless, much less attention has been paid to how the CDR

¹ See, e.g., J. Pauwelyn, ‘U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law’, *NI Working Paper 2007/07-02* (April 2007), available at http://carbontax.org/wp-content/uploads/2007/09/pauwelyn_-_duke

principle can play a role when assessing the WTO's conformity to the measure in question. Recent literature presents divergent views. On the one hand, it has been argued that by interpreting the *chapeau* of Article XX of the *General Agreement on Tariffs and Trade* (GATT) in light of the CDR principle, unilateral application of climate-related trade measures would constitute discrimination and could not be justified.² On the other hand, it has been suggested that the non-discrimination principle of WTO law could probably conflict with the CDR principle,³ making the effect of the CDR principle on the *chapeau* of Article XX GATT far from certain.⁴

In contrast to previous works, this contribution aims to study interaction between WTO law and the CDR principle in the case of climate-related BTAs by examining WTO law as a legal system seeking to promote not only free trade, but also environmental protection, while taking into account the special needs of less developed countries. Its rules and exceptions, including the Special and Differential treatment (S&D) and general exceptions, are collectively analyzed. Against this backdrop, relevant GATT provisions and jurisprudence are carefully interpreted in order to understand the perspective of the WTO legal system on the CDR principle and the extent to which the CDR principle can play a role in this realm.

This article is constructed as follows: Section B. defines the content and the legal status of the CDR principle in international law and determines whether the principle is recognized by or reflected in principles enshrined in WTO law. Section C. then provides definitions and functions of climate-related BTAs and

-univ_-working-paper-on-climate-and-competitiveness_-2007.pdf (last visited 15 August 2014) [Pauwelyn, Climate Policy]; T. Epps & A. Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (2010), 122-141; J. Hilbert & H. Berg, 'Border Tax Adjustments for Additional Costs Endangered by Internal and EU Environmental Protection Measures: Implementation Options and WTO Admissibility' (2009) available at <http://umweltbundesamt.de/sites/default/files/medien/publikation/long/3819.pdf> (last visited 15 August 2014), 9 *et seq.*

² M. Hertel, 'Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities', 45 *Journal of World Trade* (2011) 3, 653, 667. See also F. Morosini, 'Trade and Climate Change: Unveiling the Principle of Common but Differentiated Responsibilities From the WTO Agreements', 42 *George Washington International Law Review* (2010) 4, 713, 723 *et seq.*

³ S. Davidson Ladly, 'Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities', 12 *International Environmental Agreements* (2012) 1, 63, 65.

⁴ *Ibid.*, 79.

reasons why the CDR principle is of particular relevance when determining the legality of such a measure within the ambit of the WTO system. Next, section D. examines the jurisdiction of the Dispute Settlement Body (DSB) and applicable law to disputes, to explore the way in which the CDR principle can affect a WTO dispute regarding the climate-related BTAs. Finally, section E. analyzes how the findings from the previous sections influence the test of WTO legality of the measure. Given that the climate-related BTAs will be subjected primarily to the GATT rules, *inter alia* Articles I and III GATT, and – in case justification is necessary – Article XX GATT, this article examines the impact of the CDR principle in these two cases separately.

B. CDR Principle

I. Content

The CDR principle has developed from the principle of equity in general international law.⁵ It recognizes that climate change is of common concern and that each State has a common responsibility to protect the climate. However, in attributing roles and responsibilities, the CDR principle is aware of the historically larger contributions to the climate change problem by developed countries and also their higher technical and financial capabilities to cut down emissions.⁶ Such recognized facts result in differentiated responsibilities; developed countries “should take the lead in combating climate change”, including their effects,⁷ as well as assist developing countries with funds, technologies, and knowledge in addressing the problem of climate change.⁸

II. Legal Status

The legal status of the CDR principle is still open to question. As for now, it is unlikely to be classified as a customary rule.⁹ Customary rule requires evidence of a general practice accepted as law,¹⁰ whereas the content and scope of

⁵ P. Sands, *Principles of International Environmental Law*, 3rd ed. (2012), 233.

⁶ F. Yamin & J. Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (2004), 70.

⁷ *United Nations Framework Convention on Climate Change*, 21 March 1994, Art. 3 (1), 1771 UNTS 107, 169 [UNFCCC].

⁸ *Ibid.*, Art. 4 (3), (4) & (5), 173.

⁹ E. Hey, ‘Common but Differentiated Responsibilities’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. II, 444, 447, para. 18.

¹⁰ *Statute of the International Court of Justice*, 26 June 1945, Art. 38 (1) (b) [ICJ Statute].

the CDR principle are difficult to define.¹¹ Its consequences are unclear, without treaty provisions giving it meaning.¹² States, thus, divergently interpret the CDR principle,¹³ making it “[very] difficult to show that it has the necessary *opinio juris* for the establishment of international customary law”.¹⁴

Although written under the title ‘Principles’ under Article 3 of the UNFCCC, it is difficult to determine whether the CDR principle is legally binding. The CDR principle was not expressed under Article 3 in legally obligatory terms,¹⁵ but instead crafted in vague terms and using the wording ‘should’.¹⁶ The principle is, hence, most likely to be qualified as soft law.¹⁷

Despite its soft character, the CDR principle should not be regarded as legally irrelevant.¹⁸ It is most importantly a core principle of the climate change regime as evidenced in Article 4 of the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol*, where only developed countries have specific obligations to reduce greenhouse gases (GHGs) emission.¹⁹ And undoubtedly, the CDR principle serves as a guide to interpret existing climate change obligations²⁰ and provides the basis for the elaboration of future ones.²¹

III. The CDR Principle and WTO Law

The CDR principle has been argued to be an inherent part of the WTO rules.²² Indeed, the Preamble to the *WTO Agreement* affirming its environmental objective and the S&D appear to share some similarities with the CDR principle of international environmental law. Since climate-related BTAs deal with trade

¹¹ T. Honkonen, *The Common but Differentiated Responsibilities Principle in Multilateral Environmental Agreements* (2009), 89.

¹² Hertel, *supra* note 2, 665.

¹³ *Ibid.*

¹⁴ Honkonen, *supra* note 11, 302.

¹⁵ *Ibid.*, 317.

¹⁶ UNFCCC, Art. 3, *supra* note 7, 169-170.

¹⁷ Hey, *supra* note 9, 447, para. 18; Honkonen, *supra* note 11, 297.

¹⁸ Honkonen, *supra* note 11, 307.

¹⁹ UNFCCC, Art. 4, *supra* note 7, 170-174 and *Kyoto Protocol*, Art. 3, UN Doc FCCC/CP/1997/7/Add. 1, 10 December 1997, 37 ILM 22, 33-34.

²⁰ R. Wolfrum, ‘General International Law (Principles, Rules and Standards)’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. IV, 344, 353, para. 57.

²¹ L. Rajamani, ‘The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime’, 9 *Review of European Community and International Environmental Law* (2000) 2, 120, 124.

²² Morosini, *supra* note 2, 721 *et seq.*

in goods, the analysis of the S&D provisions is thereupon confined to GATT, specifically Part IV, and the ‘Enabling Clause’.

1. Environmental Objective of the WTO

The Preamble to the WTO Agreement acknowledges the protection and the preservation of the environment as one objective of the WTO. And in doing so, it should be “in a manner consistent with [Members’] respective needs and concerns at different levels of economic development”.²³ This clause reflects the concept of differentiated responsibilities according to differences in financial and technical capacities of States found in the CDR principle.²⁴ Notably, unlike the CDR principle, such a clause does not mention historical contribution to environmental problems by developed countries as a reason for differentiated responsibilities.

2. Special and Differential Treatment in WTO Agreements

Apart from the Preamble to the *WTO Agreement*, several of the WTO-covered agreements contain S&D provisions²⁵ in an attempt “to facilitate the integration of developing countries into the multilateral trading system”.²⁶ Particularly relevant to the case of climate-related BTAs are Part IV of the GATT and the ‘Enabling Clause’.

Added in 1966, Part IV of the GATT “formalised acceptance by developed countries of the non-reciprocity principle^[27] under which developed countries gave up their right to ask developing countries to offer concessions during trade negotiations to reduce or remove tariffs and other barriers to

²³ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Preamble, para. 1, 1867 UNTS 3, 154.

²⁴ See Morosini, *supra* note 2, 723.

²⁵ See WTO, ‘Trade and Development’, available at http://wto.org/english/tratop_e/devel_e/devel_e.htm (last visited 15 August 2014).

²⁶ E. Kessie, ‘The Legal Status of Special and Differential Treatment Provisions Under the WTO Agreements’, in G. A. Bermann & P. C. Mavroidis (eds), *WTO Law and Developing Countries* (2007), 12, 13.

²⁷ *General Agreement on Tariffs and Trade 1994*, 15 April 1994, Art. XXXVI:8, 1867 UNTS 187 [GATT 1994]. GATT 1994 contains, *inter alia*, the rectified, amended or modified provisions of GATT 1947 (55 UNTS 187). See GATT 1994, *supra* this note, 190. Part IV of GATT 1947, which includes Art. XXXVI:8, was added on 26 November 1964. A consolidated version of GATT 1947 is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *The Text of the General Agreement on Tariffs and Trade* (1986). Art. XXXVI:8 can be found on page 54.

trade”.²⁸ Article XXXVII in Part IV also prescribes a list of commitments of developed Contracting Parties to secure a share of developing countries in the growth of international trade. Nevertheless, they appear to be mere best effort provisions and were criticized because their language could be understood as “cast in hortatory, rather than contractual, terms and led to very little concrete action”.²⁹ Despite several attempts to give Part IV operational effect in a number of disputes, developing countries have never succeeded.³⁰

The Panel in *EEC – Dessert Apples* made clear that the commitments under Article XXXVII were additional to their obligations under Parts I to III of the GATT and that these commitments thus applied to measures which were permitted under Parts I to III.³¹ Such reasoning of the Panel hinders “the possibility that measures taken under Part IV could be recognized as valid exceptions to obligations under Parts I to III”,³² especially Article I, the most-favored-nation principle (MFN). And despite suggested alternatives to interpret Part IV so as to legally validate deviation from the MFN,³³ it cannot be ignored that, unlike the ‘Enabling Clause’,³⁴ nowhere does Article XXXVII explicitly exempt itself from Article I. Nor does it mention any ‘more favorable’ treatments to developing countries in a comparative sense to treatments to other Contracting Parties. Moreover, the wording ‘legal reasons’ of Article XXXVII:1³⁵ is indeterminate, making it possible to include the obligation under Article I GATT as a compelling legal reason that bars developed countries from according preferential treatments to developing countries. Indeed, the wording ‘more favorable’ does occur once in Part IV, but it is crafted in vague language

²⁸ Kessie, *supra* note 26, 17-18.

²⁹ M. Hart & B. Dymond, ‘Special and Differential Treatment and the Doha ‘Development’ Round’, 37 *Journal of World Trade* (2003) 2, 395, 401.

³⁰ Panel Report, *EC – Sugar Exports*, L/5011, BISD 27S/69, 10 November 1980; Panel Report, *EEC – Apples I*, L/5047, BISD 27S/98, 10 November 1980; Panel Report, *EEC – Dessert Apples*, L/6491, BISD 36S/93, 22 June 1989 [Panel Report, *EEC – Dessert Apples*]; Panel Report, *United States – Sugar Quota*, L/5607, BISD 31S/67, 13 March 1984.

³¹ Panel Report, *EEC – Dessert Apples*, *supra* note 30, para. 12.31.

³² S. E. Rolland, *Development at the World Trade Organization* (2012), 150.

³³ *Ibid.*

³⁴ See *infra*.

³⁵ GATT 1994, Art. XXXVII:1, *supra* note 27: “The developed contracting parties shall to the fullest extent possible [–] that is, except when compelling reasons, which may include legal reasons, make it impossible [–] give effect to the following provisions [...]” The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 55 (emphasis added).

under Article XXXVI GATT,³⁶ which makes it hard to distill any concrete legal effect. It would thus be very difficult to argue that Part IV allows or obligates a member to make an exception to the MFN to differentiate between developing and developed members.

Another relevant provision to climate-related BTAs is the so-called ‘Enabling Clause’,³⁷ adopted to “[...] secure [a] legal basis for [...] granting preferences to, and among developing countries [...]”.³⁸ Commencing the first paragraph with the wording ‘notwithstanding the provisions of Article I of the General Agreement’, the ‘Enabling Clause’ is clearly regarded as an exception to Article I GATT.³⁹ The ‘Enabling Clause’ allows developed countries to grant developing countries preferential treatments under prescribed conditions. However, it does not impose an obligation to do so. So far, it can therefore be concluded that within the WTO substantive provisions there exists no legal duty of developed countries to treat developing countries with more favorable treatment.

The S&D provisions and the CDR principle share some similarities but also retain differences.⁴⁰ Both have the objective of accounting for the different circumstances of different countries. Nevertheless, while the CDR principle aims at promoting environmental protection, the S&D under the WTO intends first and foremost to promote international trade.⁴¹ Another difference

“[...] is that, [unlike the CDR principle,] the differential treatment under the international trade [system] is not so clearly based on reasons of historical contribution of industrial countries [...], but

³⁶ GATT 1994, Art. XXXVI:4, *supra* note 27: “Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, [...]” The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 54 (emphasis added).

³⁷ GATT, *Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903, 28 November 1979.

³⁸ Kessie, *supra* note 26, 18.

³⁹ See WTO, ‘WTO Analytical Index: GATT 1994’ available at http://wto.org/english/ress_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1C (last visited 15 August 2014).

⁴⁰ Honkonen, *supra* note 11, 66.

⁴¹ *Ibid.*

more generally on the perceived [inequalities] in the international trading system”.⁴²

Finally, despite the existence of S&D in the WTO system, this international trade system is predominantly governed by the principle of non-discrimination in Article I GATT, which precludes differential treatment among exporting countries.⁴³ Observance of Article I:1 could contradict the CDR principle which requires developed countries to take the lead in combating climate change.⁴⁴ As a result, a conflict between the CDR principle and the MFN of the GATT is very likely⁴⁵ and will be demonstrated later in this article.⁴⁶

C. What Are Climate-Related BTAs?

Now this article turns to explore climate-related BTAs as the setting of the study of the interaction between the CDR principle and WTO law.

I. Definitions of BTAs

BTAs are not a new trade instrument, but have long been applied according to the destination principle,⁴⁷ which means that goods will be taxed only in a country where they are consumed.⁴⁸ Without BTAs, goods could be

⁴² *Ibid.*, 67.

⁴³ GATT 1994, Art. I:1, *supra* note 27: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 2.

⁴⁴ Davidson Ladly, *supra* note 3, 78.

⁴⁵ *Ibid.*, 81.

⁴⁶ See *infra* section E.

⁴⁷ M. Matsushita, T. J. Schoenbaum & P. C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2006), 825.

⁴⁸ D. Ruddigkeit, *Border Tax Adjustment an der Schnittstelle von Welthandelsrecht und Klimaschutz vor dem Hintergrund des Europäischen Emissionszertifikatehandels* (2009), 6.

double taxed or escape taxation.⁴⁹ In 1968, the Working Party on Border Tax Adjustments has defined that BTAs are

“any fiscal measures, which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to customers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products)”.⁵⁰

II. Functions of Climate-Related BTAs

1. Competitiveness

The idea of applying BTAs with regard to climate measures comes from the fact that industries in some developed countries are burdened by the costs from more stringent domestic climate measures such as carbon tax or energy tax, whereas industries in developing countries are not. This situation raises concerns among firms in developed countries that they may lose their competitiveness in the world market when competing with their counterparts in developing countries.⁵¹ BTAs have thus been purposed to relieve these concerns by charging imported goods from the countries with less stringent climate measures, the equivalent of what they would have had to pay if they had been produced domestically. This is to create a level playing field between domestic and imported products.⁵²

2. Prevention of Carbon Leakage

Besides competitiveness concerns, carbon leakage is raised as the most crucial reason to support climate-related BTAs. Carbon leakage would occur

⁴⁹ H. P. Hestermeyer, ‘Art. III GATT’, in R. Wolfrum, P.-T. Stoll & H. P. Hestermeyer (eds), *Max Planck Commentaries on World Trade Law* (2011), Vol. 5, 116, 136, para. 45.

⁵⁰ GATT, *Report of the Working Party on Border Tax Adjustments*, L/3464, BISD/18S/97, 2 December 1970, 1, para. 4 [GATT, Report of the Working Party on Border Tax Adjustments].

⁵¹ Epps & Green, *supra* note 1, 122; A. Cosby & R. Tarasofsky, ‘Climate Change, Competitiveness and Trade’ (May 2007), available at http://iisd.org/pdf/2007/climate_trade_competitive.pdf (last visited 15 August 2014), 1.

⁵² Cosby & Tarasofsky, *supra* note 51, 19.

when climate measures lead to the increase of production costs and could therefore result in relocation of industries from countries with stricter climate measures to countries with less strict or with no such measures in order to sink production costs. This would hence undermine the efforts of developed countries to combat climate change.⁵³ It is worthy to note that some studies suggested that internal climate policies, which could affect some industrial sectors, might not be sufficient to induce carbon leakage.⁵⁴

In addition to carbon leakage concerns, BTAs are also claimed to be an incentive for developing countries to take more actions to combat climate change.⁵⁵

3. Response by Developing Countries

As illustrated above, the primary objective behind the implementation of climate-related BTAs by developed countries is to shift costs resulting from domestic environmental measures to developing countries.⁵⁶ This raises strong objections among developing countries, arguing that such allocation of costs contradicts the CDR principle.⁵⁷ Considering the ineffectiveness of UNFCCC dispute settlement mechanisms and the probability that affected developing countries would challenge climate-related BTAs under the WTO dispute settlement mechanism, it is important to analyze whether, how and to what extent this principle can play a role in the WTO legal system.

D. Jurisdiction and Applicable Law in WTO Dispute Settlement

In order to study the degree to which the CDR principle is welcomed by WTO law, it is first necessary to understand the jurisdiction of the DSB as well as the limit of applicable law to WTO disputes.

⁵³ B. Volmert, *Border Tax Adjustments: Konfliktpotential zwischen Umweltschutz und Welthandelsrecht?* (2011), 28.

⁵⁴ Cosby & Tarasofky, *supra* note 51, 8.

⁵⁵ Hilbert & Berg, *supra* note 1, 3.

⁵⁶ See Davidson Ladly, *supra* note 3, 65.

⁵⁷ R. Eckersley, 'The Politics of Carbon Leakage and the Fairness of Border Measures', 24 *Ethics and International Affairs* (2010) 4, 363, 382.

I. Jurisdiction

Despite the absence of a provision explicitly delineating the jurisdiction of the DSB, such rules can nevertheless be deducted from Articles 1 (1) and 3 (2) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Article 1 (1) deals with the ‘Coverage and Application’ of the DSU. It provides that the DSU “shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the *agreements listed in Appendix I to this Understanding*”,⁵⁸ which mean the WTO covers agreements. Article 3 (2) also affirms the duty of the DSB, which is “[...] to preserve the rights and obligations of Members *under the covered agreements*”.⁵⁹ It can thus be concluded that the jurisdiction of the DSB is limited to only claims under WTO-covered agreements⁶⁰ and that the DSB cannot decide a claim based on the CDR principle under the UNFCCC.

II. Applicable Law

Unlike the ICJ Statute and UNCLOS,⁶¹ the DSU lacks a provision specifically ruling on sources of applicable law. Surely, the WTO-covered agreements are the prime source of law in WTO dispute settlement. Highly controversial is whether and to what extent international norms other than WTO law can find application in the WTO system. The debates center on Article 3 (2) DSU, providing that “[r]ecommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements*”.⁶² This provision is subject to diverse interpretation⁶³ and is far from settled.

⁵⁸ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Art. 1 (1), 1869 UNTS 401, 401 (emphasis added) [DSU].

⁵⁹ *Ibid.*, Art. 3 (2), 402 (emphasis added).

⁶⁰ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 443 [Pauwelyn, Conflict of Norms]; L. Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings’, 35 *Journal of World Trade* (2001) 3, 499, 503; J. Trachtman, ‘Jurisdiction in WTO Dispute Settlement’, in R. Yerxa & B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005), 134; A. Lindroos & M. Mehling, ‘Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO’, 16 *European Journal of International Law* (2005) 5, 857, 860.

⁶¹ *ICJ Statute*, Art. 38, *supra* note 10; *United Nations Convention on the Law of the Sea*, 10 December 1982, Art. 291, 1833 UNTS 3, 511.

⁶² DSU, Art. 3 (2), *supra* note 58, 402 (emphasis added).

⁶³ See Lindroos & Mehling, *supra* note 60, 863 *et seq.* (for example).

To the author's understanding, the explicit wording of Article 3 (2) seems to prevent the DSB from applying other international rules that contradict with WTO norms. The WTO is indeed part of the international law system⁶⁴ and the DSB has always needed to fall back on other international law, as can be witnessed in a number of cases. Nevertheless, it is important to note that the DSB restricted its application of other norms to only help fill gaps in WTO law,⁶⁵ especially in case of the law of treaties (such as the principle of non-retroactivity⁶⁶ of treaties and error in treaty formation)⁶⁷ and procedural rules (such as the authority to accept *amicus curiae* briefs),⁶⁸ or to help interpret WTO provisions within the limits of the words used (such as to interpret the term 'exhaustible natural resources' of Article XX (g) GATT by referring to other international environmental instruments).⁶⁹ No case law implies that the DSB is willing to apply other rules of international law that are not in compliance with WTO law.⁷⁰

III. Customary Rules of Treaty Interpretation

Article 3 (2) DSU also explicitly refers to other rules of international law. It provides that the provisions of the covered agreements must be clarified "[...] in accordance with customary international rules of interpretation of public international law".⁷¹ Those customary rules can be found in Articles 31 and 32 of the VCLT. Among those rules, Article 31 (3) (c) serves as a bridge connecting other norms to WTO law providing that (when interpreting a treaty) "[there]

⁶⁴ See Pauwelyn, *Conflict of Norms*, *supra* note 60, 25.

⁶⁵ Bartels, *supra* note 60, 515.

⁶⁶ See, e.g., Appellate Body Report, *Brazil – Coconut*, WT/DS22/AB/R, 21 February 1997, 15.

⁶⁷ Panel Report, *Korea – Government Procurement*, WT/DS163/R, 1 May 2000, 190-191, paras 7.123-7.126 [Panel Report, Korea – Government Procurement].

⁶⁸ Appellate Body Report, *United States – Shrimp*, WT/DS58/AB/R, 12 October 1998, 38, para. 108 [Appellate Body Report, United States – Shrimp]. See, for other examples, Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, 10 May 2000, 14, para. 39; Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses From India*, WT/DS33/AB/R, 25 April 1997, 12-17; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, 57, para. 202.

⁶⁹ Appellate Body Report, *United States – Shrimp*, *supra* note 68, 48, para. 129 *et seq.*

⁷⁰ Panel Report, *Korea – Government Procurement*, *supra* note 67, 183-184, para. 7.96. See Bartels, *supra* note 60, 506 *et seq.*

⁷¹ DSU, Art. 3 (2), *supra* note 58, 402.

shall be taken into account [...] any relevant rules of international law applicable in the relations between the parties”.⁷²

The UNFCCC satisfies all requirements of Article 31 (3) (c). The wording ‘[...] any relevant rules [...]’ is to be taken to refer to all recognized sources of international law,⁷³ which includes the UNFCCC as a treaty. Certainly, it is relevant to the case of the climate-related BTAs. Finally, since all WTO members are parties to the UNFCCC, it is indisputably applicable to the relations to all WTO members. As a result, the rules and principles of the UNFCCC, especially the CDR principle, must be taken into account when interpreting WTO provisions in a dispute concerning climate-related BTAs.⁷⁴

In addition, the CDR principle is also to be taken into consideration when interpreting WTO-covered agreements since it is also reflected in the Preamble to the *WTO Agreement*, which constitutes a “context”⁷⁵ as well as reflects “object and purpose”⁷⁶ of the GATT.

E. Climate-Related BTAs and the CDR Principle

Having the results from the analysis above, this article now turns to analyze an influence the CDR principle may have on the WTO compliance test for climate-related BTAs.

Climate-related BTAs would most probably be challenged by the test under Articles III, II (2) (a) and I of the GATT. In case it fails, it would need justification by Article XX. Given existing widespread discussions as to the WTO compliance with the measure,⁷⁷ this article hence analyzes this subject only briefly and then examines the role of the CDR principle in the BTAs dispute separately in two levels; first, at the level of GATT substantive rules, and second, at the exception level.

⁷² *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31 (3) (c), 1155 UNTS 331, 340 [VCLT].

⁷³ O. Dörr, ‘Article 31’, in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012), 521, 561-568, paras 92-104.

⁷⁴ See Hertel, *supra* note 2, 661.

⁷⁵ VCLT, Art. 31 (2), *supra* note 72, 340.

⁷⁶ *Ibid.*, Art. 31 (1), 340. Appellate Body Report, *United States – Shrimp*, *supra* note 68, 58, para. 153.

⁷⁷ See *supra* note 1.

I. GATT Substantive Rules

1. Adjustability of the Additional Costs

The additional costs to be adjusted in our case concern the production process of the product, which does not affect the physical characteristics of the product itself.⁷⁸ It thus gives rise to our foremost question of whether such additional costs are adjustable at all.

It is disputable whether Article III or Article II: 2 (a) is decisive for this issue.⁷⁹ On the one hand, carbon tax collected domestically is internal tax. Whether such tax is also collected from imported products by means of the BTAs, whether at the border or within the internal market, it would still be considered as internal tax and primarily subject to Article III: 2.⁸⁰ Article III: 2 mentions taxes applied “[...] directly or indirectly, to like domestic products”.⁸¹ A tax levied ‘indirectly’ seems to refer to a tax on the processing of the product⁸² and does not require that such processing be incorporated in the final product.⁸³

On the other hand, the wording ‘an article from which the imported product has been manufactured in whole or in part’ of Article II:2 (a) GATT⁸⁴ might forbid climate-related BTAs. The wording ‘from which’ seem to suggest “that the charge equivalent to the indirect tax shall be construed as being restricted to products [or raw material] physically incorporated into

⁷⁸ Pauwelyn, ‘Climate Policy’, *supra* note 1, 19.

⁷⁹ D. H. Regan, ‘How to Think About PPMs (and Climate Change)’, in T. Cottier, O. Nartova & S. Z. Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (2009), 97, 122.

⁸⁰ GATT 1994, Ad Art. III, *supra* note 27: “Any internal tax or other internal charge, [...] which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, [...] and is accordingly subject to the provisions of Article III.” The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 63.

⁸¹ GATT 1994, Art. III: 2, *supra* note 27. The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 6.

⁸² Hestermeyer, *supra* note 49, 134, para. 39.

⁸³ Volmert, *supra* note 53, 38.

⁸⁴ GATT 1994, Art. II:2, *supra* note 27: “Nothing [...] shall prevent any contracting party from imposing at any time on the importation of any product: (a) a charge equivalent to an internal tax imposed consistently with the provision 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 in whole or in part [...]. The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 4.

the final product”.⁸⁵ Still, this interpretation is not obligatory as the wording is ambiguous.⁸⁶ However, the equally valid French text uses the wording ‘*une marchandise qui a été incorporée dans l'article importé [...]*’⁸⁷, which would most probably establish a physical incorporation requirement and thus would exclude non-product-related measures.

Nevertheless, Article 33 (3) of the VCLT provides that the terms of a treaty are presumed to have the same meaning in each version of the authentic text. This would allow an interpretation based on the broader meaning to include non-product-related measures. Moreover, the BTAs could also be argued to fall within the wording “[...] in respect of the like domestic product [...]” of Article II: 2 (a).⁸⁸

The author believes that Article II: 2 (a) only reaffirms what Ad Article III provides; that internal taxes can also be imposed on imports at the border.⁸⁹ It is therefore Article III: 2, not Article II: 2 (a), which would be conclusive as to the adjustability of climate-related BTAs.⁹⁰ In addition, when we resort to the *travaux préparatoire*,⁹¹ it suggests that States Parties, in order to conclude the agreement, deliberately left this unsettled matter open to the DSB to decide in the future.⁹² It can thus be concluded that when nowhere in Article III: 2 prohibits the adjustment of taxes of this kind and Article II: (2) (a) is also ambiguous, additional costs resulting from climate measures should be seen as adjustable.

2. National Treatment

Next, Article III: 2 GATT, the ‘National Treatment on Internal Taxation and Regulation’, prohibits State Parties from imposing taxes on imported like

⁸⁵ F. Bierman & R. Brohm, ‘Implementing the Kyoto Protocol Without the USA: The Strategic Role of Energy Tax Adjustments at the Border’, 4 *Climate Policy* (2005) 3, 289, 293.

⁸⁶ *Ibid.*

⁸⁷ The French text is available at http://wto.org/french/docs_f/legal_f/gatt47.pdf (last visited 15 August 2014). The article can be found on page 5 (emphasis added).

⁸⁸ Epps & Green, *supra* note 1, 133.

⁸⁹ See *supra* section C..

⁹⁰ See also GATT, *Report of the Working Party on Border Tax Adjustments*, *supra* note 50, 2-3, para. 14; Pauwelyn, ‘Climate Policy’, *supra* note 1, 20.

⁹¹ VCLT, Art. 32, *supra* note 72, 340.

⁹² See GATT, *Analytical Index: Guide to GATT Law and Practice*, Vol. I, 6th ed. (1995), 145 citing *Review Working Party II on Tariffs, Schedules and Customs Administration: Report to the Contracting Parties*, L/329, 24 February 1955, 5, para. 10.

products in excess of those applied to like domestic products.⁹³ The author argues that products which are similar in their physical characteristics, whether produced in a climate-friendly manner or not, are like.⁹⁴ Thus, the like imported products must not be treated less favorably than the like domestic products. When calculating the monetary amounts of taxes to be adjusted, it is therefore necessary to establish equivalence between indirect domestic taxes and BTAs for imported products in order to pass the test of Article III: 2 GATT.

3. Most-Favored-Nation

The climate-related BTAs would then be tested by Article I GATT, the MFN. Targeting only countries without climate regulations and exempting ones with climate regulations would probably violate this standard. In order for the BTAs to be compatible, they would need to be implemented on all foreign products regardless of the climate policies of the countries of origin.

4. The Role of the CDR Principle at the Level of the GATT Substantive Rules

Next, this section examines the influence of the CDR principle in WTO law in cases where climate-related BTAs are found to comply with all abovementioned rules. To recall, Article I GATT strictly obliges WTO members to treat all exporting countries the same, regardless of different conditions prevailing in different countries. It is true that there exist Part IV concerning trade and development and the 'Enabling Clause'. However, they turn out to bear no obligation for developed countries to treat developed countries with preferential treatment.⁹⁵ Although the CDR principle is to be taken into account when interpreting WTO provisions, it cannot alter the clear meaning of Article I GATT⁹⁶ and oblige developed countries to differentiate between exporting

⁹³ GATT 1994, Art. III:2, *supra* note 27: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 6.

⁹⁴ P. Low, G. Marceau & J. Reinaud, 'The Interface Between the Trade and Climate Change Regimes: Scoping the Issues', 46 *Journal of World Trade* (2012) 3, 485, 496; Pauwelyn, 'Climate Policy', *supra* note 1, 28 *et seq.*

⁹⁵ See *supra* section section B. III.

⁹⁶ R. Gardiner, *Treaty Interpretation* (2008), 547; Pauwelyn, *Conflict of Norms*, *supra* note 60, 573.

countries. Consequently, in this case, the CDR principle cannot override the MFN and prevent the implementation of the BTAs upon developing countries.

II. Article XX GATT

In case climate-related BTAs are found to be not adjustable or violate Article I or Article III GATT, the climate-related measure will need justification under Article XX GATT, the ‘General Exceptions’. In order to be justified, it has to pass the two-tier test: first, the measure must fall under one of the exceptions set forth in items (a) through (j), and if so, it must have been applied in a manner consistent with the *chapeau* of Article XX.⁹⁷

1. Article XX (g)

Through the list of exceptions provided, Article XX(g) is found to be most relevant to the objective of climate protection.⁹⁸ Article XX(g) contains three requirements. First, the climate needs to fall within the meaning of ‘exhaustible natural resources’. The Appellate Body in *United States – Gasoline* considered clean air as an exhaustible resource.⁹⁹ Taken into account the importance of the problem of climate change nowadays, the climate should also fall into the same category.¹⁰⁰

Furthermore, the measure must ‘relate to’ the conservation of exhaustible natural resources. This requires that “a close and genuine relationship” between the measure and the conservation of natural resources must be established.¹⁰¹ Since climate-related BTAs are argued to aim at preventing carbon leakage, they would therefore meet this criterion.

The last requirement is that the measure must be made ‘in conjunction with restrictions on domestic production or consumption’. This means that the regulating country must also impose a similar restriction domestically, as a requirement of even-handedness.¹⁰² However, there is no requirement that the trade measure be “‘primarily aimed’ [at] [...] making effective certain restrictions

⁹⁷ Appellate Body Report, *United States – Gasoline*, WT/DS2/AB/R, 20 May 1996, 22 [Appellate Body Report, *United States – Gasoline*].

⁹⁸ See Hertel, *supra* note 2, 669; Hilbert & Berg, *supra* note 1, 20; Epps & Green, *supra* note 1, 142.

⁹⁹ Appellate Body Report, *United States – Gasoline*, *supra* note 97, 14.

¹⁰⁰ Pauwelyn, ‘Climate Policy’, *supra* note 1, 79.

¹⁰¹ Appellate Body Report, *United States – Shrimp*, *supra* note 68, 51-52, para. 136.

¹⁰² Appellate Body Report, *United States – Gasoline*, *supra* note 97, 21.

on domestic production or consumption”.¹⁰³ Proposed to offset additional costs endangered by internal climate measures, it is also likely that climate-related BTAs would fulfill this requirement.

2. *Chapeau*

Should a trade measure fall under Article XX(g), the next step is to examine whether it also satisfies the requirements of the *chapeau* of Article XX. At this level, the object of examination is no longer the policy objective, but how the measure is actually applied.¹⁰⁴ The purpose of the *chapeau* is to prevent the abuse of exceptions under Article XX.¹⁰⁵ For a trade measure to be consistent with the *chapeau*, it should not (a) amount to arbitrary or unjustified discrimination and (b) be a disguised restriction on international trade.¹⁰⁶

a. Arbitrary or Unjustifiable Discrimination

Not much clarity exists as to this *chapeau's* requirement.¹⁰⁷ The Article XX jurisprudence has nevertheless suggested some criteria a trade measure has to reach. First, the measure in question must provide sufficient flexibility,¹⁰⁸ so that different exporting countries would have “sufficient latitude [...] with respect to the [measures they] [...] may adopt to achieve the level of effectiveness required” by the measure in question.¹⁰⁹ Second, the administration of measures must comply with other WTO standards, such as transparency and due process. Third, *serious, good faith efforts to negotiate* bilateral or multilateral agreements should be made on a non-discriminatory basis, especially when the measure addresses a universal environmental problem.¹¹⁰ The past climate negotiations prove that governments are still unwilling to bind themselves to protect the

¹⁰³ Appellate Body Report, *China – Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R & WT/DS398/AB/R, 30 January 2012, 141-142, para. 357.

¹⁰⁴ Appellate Body Report, *United States – Shrimp*, *supra* note 68, 62-63, para. 160.

¹⁰⁵ Appellate Body Report, *United States – Gasoline*, *supra* note 97, 22; Appellate Body Report, *United States – Shrimp*, *supra* note 68, 61-62, paras 158-159.

¹⁰⁶ Appellate Body Report, *United States – Shrimp*, *supra* note 68, 44, para. 120.

¹⁰⁷ See W. J. Davey, ‘Non-Discrimination in the World Trade Organization: The Rules and Exceptions’, 354 *Recueil des Cours de l’Académie de Droit International* (2011), 193, 411.

¹⁰⁸ Appellate Body Report, *United States – Shrimp*, *supra* note 68, 64-65 & 72-73, paras 164-165 & 177.

¹⁰⁹ Appellate Body Report, *United States – Shrimp (Article 21.5 - Malaysia)*, WT/DS58/AB/RW, 22 October 2001, 46, para. 144 [Appellate Body Report, *United States – Shrimp (Article 21.5 - Malaysia)*].

¹¹⁰ Appellate Body Report, *United States – Shrimp*, *supra* note 68, 65 *et seq.*, paras 166 *et seq.*

climate. This has been argued to increase the legitimacy degree of climate-related BTAs.¹¹¹

b. Disguised Restriction on International Trade

The definition of a disguised restriction on international trade is still unclear.¹¹² The Panel in *EC – Asbestos* suggested that a protectionist intent “can [...] be discerned from its design, architecture and revealing structure”.¹¹³ As to climate-related BTAs, the occurrence of carbon leakage is as yet hypothetical.¹¹⁴ Furthermore, while BTAs also have been argued to create an incentive for developing countries to adopt more stringent climate policies, this role of BTAs is broadly questioned¹¹⁵ and even found to be vain.¹¹⁶ The obvious main result seems to be the level playing field between developed and developing countries. It is quite doubtful whether climate-related BTAs would actually be beneficial for conservation of the world’s atmosphere, rather than trade protectionism. In this case, the BTAs could then be considered to constitute a “[disguised] restriction on international trade”.¹¹⁷

3. The Role of the CDR Principle at the Level of Article XX GATT

This section analyzes the influence of the CDR principle on the Article XX GATT-test regarding climate-related BTAs. Since the *chapeau’s* prohibition of ‘[...] arbitrary or unjustifiable discrimination [...]’ is where the CDR principle would possibly play an important role,¹¹⁸ the analysis confines itself only to the *chapeau’s* non-discrimination requirement.

¹¹¹ Hilbert & Berg, *supra* note 1, 26.

¹¹² S. Puth, *WTO und Umwelt: Die Produkt-Prozess-Doktrin* (2003), 354.

¹¹³ Panel Report, *EC – Asbestos*, WT/DS135/R, 18 September 2000, 449, para. 8.236.

¹¹⁴ See *supra* section section C. II. 2.

¹¹⁵ R. Leal-Arcas, *Climate Change and International Trade* (2013), 136; N. Meyer-Ohlendorf & M. Mehling, ‘Questions From the Devil’s Advocate: Is a BTA Only the Third-Best Option (Out of Three)?’ (2008), available at http://ecologic.eu/download/vortrag/2008/meyer-ohlendorf_grenzsteuerausgleichsmassnahmen.pdf (last visited 15 August 2014).

¹¹⁶ N. Tarui, M. Yomogida & Y. Yao, ‘Trade Restrictions and Incentives to Tax Pollution Emissions’ (2011) available at http://manoa.hawaii.edu/reis/wp-content/files_mf/trade_pollution_tax_july2011.pdf (last visited 15 August 2014), 18-19 (especially).

¹¹⁷ See Hertel, *supra* note 2, 674; Davidson Ladly, *supra* note 3, 78.

¹¹⁸ See Hertel, *supra* note 2, 675 *et seq.*; Morosini, *supra* note 2, 724.

a. Interpreting ‘Discrimination’ in Consideration of the CDR Principle

Under the *chapeau* of Article XX GATT, discrimination has been claimed to occur, not only when countries with the same conditions are treated differently, but also when countries with different conditions are treated the same. The proponents for this stretched meaning of discrimination argue that the DSB “[...] ought to draw upon the meaning of discrimination under UNFCCC [Article 3 (5)¹¹⁹] [...] to interpret the non-discrimination requirements [of the *chapeau*] of Article XX GATT”.¹²⁰ In light of the CDR principle, discrimination under the UNFCCC would occur if countries in which different conditions prevail are treated the same. In this reasoning, when deciding a WTO dispute and taking into account the CDR principle, climate-related BTAs which require developing countries to adopt climate measures comparable in effectiveness to those in developed countries would constitute ‘discrimination’ under the *chapeau* of Article XX and hence, could not be justified.¹²¹

Although the CDR principle must be taken into account, it is questionable whether the abovementioned result would not exceed the reach of the term ‘discrimination’ interpreted in light of its context.¹²² The Preambles both of the *WTO Agreement*¹²³ and the GATT 1994¹²⁴ emphasize that the core objective of the WTO (and the GATT) is to eliminate ‘discriminatory treatment’ in international trade relations in order to achieve a level playing field between private producers.¹²⁵ The MFN, enshrined in Article I GATT, requires the members to treat all other members the same, regardless of different conditions in different exporting countries. Among others, Article XVII:1(a) GATT affirms this definition of the term ‘discrimination’ by mentioning the “general principles of nondiscriminatory treatment” which directly refers to the MFN treatment.¹²⁶ Systematically, the word ‘discrimination’ prescribed in the WTO-covered

¹¹⁹ UNFCCC, Art. 3 (5), *supra* note 7, 170.

¹²⁰ Hertel, *supra* note 2, 654 (emphasis added). See also Morosini, *supra* note 2, 723.

¹²¹ Hertel, *supra* note 2, 676 *et seq.* See also Low, Marceau & Reinaud, *supra* note 94, 510; Riddigkeit, *supra* note 48, 28.

¹²² VCLT, Art. 31 (1), *supra* note 72, 340.

¹²³ *Ibid.*, Art. 31 (3), 340.

¹²⁴ *Ibid.*, Art. 31 (2), 340.

¹²⁵ Davidson Ladly, *supra* note 3, 80-81.

¹²⁶ WTO, ‘WTO Analytical Index: GATT 1994’, available at http://wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_06_e.htm#article17 (last visited 15 August 2014), para. 725.

agreements, including the one in the *chapeau* of Article XX GATT, should mean different treatments between trading countries, regardless of different conditions prevailing across countries.

Furthermore, the addition of the phrase ‘between countries where the same condition prevails’ indicates the intention of the WTO parties to condemn only discrimination that results from different treatment to countries with the same circumstances. Interpreting the term ‘discrimination’ according to the CDR requirement would indeed be inconsistent with this phrase, rendering it futile. The non-existence of legal obligation in the WTO system to treat developing countries with differential and preferential treatment despite S&D provisions¹²⁷ also prohibits such interpretation.

b. Revisiting *United States – Shrimp*

Many authors also hold an opinion that the Appellate Body’s decision in *United States – Shrimp* may support the CDR principle’s requirement.¹²⁸ The ruling wording

“it is not acceptable [...] for one WTO Member [...] to require other Members to adopt essentially the same comprehensive program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members [...]”¹²⁹

has been read to recognize a duty to consider various states of development of exporting countries. However, the terms ‘different condition’ within the meaning of *United States – Shrimp* and the CDR requirement seem incomparable.

In *United States – Shrimp*, the wording ‘different condition’ is likely to concern the *different levels of risk* of harm to conserved sea turtles in different countries, which depend upon, as the Appellate Body listed in the same paragraph, the actual incidence of sea turtles in those waters, the species of those sea turtles, etc.¹³⁰ What was unacceptable was the fact that the United States (U.S.) required exporting countries to use exactly the same measure as that used by the U.S. and must also be certified by the U.S. Although other countries

¹²⁷ See *supra* section section B. III. 2.

¹²⁸ Hertel, *supra* note 2, 677; Morosini, *supra* note 2, 722 & 724; Pauwelyn, ‘Climate Policy’, *supra* note 1, 39; Low, Marceau & Reinaud, *supra* note 94, 515.

¹²⁹ Appellate Body Report, *United States – Shrimp*, *supra* note 68, 64-65, para. 164.

¹³⁰ *Ibid.*

might have adopted some measures which were comparable in effectiveness in protection of sea turtles or even used the identical measure as the U.S. but were not certified, their shrimp exports were banned.¹³¹ Nevertheless, after the U.S. revised its guidelines to allow certification of exporting countries having measures comparable in effectiveness to that of the U.S., the trade measure passed the test of the *chapeau*.¹³²

On the other hand, the CDR principle leaves the GHGs limitations of developing countries voluntary. Accordingly, developing countries should not be forced to adopt domestic climate measures by a unilateral trade measure of developed counterparts. Unlike in *United States – Shrimp*, the U.S. was entitled to require exporting countries to adopt measures to conserve sea turtles to achieve the objective prescribed in Article XX(g). No exporting country must be exempted by reason of their development conditions. *United States – Shrimp* thus does not seem to support the CDR requisite.

c. The Relationship Between the CDR Principle and the Accomplishment of Climate Conservation

The influence of the CDR principle on Article XX GATT would face another obstacle: its relationship to the accomplishment of the climate objective of the regulating country. The jurisprudence of Article XX GATT suggests that once the objective pursued falls into one paragraph, the Appellate Body regards the achievability of the justified goal as important and one which must be secured.

In *United States – Shrimp*, as already mentioned, the U.S. could in the end apply import bans to require exporting countries to conserve sea turtles as the U.S. intended, as long as sufficient flexibility was provided. Manifestly in *Brazil – Retreaded Tyres*, the Appellate Body held that an alternative measure within the ambit of the necessity test of Article XX(b) should also “preserve for the responding [country] its right to achieve its desired level of protection with respect to the object pursued.”¹³³ Besides, the Appellate Body also found it unacceptable “[...] when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to

¹³¹ *Ibid.*, 65, para. 165.

¹³² Appellate Body Report, *United States – Shrimp (Article 21.5 - Malaysia)*, *supra* note 109, 46, para. 144.

¹³³ Appellate Body Report, *United States – Gambling*, WT/DS285/AB/R, 7 April 2005, 102, para. 308. See also Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, 63-64, para. 156 [Appellate Body Report, *Brazil – Retreaded Tyres*].

the accomplishment of the objective that falls within the purview of one [of the objective], or goes against this objective".¹³⁴ Therefore, it seems doubtful that the DSB would set aside the environmental objective and interpret the *chapeau* in light of the CDR principle to oblige the regulating State to lift the climate-related BTAs from developing countries.

The CDR principle must indeed be taken into consideration when interpreting the *chapeau* of Article XX GATT, but not without limits. It could not go beyond the ordinary meaning of the term 'discrimination' read in its context. The term could only mean *different treatments* and rejects the notion that discrimination would also occur when countries with different conditions are treated the same. The *contra legem* interpretation and Article 3 (2) of the DSU¹³⁵ also preclude the addition to the *chapeau* of a new obligation to differentiate between exporting countries. Furthermore, the Article XX GATT case law does not seem to support the influence of the CDR principle or even hamper it. After all, it would be difficult for the CDR principle to pierce through the armor of WTO law in order to effectively secure environmental fairness in this domain.

F. Conclusion

National climate measures have put industries in developed countries in fear that their products will lose the capacity to compete with those of their developing counterparts in the world market, and that this might lead to carbon leakage. Unilateral trade measures have thus been introduced as a solution to those concerns. Among those measures are climate-related BTAs. Its proposal has caused debates about its compliance with both the CDR principle and WTO law. This article focuses on the impact that the CDR principle might have when deciding WTO disputes regarding climate-related BTAs.

Within WTO law, there is a trace of concepts similar to the CDR principle: the environmental objective enshrined in the Preamble to the *WTO Agreement* and the S&D system. Both concepts recognize the special needs of developing countries. Unfortunately, they bear no legal obligation to provide developing countries with preferential treatment. Nevertheless, the Preamble could still at least add color to the interpretation of the WTO-covered agreements. Also as a relevant international rule applicable to all WTO members, the CDR principle of the UNFCCC must be taken into account when interpreting WTO provisions.

¹³⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 133, 97, para. 246.

¹³⁵ See also Pauwelyn, *Conflict of Norms*, *supra* note 60, 573.

The test of WTO legality of the climate-related BTAs would begin with the GATT rules: Articles I, II:2(a) and III. There is a possibility that, if carefully designed, the measure could pass all tests. Given the predominance of the MFN and lack of legal duty to differentiate between exporting countries, the CDR principle could obviously not bar the application of the BTAs if all GATT requirements are already fulfilled.

The hope for the CDR principle seems to depend on Article XX GATT in case the BTAs need justification. Attempts have been made to interpret the term 'discrimination' in the *chapeau* of Article XX GATT in light of the CDR principle to also condemn the same treatment to countries with different conditions. However, interpreted in accordance with the MFN-dominated WTO law system as its context, the term "discrimination" under the *chapeau* could only mean different treatments between exporting countries, regardless of different states of development of exporting countries. Taken together, the result of the analysis demonstrates that WTO law, as a guardian of free trade, would hardly let the CDR principle bend itself to prescribe a duty to differentiate between exporting countries according to their different states of development; hence, leaves environmental fairness insecure within the ambit of the WTO system.

Notwithstanding the paralysis of the CDR principle in international trade law, this work suggests that WTO members should indeed refrain from a unilateral application of climate-related BTAs which could not guarantee climate benefits. On the contrary, this action would convey ignorance of developed countries regarding the special needs of developing countries, suggesting that the S&D system and the CDR are purely illusive. This will threaten the cooperative efforts under the UNFCCC and might discourage future collaborations, which is the best means to address global warming. In order to achieve this goal, all parties should indeed put sincere efforts into bringing about a mutual agreement within the UNFCCC framework for the balance between trade, climate, and fairness.