THE WTO LAW OF BORDER CARBON ADJUSTMENTS
- in Light of the Common but Differentiated Responsibilities Principle

By Gustav Blomberg

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1 Introduction

1.1 Background

Eleven of the last twelve years (1995-2006) rank among the twelve warmest years in the instrumental record of global surface temperature (since 1850).\(^1\) Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.\(^2\) As a result of human activity, in the form of uptake of anthropogenic carbon emissions, the atmospheric concentrations of carbon emissions now far exceed the natural range over the last 650,000 years.\(^3\) The acidity of the surface ocean has increased.\(^4\) Most of the global average warming over the past 50 years is very likely due to anthropogenic (pollution due to human activity) greenhouse gas (GHG) increases.\(^5\) Carbon dioxide, which constitutes one of these GHG gases, causing around three quarters of the total warming effect due to GHG gases.\(^6\) In the “Joint science academies’ statement,”\(^7\) the thirteen signatories: national science academics of Brazil, Canada, China, France, Germany, India, Italia, Japan, Mexico, Russia, South Africa, United Kingdom and Unites States of America, concurred with the IPCC, and declared that:

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\(^2\) Ibid., p. 72.

\(^3\) Ibid., p. 37.

\(^4\) Ibid., p. 72.

\(^5\) Ibid.


\(^7\) *Joint science academies’ statement on growth and responsibility: sustainability, energy efficiency and climate protection*, May 2007.
“It is unequivocal that the climate is changing, and it is very likely that this is predominantly caused by the increasing human interference with the atmosphere. These changes will transform the environmental conditions on Earth unless counter-measures are taken.”

For the next two decades a warming of about 0.2°C per decade is projected by the IPCC. Approximately 20 to 30% of species assessed so far are likely to be at increased risk of extinction if increases in global average warming exceed 1.5 to 2.5°C. As global average temperature increase exceeds about 3.5°C, model projections suggest significant extinctions (40 to 70% of species assessed) around the globe.

It is, moreover, estimated that by the 2080s, many millions more people than today are projected to experience floods every year due to sea level rise. The health status of millions of people is projected to be affected through, for example, increases in malnutrition; increased deaths, diseases and injury due to extreme weather events; increased burden of diarrhoeal diseases; increased frequency of cardio-respiratory diseases due to higher concentrations of ground-level ozone in urban areas related to climate change; and the altered spatial distribution of some infectious diseases.

The risks associated with climate change was acknowledged by the US Senate Relations Committee, already in 1987, stating that:

“Global warming is a potential environmental disaster on a scale only exceeded by nuclear war.”

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8Ibid., p. 1.
9IPCC-Report, Supra note 1, p. 72.
10Ibid., p. 42.
11Ibid., p. 54.
12Ibid., p. 48.
13Ibid.
Moreover, the International Community of States acknowledged the need to address carbon emissions in order to avoid adverse effects on the climate already in 1992 by adopting The United Nations Framework Convention on Climate Change (UNFCCC), with the ultimate objective of:

“...achieve...stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” [Emphasis added]

However, it remains to be seen how this “stabilization of greenhouse gas concentration in the atmosphere” should be achieved. The rate of growth of carbon emissions was much higher during the recent 10-year period of 1995-2004 than during the previous period of 1970-1994,15 which is markedly, in view of the, conjunctionally, conclusion of the UNFCCC treaty. Totally, global GHG gas emissions due to human activities have grown since pre-industrial times, with an increase of 70% between 1970 and 2004.16 Fundamental improvements, in climate mitigations, are therefore necessary.

Human consumption is, ultimately, the source of all anthropogenic carbon emissions. It is, consequently, crucial to change unsustainable production- and consumption patterns. However, as the Stern Report points out, climate change “is the greatest and widest-ranging market failure ever seen.”17 Carbon emissions causes harm and social-costs that are not calculated into the actual price of goods. One potential option that addresses this problem, is highlighted by the IPCC:

“Policies that provide a real or implicit price of carbon could create incentives for producers and consumers to significantly invest in low-GHG products, technologies and processes.”18

15IPCC-Report, supra note 1, p. 36.
16Ibid.
17Stern, supra note 6, p. i.
18Ibid., p. 59.
Emissions trading schemes or carbon taxes are the two main options suggested in order to provide “a real or implicit price of carbon.” Emissions trading schemes are a system where carbon costs imposed are linked to prevailing market permit prices. This implicates that the carbon cost will fluctuate, depending on the market. In the case of a carbon taxes, the government regulates the rate, which means that it will be fixed. So, the critical difference between these two options is the way in which the carbon cost is decided. Other than this, not much distinguishes these two policies. They are both designed to expose producers and consumers to the costs of their decision to emit carbon in order to give an incentive to both producers and consumers to limit the use of carbon-intensive products and to shift to greener energy. In addition, in both cases the method is market intervention.

The process, to internalize carbon costs in the price of products, is, nevertheless, complicated. The majority of climate impacts of individuals are not associated with the direct emissions from heating our houses and driving our cars, but with the indirect emissions that relates to the products we buy. For example, the climate change impacts of a car are not only related to the emissions of driving it, but also to emissions associated with raw material extraction, manufacturing, distribution and disposal of the car. These emissions are referred to as indirect-carbon emissions. Many of these indirect emissions occur outside the country of consumption. This indicates a clear obstacle. A country that imports cars, for example, has limited possibility to induce the foreign manufacturer to use more effective production methods or greener energy sources.


21See Barrett J, Minx J, Peters G & Scott K, An analysis of Sweden’s Carbon Footprint, Report prepared for the WWF-World Wide Fund For Nature, 2008, (hereafter cited as WWF-paper), p. 28. (In Sweden, these indirect emissions due to consumption currently contribute to 64% of the total household emissions, with direct consumption contributing to 36% household emissions.)

The direct and indirect emissions from final consumption within a country are referred to as its *carbon footprint*. Accordingly, Sweden’s carbon footprint consist of the global emissions produced from final demand in Sweden, with the emissions from imports consumed within Sweden included and the emissions attached to exported products excluded.

Almost 50 % of the Swedish carbon footprint is due to indirect emissions generated by imports, according to the *World Wide Found for Nature* (WWF). Moreover, these global emissions are likely to increase. Global trade are growing twice as fast as global Gross Domestic product (GDP), which indicates an increased number of imported products. Furthermore, developed countries tend to shift to a more highly skilled and service economy and import carbon-intensive products from less developed countries. Thus, the carbon intense production of goods takes place in other countries. For example, the Swedish electronic industry might mainly focus on research, science and technology, whereas more carbon intensive activities upstream, such as the manufacture of the hardware itself, might not take place in Sweden anymore. Such patterns of specialisation are common in an increasingly specialised global supply chain. This is one of the reasons why highly developed countries like Sweden have low carbon emissions, from a production perspective, but higher carbon emissions from a consumption perspective; The WWF, has declared that:

“To achieve a low carbon economy, Sweden must reduce greenhouse gas emissions from its territory, whilst also reducing global emissions from

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23Ibid., p. 15-16.
24Ibid., p. 21, figure 8.
25Ibid., p. 16.
26Ibid., p. 25.
27Global climate change impacts of Swedish citizens are 1.2t/cap or 17% higher, when measured from a consumption perspective (carbon footprint: 7.2 tones of carbon emissions per capita), than suggested when they are measured from, merely, a direct emissions perspective (territorial emissions: 8.4 tones of carbon per capita). Ibid., p. 21, at fig. 8.
consumption, addressing the production of products in other countries.\textsuperscript{28} [Emphasis added]

One potential solution is to introduce a domestic carbon tax or domestic allowances requirements that applies to both domestic products and imported products equally, based on indirect emissions generated due to the Production and Process Methods (PPM) used. In other words, domestic and imported products produced with low efficiency or carbon intense energy sources, coal produced steel for example, would be, on a equally basis, taxed at a higher rate then domestic and imported products made with a more efficient production-method/greener energy resources. This kind of measure, to incorporate imports in a domestic carbon tax system or allowances requirements scheme is referred to as border carbon adjustment (BCA). If the tax system focuses on PPM emissions, as the example above, the BCAs are referred to as PPM-based BCAs. Sometimes analysts also refer to the notion origin-specific BCAs. However, this form of BCA does not incorporate imports in domestic climate policy. In this case the importing government would impose a “punitive” tax on merely imported products, originating from countries that doesn’t fulfil its international climate obligations, such as non-Kyoto signatories and non-complying Kyoto-signatories. Accordingly, instead of incorporating imported products in a domestic carbon tax scheme, as “ordinary” BCAs, the importing country would apply a “countervailing carbon tariff” on imports originating from non-Kyoto parties or non-complying Kyoto-parties. The importing country would, thus, seek to compensate the economic burden faced by domestic producers from the emissions reduction obligations imposed on them in consequence of the fulfilment of international climate obligations. The problem with origin-specific BCAs are the complex challenge of determining how to ensure that the rate of taxation imposed on an imported product is actually equivalent to the economic burden imposed on the like or competing domestic products.\textsuperscript{29} For example, if a Kyoto-complying country would adopt domestic command-and-control policies in order to fulfil its Kyoto-obligations, resulting in an increased

\textsuperscript{28}WWF-paper, supra note 21, p. 40.

production cost for the domestic industry, how should this cost be transformed into an equalising cost on imports originating from non-signatories or non-complying countries? These practical difficulties linked to origin-specific BCAs, indicates that it is less likely that these measures, in comparison with “ordinary” BCAs, will be a political reality. However, both forms of BCAs would likely result in international controversy if they were implemented. In particular, since the both types of BCAs is relevant in relation to the obligations under the World Trade Organisation (WTO) law that, inter alia, regulates the governmental treatment of traded goods through the General Agreement on Tariffs and Trade (GATT). It may also have implications from a United Nations Framework Convention on Climate Change (UNFCCC) perspective.

This thesis departs from these international law issues associated with the implementation BCAs.

1.2 Purpose

The primary objective of this study is to address the two following questions:

1. Would it be WTO-compatible to incorporate imported products in domestic climate policy by imposing PPM based BCAs on imports?31
2. If PPM based BCAs would be WTO-compatible, would it also be WTO-compatible, in light of the Common but Differentiated Responsibilities (CBDR) principle, to modify BCAs so that products originating from developing countries would face less stringent adjustment?

30The WTO has, currently, 153 member states, including, inter alia,: Brazil, European Communities, China, India, South Africa and United States of America. See: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

31For example: would it be WTO-compatible to incorporate imports in a domestic carbon tax scheme so that both imported products and domestic products produced with carbon intense energy sources, steel made by coal for example, would be taxed at a higher rate, due to their PPM emissions, then imported and domestic products made with greener energy resources, steel produced by natural gas for example.
1.3 Methodology

A legal positivism viewpoint will be applied in the pursuit of accomplishing the purpose of this thesis.

The sources of law studied are treaty law, case law and legal doctrine. Relevant treaty law is, primary, the GATT and the UNFCCC. However, other environmental treaties, such as the Rio Declaration, will also be touched upon as a reflection of the fact that the preamble to the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"), which “informs” the GATT,\(^\text{32}\) acknowledges that the rules of trade should be "in accordance with the objective of sustainable development,” and should seek to “protect and preserve the environment.”

Relevant case law consists of adopted WTO-Panel decisions and WTO-Appellate Body decisions (unadopted WTO decisions lacks legal status\(^\text{33}\)).

Legal doctrine is not only used in order to interpret the WTO decisions, but also as a complement to case law as a consequence of the fact that the “body” of WTO decisions is limited.

1.4 Demarcation

Aspects, related to BCAs originating from other multilateral free trade agreements or bilateral free trade agreements, will not be considered.

1.5 Disposition

The second chapter puts BCAs in their international context. Chapter three analyzes the eligibility of BCAs under the GATT. The closing chapter presents concluding remarks based on the WTO legality analyze.

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2 BCAs in the international context

2.1 The WTO, the GATT and the Current Border Carbon Adjustment Suggestions

The relevant WTO regulation in respect of BCAs is the GATT, which supervise government restriction on trade in goods. A WTO member, who believes that a PPM based BCA scheme violates the GATT, may raise the issue in WTO Dispute settlement.34 This dispute settlement system is the strongest compliance system in any global organization today.35 A three-person panel will be appointed, which will review briefs, hold oral hearings, and issue a decision in about six month.36 Either the plaintiff government or the defendant government may appeal this decision to the WTO Appellate Body whose findings are to be “unconditionally accepted” by all parties to the dispute.37 A losing defendant government is given an allotted period of time to bring its measure into compliance but if the defendant government fails to comply, the complaining party are granted to impose trade sanctions unless all governments disapprove.38

It is critical to highlight that the WTO dispute system lacks deterrent power and, hence, does not provide much of a disincentive to avoid a violation in the first place.39 Thus, many governments engage in trade or economic policies that test the limits of WTO law.40 This is critical to keep in mind when considering the extent to which WTO rules lacking clarity are likely to constrain a WTO member from imposing BCAs on imports.

38DSU, Annex 2, Art 22.6.
39Supra note 31.
40Charnovitz: Trade and Climate, Supra note 35.
In fact, there are currently a number of WTO members that inquires whether they may impose trade measures on carbon intense imports. The U.S. the Senate is, at the present, reviewing the Clean Energy Jobs and American Power Act\textsuperscript{41} (the “Boxer-Kerry bill”). This bill proposes to include some form of BCAs.\textsuperscript{42} In addition, the American Clean Energy and Security Act of 2009, \textsuperscript{43} (based on the “Waxman-market bill”), was passed by the U.S. House of Representatives in June 2009 and are currently under the scrutiny of the senate. This bill also includes some form of BCAs.\textsuperscript{44} The EU is also considering BCAs. The EU commission is entertaining the possibility to apply BCAs for the most vulnerable industries,\textsuperscript{45} however it seems like there will not be any decision on introducing BCAs in EU until the climate negotiations have resulted in an agreement, this out of concern that the treat of BCAs would negatively prejudice the negotiation.\textsuperscript{46}

### 2.2 Competitiveness concerns and carbon leakage

BCA is, ultimately, a response to asymmetry in climate policy (i.e. the variety of national policies and political ambition to address climate change). However, asymmetry in climate policy not only raises environmental concerns, such as the complexity of internalizing the cost of indirect emissions from imported products (see Section 1.1), it also implies competitiveness concerns. If domestic producers face more stringent climate policy, such as PPM based carbon taxes, then the domestic producers may loose market shares, both internationally and domestically. These competitiveness concerns have a restraining effect on the political will to adopt ambitious climate policy. In

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{41}S. 1733, Clean Energy Jobs and American Power Act.
  \item \textsuperscript{42}Under Subtitle "E—Ensuring Real Reductions in Industrial Emissions” at Section ”765. International Trade” of the Boxer-Kerry bill it provides that: "\textit{It is the sense of the Senate that this Act will contain a trade title that will include a border measure that is consistent with our international obligations and designed to work in conjunction with provisions that allocate allowances to energy-intensive and trade-exposed industries.}"
  \item \textsuperscript{43}H.R. 2454: American Clean Energy and Security Act of 2009.
  \item \textsuperscript{44}International Centre for Trade and Sustainable Development (ICTSD), Competitiveness and Climate Policies: \textit{Is There a Case for Restrictive Unilateral Trade Measures?}, Information Note Number 16, 2009, p.5.
  \item \textsuperscript{45}Kommerskollegium (Swedish National Board of Trade), \textit{Climate measures and trade: Legal and economic aspects of border carbon adjustment}, 2009, (hereafter cited as Kommerskollegium report), p. 6.
  \item \textsuperscript{46}Ibid., p. 6-7.
\end{itemize}
\end{footnotesize}
Europe, competitiveness concerns have led to the significant dilution of political ambition, in respect of implementing the emissions trading scheme. This concern are often linked to BCAs. In a New York Times Op-ed contribution, in October 10, 2009, Senator John Kerry and Republican Senator Lindsey Graham, expressed:

“...we cannot sacrifice another job to competitors overseas. China and India are among the many countries investing heavily in clean-energy technologies that will produce millions of jobs. There is no reason we should surrender our marketplace to countries that do not accept environmental standards. For this reason, we should consider a border tax on items produced in countries that avoid these standards. This is consistent with our obligations under the World Trade Organization and creates strong incentives for other countries to adopt tough environmental protections.” (Emphasis added)

However, the issue becomes even further complicated in view of the fact that competitiveness concerns, indirectly, is linked to an environmental concern: carbon leakage. The IPCC defines leakage as:

“...[an] increase in emissions outside the country as a result of a country's climate policy/decrease in emissions inside the country as a result of a country's climate policy...”

Leakage that is driven by a decrease in short-term international market share is referred to as “Competitiveness driven leakage.” In the longer term, differences in cost levels could

lead to relocation of energy-intensive industries to countries with more favourable climate policies. This is referred to as the “investment channel” for leakage.

Empirical evidence of carbon leakage is limited which is due to the fact that it has only come from the EU Emissions Trading Scheme were the vast majority of those emission allowances, has so far, been given for free\(^{50}\) (which means that the burden imposed on the European industry is still quite limited).

2.3 The UNFCCC principle: “common but differentiated responsibilities”

It is not only the GATT that risks to conflict with PPM based BCAs, these measures may also violate one of the cornerstones of the UNFCCC the CBDR principle. Article 3.1 of the UNFCCC provides:

> “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” [Emphasis added]

This principle, inter alia, constitutes a acknowledgment of the fact that the largest share of historic and current global emissions has originated in developed countries, and thereby applies historical responsibility or the ‘polluter pays’ principle,\(^{51}\) it also


\(^{51}\)The preamble in the UNFCCC provides:

> “The Parties to this convention: 

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Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that
accounts for the requirement to allow developing countries relative share of emissions to rise to accommodate their aspirations for growth and poverty reduction.52

In view of the CBDR principle, it could be argued that BCAs constitutes a violation of the Article 3.1 proviso of the UNFCCC. BCAs may be regarded as an interference with the developing countries right to increase their relative share of emissions. This may be especially relevant in respect of the form of BCAs focused on in this study (PPM based BCAs that seeks to adjust PPM emissions i.e. indirect emissions which are generated in the exporting country due to the production of the imported product).

At one of the negotiating session for the subsequent Kyoto-protocol, India and China, supported by dozens of developing countries, introduced language in the draft text to prevent the use of BCAs. The text reads as follows:

“[Developed country Parties shall not resort to any form of unilateral measures, including [countervailing border measures] [and border tax adjustments][fiscal and non-fiscal border measures], against goods and services imported from developing countries on grounds of protection and stabilization of the climate. Such measures would violate the principles and provisions of the Convention, including, in particular, those related to the principle of common but differentiated responsibilities (Article 3, paragraph 1), to trade and climate change (Article 3, paragraph 5), and to the relationship between mitigation actions of developing countries and the

the share of global emissions originating in developing countries will grow to meet their social and development needs,”

52 Stern, supra note 6, p. 473 (referring to Millennium Development Goals: “Recognizing the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions”)
provision of financial resources and technology by developed country Parties (Article 4, paragraphs 3 and 7).”[^53] [Emphasis added]

It is, nevertheless, ambiguous whether trade measures, such as a BCAS, actually, as this draft suggests, violate the UNFCCC. Especially in view of the fact that article 3.5 of the UNFCCC provides, in relevant part:

“Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”

This provision was included in the UNFCCC to ensure that trade measures taken by UNFCCC Parties to implement the Convention are consistent with free trade principles, such as the obligations that follows by the GATT.[^54] It, consequently, also implies that trade measures to address climate change are sanctioned by the UNFCCC, as long as they doesn’t constitute an “arbitrary or unjustifiable discrimination or a disguised restriction on international trade,” regardless of whether they are applied against developing countries. However, as a response it could be advocated that trade measures that undermines the CBDR principle, de facto, constitutes “arbitrary or unjustifiable discrimination” and, thus, not are sanctioned by the UNFCCC.

[^53]: Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Subgroup on paragraph 1 (b) (vi) of the Bali Action Plan (Economic and social consequences of response measures), First part of the seventh session Bangkok, 28 September to 9 October 2009, p. 2.

3 The Eligibility of BCAs Under the GATT

The GATT is constructed upon a foundation of negative rights;\textsuperscript{55} it does not create a general right of market access, but only negative right against, primarily, discriminatory measures. Therefore, the question is whether PPM based BCAs are regulated/restricted by these negative rights. However, even if a PPM based BCA scheme would be found to \textit{prima-facie} violate any of the WTO members negative rights under the GATT, it would still be WTO-compatible to apply the scheme, provided that the scheme could be justified as an \textit{Article XX exception}.

In line with this structure, this chapter both reviews the eligibility of PPM based BCAs as \textit{non-prima facie} violations (Section 3.2-3.4.3), and inquires the eligibility of PPM based BCAs as \textit{Article XX exceptions} (3.5-3.5.3.2). The WTO-legality to CBDR-modify PPM based BCAs is addressed conjunctionally depending on the provisions that may be relevant in this respect (Section 3.4.2, 3.5.3.1.1, and 3.5.3.1.2).

However, before going into the legal details the first section (Section 3.1.1) addresses the issues associated with the difficulty to detect PPM related carbon emissions.

3.1 The Difficulty of Estimating Carbon Emissions

3.1.1 “Best Available Technology” and “Predominant Method of Production”
There is a practical aspect, which is of particular relevance in respect of the implementation of PPM based BCAs: PPM-related carbon emissions are impossible to detect by analyzing the physical characteristics of the imported products. The importing country would, consequently, have to rely on supporting documents provided by the foreign manufacturer in order to estimate the carbon emissions. However, the manufacture may refuse, or simply not possess this kind of information. In the absence

of sufficient information two alternative baselines for calculate the PPM emissions of imports are suggested:56

(1) “Best available technology”57 means that imports would only have to pay the price of carbon emitted for the same product produced in the country of importation with the least carbon emitting technology. However, this would seriously reduce the amount of adjustment that can be imposed on imports.

(2) “Predominant method of production”58 means that imported products would be taxed based on the amount of taxable products that would have been used to produce the product in the country of importation using the predominant domestic method of production. However, where the exporting producer provides information on the carbon emissions used in manufacture, the tax or the allowances requirements must be based on actual amount of carbon emissions in the manufacture of imported products, in order to comply with the GATT.59

3.2 PPM Based BCAs in the Form of Carbon Taxes

3.2.1 Characterization: “Internal tax” or Prohibited “Charge or Duty”
One of the provisos that, likely, would be referred to in order to claim that PPM based BCAs, in the form of a carbon tax scheme that incorporates imports, violates the GATT, is Article II:1 (b).60 It prohibits the imposition of “other duties or charges” on the

57Ismer & Neuhoff, supra note 20, p. 15.
59Ibid, see also Pauwelyn, supra note 56, p. 31, Ismer & Neuhoff, supra note 20, p. 15.
60Article II: 1 (b) of the GATT provides: The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their
importation of products in excess of bound Most-Favoured-Nation rates of custom duties. Article II:2 (a) of the GATT, nevertheless, limits the scope of this prohibition.\textsuperscript{61} It provides:

\begin{quote}
2. \textit{Nothing in this Article 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 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,\textquotedblright}
\end{quote}

If a carbon tax is characterized as a “charge or other duty” under Article II:1 (b) it is, accordingly, prohibited, unless it isn’t an internal tax in accordance with Article II:2 (a).

However, it is questionable whether a carbon tax actually constitutes a prohibited “charge or duty,” in the first place, and the question of whether it would be covered by the exception in Article II:2 (a) may, thus, be of less relevance.\textsuperscript{62} This is related to the fact that a carbon tax may be characterized as “border tax adjustment.” Measures that are characterized as "border tax adjustment" do not fall under the scrutiny the "charge or duty" -prohibition under Article II:1 (b).\textsuperscript{63}

\begin{flushright}
61 Article II:2 of the GATT provides in part:
2. Nothing in this Article 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 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;
63 Ibid.
\end{flushright}
The 1970 Report of the GATT Working Party on Border Tax Adjustments⁶⁴ constitutes a key instrument in order to interpret the term border tax adjustment.⁶⁵ It defines the term by referring to a definition applied in the Organisation of Co-operation and Development (OECD). This definition provides that border tax adjustments 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 consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products)."⁶⁶

The destination principle means that goods should be taxed in the country of consumption.⁶⁷ The opposite is the origin principle, which requires that products be taxed in the country of production. The destination principle has been internationally harmonized.⁶⁸

In accordance with the destination principle, a carbon tax scheme, would tax the goods were they are consumed.⁶⁹ China-produced steel imported in Sweden for consumption is taxed in Sweden and not in China. The definition doesn’t introduce any distinction as

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⁶⁶Working Party Report, supra note 64, para. 4.


⁶⁸Ibid.

⁶⁹As Pauwelyn puts it: “The very idea of a carbon tax is to internalize the social cost of carbon in the ultimate price of products so as to give an incentive to both producers and consumers to limit the use of carbon-intensive products and to shift to greener energy.” Pauwelyn, supra note 56, p. 20.
to whether, in the case where the adjustment is based on inputs, the inputs are physically embodying the product in question. Consequently, the fact the carbon tax would tax inputs which are not physical incorporated in the product, i.e. PPM related carbon emissions, does not seem to constitute an obstacle.

However, if a carbon tax scheme would be characterized as border tax adjustments under Article III and consequently, not violate the GATT as an prohibited charge under Article II of the GATT, the importing country would, nevertheless, be required to (1) not violate the National Treatment obligation, (2) not violate the Most-Favoured-Nation treatment obligation; when applying the carbon tax scheme on imports. Otherwise, it would anyway constitute a *prima facie* violation of the GATT.

### 3.2.2 The National Treatment Obligation

The principle of National Treatment means, broadly, that imported products should not be discriminated in relation to *domestic products*. The obligation is set out in Article III of the GATT. Paragraph 2 regulates the application of domestic *taxes* on imported products, i.e. carbon taxes (provided that they are not a prohibited charge under Article II).

Paragraph 2 consists of two sentences:

1. **First sentence:**
   - *Imported products shall not be subject to internal taxes (carbon taxes) in excess of those applied to “like” domestic products.*

2. **Second sentence:**
   - *Imported products shall not be subject to internal taxes (carbon taxes) dissimilarly from “directly competitive or substitutable” domestic products in such a way as to protect domestic production.*

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70Howse & Eliason, *supra* note 29, p. 23.

71The text in Article III:2, 1 sentence, provides: “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.”

72Second sentence in paragraph 2 must be read in conjunction with paragraph 1 of Article III, and in light of the AD of paragraph 2:
What is critical in respect of a carbon tax scheme is, consequently, whether products with different levels of PPM-related carbon emissions would be characterized as “like” or “unlike”: if steel from US made with coal (subject to a high carbon tax) is “like” domestically produced steel using natural gas (subject to a lower carbon tax), the National Treatment obligation is violated. If they, instead, are characterized as “unlike” due to their PPM related carbon emissions they can be taxed at different levels. However, physical identical products would most certainly, still be characterized as “directly competitive or substitutable,” and, consequently, fall under the scrutiny of the second sentence, regardless of whether they have differentiated PPM related carbon emissions. Ismer and Neuhoff suggest, regarding the second sentence, that it “could be safely denied” that a carbon tax would constitute a measure that affords protection of domestic products.73

In order to determinate whether an imported product is “like” or “directly competitive or substitutable” and a case-by-case examination weighing all relevant factors is required.74 The Appellate Body have, analysed what factors that, typically, should be considered. Both in respect of the “like” notion and in respect of the “directly competitive or substitutable” term,75 it refers to three factors enumerated in the Report

73 Ismer & Neuhoff, supra note 20, p. 17.
74 Howse & Eliason, supra not 29, p. 20.
75 Ibid.
of the Working Party on Border Tax Adjustment:\textsuperscript{76} 1) the extent to which the products are capable of serving the same or similar \textbf{end-uses} in a given market; (2) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand, referred to as \textbf{tastes and habits}, which change from country to country; (3) the physical properties of the products, referred to as the product’s \textbf{properties, nature and quality}. In addition the Appellate has adopted a forth aspect that may be probative: (4) \textbf{Tax classification}.

It is critical to emphasise that these criteria are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.\textsuperscript{77} This criterion “does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence,”\textsuperscript{78} according to the Appellate Body.

The Appellate Body has explained, regarding the difference between sentence one and two that “perfectly substitutable” products fall within Article III:2, first sentence (the more stringent obligation) while “imperfectly substitutable” products can be assessed under Article III:2, second sentence (the less stringent obligation).\textsuperscript{79} Accordingly, if US steel made with coal is regarded as merely imperfectly substitutable with domestic steel using natural gas, it will not be regarded as “like.” This narrow meaning of the like notion is related to the fact that national authorities must have substantial flexibility in classifying products within their tax system so that “substitutable,” but not “perfectly substitutable” products can be taxed at different rates.\textsuperscript{80} The Appellate Body has, explicitly, emphasised that “the first sentence of Article III:2 must be construed \textit{narrowly}, so as not to condemn measures that its strict terms are not meant to condemn.”\textsuperscript{81}

\begin{flushleft}
\textsuperscript{76} Working Party Report, \textit{supra} note 64, para. 18.


\textsuperscript{78} Ibid., para. 102.


\textsuperscript{80} Gaines-PPMs, \textit{supra} note 55, p. 414.

\textsuperscript{81} Japan- Alcoholic Beverages II, \textit{supra} note 33, p. 19-20.
\end{flushleft}
There is no adopted WTO decision that neither rejects or embraces a “like”-distinction based on PPM related environmental aspects. Howse and Eliason, nevertheless, advocates,\(^\text{82}\) that it would seem odds with the Appellate body’s reasoning, that all evidence probative of likeness in the particular context must be taken into account,\(^\text{83}\) to exclude differences between the products that relate to potentially catastrophic global environmental harms.

This interpretation seems reasonable, especially in view of the Appellate Body’s emphasis on the “narrow” construing of the “like” notion under III:2. Moreover, the principle of sustainable development, a principle that, \textit{inter alia}, promotes cost-internalisation of environmental costs,\(^\text{84}\) “informs the GATT.”\(^\text{85}\) This principle would risk to be undermined if it would be precluded to tax-distinguish among products due to PPM emissions.

\section*{3.3 PPM Based BCAs in the Form of Allowances Requirements}

\subsection*{3.3.1 Characterization: “Internal Tax” or “Internal Regulation”}

If the country of importation would impose PPM based BCAs on imports, in the form of incorporating imports in an allowances requirements scheme, the first step, in order to analyze the GATT legality of the BCAs, is to identify the accurate GATT-characterization of allowances requirements. Some of the analyst suggests that allowances requirements

\begin{itemize}
\item \(^\text{82}\)Howse & Eliason, \textit{supra} not 29, p. 27.
\item \(^\text{83}\)EC-Asbestos, \textit{supra} note 77, p. 102.
\item \(^\text{84}\)\textit{Trade and Sustainable Development Principles}, Winnipeg, International Institute for Sustainable Development, 1994, (“Internalization of environmental costs is essential to achieve efficiency. Despite the substantial practical difficulties this entails, high priority should be attached to its implementation. As costs are progressively internalized, the contribution of all economic activity, including trade, to the efficient utilization of resources is enhanced.”)
\item \(^\text{85}\)US –Shrimp, \textit{supra} note 32, para. 129.
\end{itemize}
should be regarded as a “regulatory requirement, “86 while some analysts characterizes the measures as “taxes.”87

The scholars that characterises allowances requirements as domestic taxes, refers to an OECD definition of “taxes.”88 This definition describes taxes as a compulsory contribution, imposed by the government for which the taxpayers receive nothing identifiable in return.89 The analysts suggest, in light of this definition, that an allowances-requirements scheme would constitute an “unrequited” payment to the government and should therefore be characterized as a “tax.”90 Provided that this is the accurate characterization it means that the inquiry above would apply also in respect of an allowances-requirements scheme.

However, a significant number of analysts are convinced that allowances requirements constitute “internal regulations” under Article III:4 of the GATT. In a paper, prepared under the authority of the Chair of the round table on sustainable development at the OECD, the author states: “A requirement to purchase offsets at the border would...be covered by GATT Article III:4,”91 a report, produced by the International Institute for Sustainable Development (IISD) prescribes: “If the measure in question were a requirement to purchase offsets at the border, as opposed to a tax adjustment, it would, as a regulation, be covered by GATT Article III:4”92 Howse and Eliason states: “In our view, it must be seen as part of a regulatory scheme that applies both to domestic and foreign products; the difference is the manner of application, which in the latter case

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88Ibid.
89OECD, Note on the Definition of Taxes by the Chairman of the Negotiating Group on the Multilateral Agreement on Investment (MAI), (DAFFE/MAI/EG2(96)3, 19 April 1996, para. 1.
90Pauwelyn, supra note 56, p. 21, de Cendra, supra note 83.
91OECD paper, supra note 82.
92IISD paper, supra note 50, p. 56.
occurs through a method requiring that certification of regulatory compliance accompany products at the border." If these analysts are right it means that PPM based BCAs, in the form of allowances requirements, falls under the scrutiny of paragraph 4 (compared with paragraph 2 that cover taxes) in Article III of the GATT.

3.3.2 The National Treatment Obligation

Article III:4 of the GATT provides that imports shall be “accorded treatment no less favourable” than that accorded to “like” domestic products. Consequently, when analysing the compatibility of BCAs in the form of a PPM based allowances requirements scheme, the first stage in the analysis is to consider whether products can be regarded as unlike due to PPM related carbon emissions in relation to domestic products. If they are considered as unlike there is no reason for further review, the products can be treated differently in an allowances requirements scheme, depending on PPM emissions, without any risk of violating Article III:4. If the products instead are considered as like, the next step is to consider whether imports are being treated “less favourable.”

3.3.2.1 “Like Products”

A determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products, according to the Appellate Body. However, the Appellate Body has also emphasised that not all products which are in some competitive relationship are "like products" under Article III:4.

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93Howse & Eliason, supra note 29, p. 27.
94Article III:4 of the GATT 1994 reads, in relevant part:
The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ... (Emphasis added)
95EC-Asbestos, supra note 77, para. 99.
96Ibid.
The Appellate Body has explained that the scope of the “like” notion under Article III:4 is broader than the scope of the “like” notion under Article III:297 (first sentence). What is critical under Article III:4, is, as mentioned above in this section, whether the provided evidence indicates whether and to what extent, the products involved are, or could be, in a “competitive relationship in the marketplace.”98 Accordingly, can Swedish steel and Russia steel, for example, be distinguished as non-competitive if Swedish steel is produced with green energy while Russian steel is produced with coal?

In order to answer this question it is necessary, in line with the analyze under Article III:2, to consider the four criteria in the report of the Working Party on Border Tax Adjustments99 in order to determinate the meaning of “like” under Article III:4.

- Physical characteristics
- End uses
- Consumer habits
(In addition, customs classifications may be probative)100

PPM related carbon emissions might constitute a distinguishing element in view of one of theses criteria in particular: consumer tastes and habits. In the EC-Asbestos report, the Appellate Body declared: “we believe that this evidence [of health risks associated with chrysotile asbestos fibres] can be evaluated under the existing criteria... of consumers' tastes and habits...”101 It then concluded “we are... persuaded... that the health risks associated with chrysotile asbestos fibres influence consumers' behaviour with respect to the different fibres at issue.”102 This reasoning may have implications in respect of allowances requirements, in the sense that if it could be established that environmental risks associated with carbon emissions would influence consumers' behaviour it would constitute relevant indication of unlikeness. Especially in vie of the

97Ibid.
98Ibid., para.103.
99Working Party Report, supra note 64, para. 18.
100Howse & Eliason, supra note 29, p. 20.
101Ibid., para. 113.
102Ibid., para. 122.
fact that the criteria “consumer tastes and habits” is considered as a key elements in the “competitive relationship” determination. The determination of whether an aspect, such as carbon emissions for example, would influence consumer's behaviour is based on a presumption of a perfect marketplace were consumers are provided with all relevant information. In the case of allowances requirements, the test would, consequently, be whether a sufficiently informed consumer who is aware of the environmental hazard that global warming might represent, will treat the two goods (one product with high PPM related carbon intensity, and one product with low carbon intensity) as unlike goods.

However, even if it would be found that an informed consumer would treat products unlike due to carbon emissions, it is still ambiguous whether it would be enough in order to establish unlikeness, if the products were identical in respect of the physical properties. The Appellate Body has explained that in cases were the physical properties indicates that two products are unlike, a high burden is imposed on a complaining government to establish that, despite the physical differences, there is a competitive relationship between the products such that demonstrates that the products are "like" under Article III:4. This in its turn, indicates that, in the opposite situation, were the physical properties indicates that two products are “like” the same high burden would be imposed on the defendant government that clamed that the products were unlike due to PPM emissions. However, provided that the same logic would apply in the opposite situation, it, nevertheless, means that it isn’t precluded that two products with identical properties still can be characterized as unlike due to PPM emissions.

\[\text{Ibid., para. 117.}\]
\[\text{EC-Asbestos, supra note 77, para. 136.}\]
3.3.2.2 “Less Favourable”

Even if products with different PPM related carbon emissions, nevertheless, are “like,” it do not necessitates that it constitutes a violation of Article III:4 to distinguish among them. This is a consequence of following statement made by the Appellate Body:

“a Member may draw distinctions between products which have been found to be "like," without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products.”

In order to constitute a violation of Article III:4, the “less favourable treatment” must, consequently, be in relation to the group of imported products in relation to the group of like domestic products. Furthermore, in a subsequent Appellate Body report, the Appellate Body declared:

“...the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product.”

If that finding were applied in an examination of an allowances requirements scheme, then the environmental reasons could be used to explain why the scheme tax relates to environmental concerns of climate change, not to “the foreign origin of the product,” according to Pauwelyn’s interpretation.

106 Ibid., para. 100.
109 Pauwelyn, supra note 56, p. 30.
3.4 Most Favoured Nation Obligation

Even if a PPM based BCA scheme, in the form of a PPM based allowances requirements scheme or a PPM based carbon tax, would be characterized as a internal regulation/tax and comply with the National Treatment obligation under Article III, it would still constitute a *prima-facie violation* if it would violate the Most-Favoured- Nation obligation under Article I of the GATT.

3.4.1 Carbon Taxes and Allowances Requirements

Article I of the GATT provides, with respect to both internal regulations (allowances requirements) and internal taxes (carbon taxes), that any favour granted by a party to any product shall be accorded immediately and unconditionally to the “like” product of all other parties. In other words, an importing country cannot discriminate by treating the products of one exporting country better then the “like” product of another exporting country. Accordingly, in line with National Treatment obligation in respect of taxes under Article III:2 first sentence, the decision as to whether two products are “like” will often determinate the outcome of a case because it means an requirement of identical treatment.

The WTO panel, sated in the Indonesia-auto report, regarding the interpretation of the term “like,” that:

“We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car. The same

110GATT Article I (General-Most-Favoured-Nation Treatment) provides in part: “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.”

considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I.”

This statement, indicates that the width of the term “like” harmonies with Article III:2. Consequently, if products would be characterized as unlike in respect of Article III they would also fall outside the scope of the like notion in respect of Article I.

There is an additional aspect; some of the exporting countries may have similar carbon taxes or allowances requirements in place. Should PPM based BCAs be applied, also, on imports originating from those countries? The answer is yes: BCAs that excludes imported products originating from countries that have emission cuts in place would violate GATT Article I. This follows by the destination principle (see Section 3.2.1), which prescribes that products should be taxed in the country of consumption and not in the country of production. However, Pauwelyn suggests, in light of the destination principle, that exporting countries with similar carbon taxes would be able to avoid this “double taxation” by rebating any tax or costs borne by products upon exportation.

3.4.2 “Common But Differentiated Responsibility” Modification of BCAs

Another dimension of the Most-favoured-nation obligation relates to the CBDR principle. It may constitute a violation of the CBDR principle to apply BCAs on imports originating from developing countries (see Section 2.3). Provided that this is an accurate interpretation, would it be possible to modify a BCA scheme so that it would apply less stringent, or not at all, in respect of imports originating from developing countries without violating the Most-Favoured-Nation Obligation? The answer is no. The Appellate Body has explicitly declared that:

\[^{112}\text{Indonesia – auto report, supra note 111, para. 14.141.}\]
\[^{113}\text{The scope of “like” in Article III:4 is broader than the scope of “like” in Article III:2 and implicates, consequently, that products characterized as “unlike” under Article III:4 also would be considered as “unlike” under Article I}\]
\[^{114}\text{Pauwelyn, supra note 56, p. 32, See also Charnovitz: PPMs, supra note 36, p. 83-84,(referring to the Panel Report, Belgian Family Allowances, BISD 1S/59 (1953), adopted 7 November 1952).}\]
\[^{115}\text{Ibid, (Pauwelyn), p. 33.}\]
“The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin.”

It would consequently constitute a prima facie violation, in relation to developed countries, to differentiate among imports due to their origin, even if it was in order to comply with the CBDR principle. However, it would be unwarranted to conclude that this means that it, de facto, would constitute a GATT violation. If a measure is considered to be inconsistent with the Most-Favoured-Nation obligation, then a dispute panel must examine, as a second step, whether the measure is, nevertheless, justified by the Enabling Clause.

3.4.3 The Enabling Clause
The function with the enabling clause is to enhance market access for developing countries as a mean of improving their economic development by authorizing preferential treatment for those countries, "notwithstanding" the obligations of Article I. Paragraph 1 of the Enabling Clause, which applies to all measures authorized by that Clause, provides:

"Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." (Footnote omitted)

Paragraph 2 of the Enabling Clause identifies four types of measures that are covered by the exception. None of these categories applies to internal regulations. It is,

117 The Enabling Clause is an integral part of the GATT (see Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, adopted 20 April 2004, [hereafter cited as EC –preferences], para. 90).
118 Ibid., para. 92.
119 Paragraph 2 provides:
consequently, not possible to justify allowances requirements under the Enabling Clause, provided that they are characterized as internal regulations and not as internal taxes. The only chance for WTO-compatibility, in that case, would be through the Article XX exception (See Section 3.5.3.1.1 and 3.5.3.1.2).

Taxes, such as a carbon tax (and allowances requirements if they are regarded as a tax), on the other hand, would, likely, be covered under paragraph 2(a), which authorizes the use of Generalized System of Preferences (GSP) schemes.120 However, a measure must be "generalized, non-reciprocal and non-discriminatory" in order to get authorization by paragraph 2 (a).121 The term "non-discriminatory" means that if a developed country applies the GSP scheme more generous in relation to some of the developing countries, it must be based on an objective standard of developing country needs.122 In order to determinate whether developing countries have similar or different "needs" the Appellate Body refers to multilateral instruments adopted by international organisations.123 Consequently, if the subsequent Kyoto-protocol would include differentiation among developing countries, it would, likely, be possible to differentiate,

"(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences, 3[Footnote 3 in the cited text provides: As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non- reciprocal and non discriminatory preferences beneficial to the developing countries"]
(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
(c) Regional or global arrangements entered into amongst less- developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non- tariff measures, on products imported from one another
(d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

120Pauwelyn, supra note 56, note 120.
121EC-Preferences, supra note 117, para 148.
122Ibid., para. 163.
123Ibid.
not only between developed and developing countries, but also among developing countries.

3.5 Article XX Exception

As already mentioned above, even if a PPM based BCA scheme would be found to prima-facie violate any of the obligations under the GATT, it would still be WTO-compatible to apply the scheme on imports, provided that they could be justified as an Article XX exception.

3.5.1 Structure of Article XX

Article XX of the GATT 1994 reads, in its relevant parts:

*Article XX*

*General Exceptions*

*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:*

...  

*b) necessary to protect human, animal or plant life or health;*  

...  

*g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;*

In order to justify PPM based BCAs, the measures must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the chapeau of Article XX (the
introduction phrase in the proviso). The Appellate Body has characterized the analysis as “two-tiered.” It has also emphasised that the first step is to review whether there is a provisional justification, and the second step is to inquire whether the measure complies with the introductory clause (The Chapeau). The reason why it is critical to follow this order is due to the fact that the two steps have different functions. The first step is a review of the general design of the measure in the course of determining whether that measure falls within one or another of the paragraphs of Article XX. The second step seeks to prevent abuse of the exceptions, it does, not address the questioned measure or its specific contents as such, but rather the manners in which it is applied.

3.5.2 Provisional Justification

Two provisional justifications are relevant in respect of PPM based BCAs: Paragraph (b) and paragraph (g). Paragraph (b) covers, inter alia, measures that are “necessary to protect plant life” [emphasis added], while paragraph (g) covers measures “relating to the conservation of exhaustible natural resources....” [emphasis added]. The critical difference between the two provisions is that, paragraph (b) prescribes that the measure must be “necessary” in relationship to its objective, while paragraph (g), merely, requires that the measure must “relating to” its objective. This difference implicates, according to the Appellate Body, that the two phrases are not equivalent: that there is a significant difference in the closeness of connection suggested by “in relation to” as opposed to “necessary.”

125 Ibid.
126 US-Shrimp, supra note 32, para. 117-122. (The Appellate Body reversed the findings by the panel due to the fact that that the panel had ignored the order of how to interpret Article XX).
128 US-gasoline, supra note 124.
129 Ibid., p. 16-19.
It is, consequently, likely that a respondent would prefer to render PPM based BCAs under XX (g) (relate to) rather then under XX (b) (necessary).\footnote{Howse & Eliason, supra note 29, p. 18, OECD paper, supra note 19, p. 24, IISD paper, supra note 50, p. 56.} This paper will therefore merely focus on paragraph (g) in respect of the provisional test of Article XX, however the next step of the analyze, the chapeau, will still be relevant also in respect of paragraph (b).\footnote{US-Shrimp, supra note 32, para. 120. (The Appellate Body, nevertheless, states in this report that the Chapeau may be construed differently, depending on which provisional justification that it is applied in relation to.)}

Paragraph (g) is sort out in too three tests, which would apply as follow in respect of PPM based BCAs:

1. Is the planet's atmosphere an “\textit{exhaustible natural resource}”?
2. Does the BCAs “relate” to the conservation of the planets atmosphere?
3. Is the BCAs made effective in conjunction with domestic restrictions?

\textbf{3.5.2.1 Exhaustible Natural Resource}

Clean air is an exhaustible natural resource within the meaning of GATT Article XX (g), according to the Appellate Body\footnote{US-Gasoline, supra note 124, p. 19.}

In addition, the preamble, which establishes the interpretative context for the GATT,\footnote{US-Shrimp, supra note 32, para. 129.} refers to sustainable development as an objective of the WTO.\footnote{The text reads in relevant part:}

\textit{The Parties} to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the \textit{objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so}}
interpretation of the notion “Exhaustible natural resources” in light of current science and contemporary concerns of the community of nations about the protection and conservation of the environment. The Appellate Body has explicitly stressed that:

“the generic term ‘natural resources’ in Article XX (g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary.’”

Already in 1992, the international community acknowledged the need to protect the atmosphere, through the conclusion of the United Nations Convention on Climate Change (UNFCCC). It thus seems likely, in light of the contemporary concerns of the community of nations, that the atmosphere will be regarded as an exhaustible natural resource.

Howse and Eliason state that it is not particularly controversial to claim that the atmosphere is an exhaustible natural resource. The authors of the IISD-paper declare that life-sustaining atmosphere is arguably an exhaustible natural resource and the authors of the OECD-paper concur.

3.5.2.2 Relates to the Conservation of the Earth’s Atmosphere

It is the BCA scheme as a whole that is to be examined under the “relate to” prerequisite, and not the legal finding of prima-facie violation. If a BCA scheme, for example, would exclude imports originating from countries with a comparable domestic carbon tax, and thus violate the Most-favoured-Nation obligation, it would not be this isolated act that would be the subject for the examination of whether the measure comply with the “related to” prerequisite.

a manner consistent with their respective needs and concerns at different levels of economic development, ...(Emphasis added)

135US-Shrimp, supra note 32, para.128.
136Ibid., para. 129-130.
137Ibid., para. 130.
138Howse & Eliason, supra note 29, p. 18.
139IISD-paper, supra note 50, p. 56.
140OECD-paper, supra note 19, p. 24.
141US – Gasoline, supra note 124, p. 16.
In order to review whether the “in relation to” prerequisite is fulfilled, the Appellate Body inquires whether there is a “close and genuine relationship of ends and means.”\textsuperscript{142} It also inquires that the measure is not “disproportionately wide in its scope and reach in relation to the policy objective.”\textsuperscript{143} The Appellate Body looks at the proportionality, \textit{merely}, in terms of how the design or structure of the measure fits with the goal.\textsuperscript{144} In other words, it is not a matter of a comparative analyse of the environmental benefits of the measure versus its trade restrictive effects.\textsuperscript{145}

PPM based BCAs would, likely, be characterized as a measures that “relates to” the UNFCCC objective to “prevent dangerous anthropogenic interference with the climate system,” provided that their primary function would be to internalize the social cost of carbon emissions. This, \textit{inter alia}, in view of the fact that a significant number of international instruments and declarations embrace the needs for, and the appropriateness of, internalize environmental costs. The Principle 8 of the Rio Declaration provides:

\begin{quote}
“To achieve sustainable development and higher quality of life for all people, States should \textit{reduce and eliminate unsustainable patterns of production and consumption} and promote appropriate demographic policies.”\textsuperscript{146}
\end{quote}

\textit{[Emphasis added]}

Furthermore, Principle 16 of the Rio Declaration\textsuperscript{147} provides, in part:

\begin{quote}
\textbf{\textsuperscript{142}US-Shrimp, supra note 32, para. 136..}
\textsuperscript{143}Ibid., para. 141.
\textsuperscript{145}Ibid.
“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution...” [Emphasis added]

Additionally, efficiency and cost Internalization constitutes a “cornerstone” of the principle of sustainable development.\textsuperscript{148} This is reflected in the “Trade and Sustainable Development principles,”\textsuperscript{149} which are intended to ensure trade policies work so that they achieve sustainable development.\textsuperscript{150} The principles prescribes, in relevant part:

\textbf{“Internalization of environmental costs is essential} to achieve efficiency. Despite the substantial practical difficulties this entails, \textbf{high priority should be attached to its implementation. As costs are progressively internalized, the contribution of all economic activity, including trade, to the efficient utilization of resources is enhanced.”}\textsuperscript{151} [Emphasis added]

The close nexus between the notion sustainable development and cost-internalizations would, likely, play a significant role in a WTO dispute, since, as mentioned above (Section 3.5.2.1), the preamble of the WTO Agreement, which informs the GATT 1994,\textsuperscript{152} embraces the objective of sustainable development.

Finally, a significant number of analysts seem to be convinced that the “relate to” prerequisite would be fulfilled. Pauwelyn states “climate change measures should normally pass this ‘relate to’ test.”\textsuperscript{153} The IISD estimates that “both a border tax and a

\begin{itemize}
  \item \textsuperscript{148}Potts Jason, \textit{The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy}, Winnipeg: International Institute for Sustainable Development, July 2008, p. 3.
  \item \textsuperscript{149}Trade and Sustainable Development Principles (Winnipeg: International Institute for Sustainable Development, 1994).
  \item \textsuperscript{150}Ibid., p. 14.
  \item \textsuperscript{151}Ibid., p. 16.
  \item \textsuperscript{152}\textit{US-Shrimp, supra} note 32, para. 129
  \item \textsuperscript{153}Pauwelyn, \textit{supra} note 56, p. 36.
\end{itemize}
request to purchase allowances would likely pass.” The author of the OECD paper comes to the same conclusion.

There is, nevertheless, always a risk that some members of the Congress/parliament or other contributing policymakers may support PPM based BCAs due to protectionist motivations rather than environmental motivations. However, if a PPM based BCA scheme, *de facto*, has a rational relationship, in its design and operation, with the objective of protecting the earth’s atmosphere, it is irrelevant whether some members of the Congress/parliament may have other motives.

### 3.5.2.3 Effective in Conjunction With Domestic Restrictions

The prerequisite that trade measure must be made effective in conjunction with domestic restrictions constitutes a “requirement of even-handedness in the imposition of restrictions.” However, the Appellate Body has, conjunctionally, emphasised that the requirements does not go as far as a prescribing identical treatment.

This prerequisite does not seem to constitute an obstacle in respect of BCAs, since these measures, *de facto*, incorporates imports in domestic climate policy on equal conditions. If Sweden would implement BCAs, in the form of PPM based carbon taxes, for example, it would mean that the tax would apply equally to imported products and to domestic products: steel from China made with coal would in line with domestic Sweden-steel made with coal be subject to a high carbon tax then steel produced by natural gas.

### 3.5.3 The chapeau

If it would be found that a PPM based BCA scheme was provisionally justified under Article XX (g) (alternative Article XX (b), the next step would be to examine whether the application of the BCA scheme satisfied the requirements of the chapeau of Article XX.

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154IISD-paper, *supra* note 50, p. 56.
158Ibid.
The chapeau of Article XX of the GATT 1994 reads:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures [specified in the subsequent paragraphs of Article XX].” [Emphasis added]

The word “applied” reflects that the chapeau is about the measures “detailed operating provisions” and how they are “actually applied.”\(^{159}\) Accordingly, the environmental policy goal no longer matters; the legitimacy of the policy goal and how the legislation relates to it must be examined under paragraph (g) (or b), not the introductory phrase.\(^{160}\) The chapeau, merely, serves to ensure that Members’ rights to avail themselves of the exceptions under Article XX are applied in good faith\(^{161}\) and without abuse.\(^{162}\)

The chapeau consists of two requirements.

1. First, a measure must not be applied in a manner that would constitute “arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”

2. Secondly, this measure must not be applied in a manner that would constitute “a disguised restriction on international trade.”

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\(^{159}\)US-Shrimp, supra note 32, para.160.

\(^{160}\)Ibid., para. 149.


\(^{162}\)Ibid, para. 224.
3.5.3.1 Arbitrary or Unjustifiable Discrimination Between Countries Where the Same Conditions Prevail

3.5.3.1.1 The Three Element Definition

The Appellate Body has declared that it is a matter of violation of the chapeau provided that three elements exist:163

1. First, the application of the measure must result in discrimination.
2. Second, this discrimination must occur between countries where the same conditions prevail.
3. Third, the discrimination between countries where the same conditions prevail must be arbitrary or unjustifiable in character.

In the US-Shrimp report, the Appellate Body found that the application of a US trade measure, to condition market access upon the adoption of a tuna protection policy, constituted “unjustifiable discrimination between countries where the same conditions prevail.” One of the grounds was related to the failure of the United States to engage some of the WTO Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles. The United States had adopted a cooperative approach with some other WTO Members, from the Caribbean/Western Atlantic region, with whom it had concluded a multilateral agreement on the protection and conservation of sea turtles, namely the Inter-American Convention. It was this differentiated approach that constituted the “discrimination.” The Appellate Body, explicitly, stated that:

“...the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory...”164

163US-Shrimp, supra note 32, para. 150.
164Ibid., para. 172.
Some analysts suggest that this finding imposes a general duty to negotiate before imposing “unilateral” actions.\textsuperscript{165} If this were so, it would, likely, necessitate serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements before imposing BCAs on imports. However, it seems unlikely, in light of the wording cited above, that this finding, actually, in itself suggests a general duty to negotiate. This is highlighted by Howse, who states that the Appellate Body never held that the requirements of the Chapeau, in and of themselves, impose a sui generis duty to negotiate.\textsuperscript{166} The IISD states in line with this claim:

“...in fact the finding was that treatment was arbitrary not simply because international negotiations were not pursued with the complainants, but rather because the United States pursued international negotiations with some members but not with others...”\textsuperscript{167}

Although, it, accordingly, seems like current WTO jurisprudence not prescribes a duty to negotiate it is clear that it would be preferred by the WTO,\textsuperscript{168} and also by the climate regime. The UNFCCC, explicitly, acknowledges in the preamble “that the global nature of climate change calls for the widest possible cooperation.”

Discrimination inconsistent with the chapeau can occur only between countries “were the same conditions prevail.” This means that it, implicitly, in the “same conditions” proviso is an allowance for discriminating in an Article XX measure between any two

\textsuperscript{165}Kommerskollegium-report, supra note 45, p. 15.
\textsuperscript{166}Howse, supra note 144, p. 507.
\textsuperscript{167}IISD-paper, supra note 50, note 52.
\textsuperscript{168}Report of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171, Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN(96)/2, 26 November 1996. (“...multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due respect must be afforded to both.”)
countries with different conditions. This may be a critical aspect in respect of BCAs, in light of the CBDR principle. If different economic statuses would be regarded as different conditions it would imply that it would be possible to graduate the import tax or allowances requirements depending on the stage of economic development of the foreign country in question, since it would be discrimination between countries were different conditions prevail and, consequently, not violate the chapeau. However, it seems ambiguous whether economic status can be regarded as different conditions. The only principled basis, according to Gaines, on which to select the relevant conditions for comparison is that they should have something to do with the declared objectives of the measure (this would implicate, in the case of BCAs, something to do with climate mitigation). Based on this starting point, he explicitly rejects the idea that economic conditions should be regarded, since them bear no direct relationship to environmental objectives. Nevertheless, although Gaines seems to be convinced that economic conditions should not be taken into account it is important to emphasise that there is no finding that preclude this possibility.

Moreover, a measure not only has to be a “discrimination between countries were the same conditions prevail” in order to violate the chapeau, it also has to be “arbitrary or unjustifiable.” It may, consequently, still be possible to comply with the chapeau, even if BCAs, that are CBDR modified, are characterized as discriminatory.

Analyzing whether discrimination is justified usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. There is arbitrary or unjustifiable discrimination when a discriminatory measure is applied "between countries where the same conditions prevail," and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. Accordingly, it is critical whether the alleged rationale for discriminating does relate to the pursuit of the

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170Ibid., p. 799.

171Ibid., p. 781-782.

172Brazil-Tyres, supra note 161, para. 227
objective. To modify BCAs, so that they would be applied less stringent in respect of
developing countries, would decrease the adjustment effect of the BCAs, and
consequently rather go against the objective to protect the atmosphere. However,
provided that the CBDR principle would require such modification, the action would
support the UNFCCC and thus, indirectly, have a rational connection to the objective of
protecting the atmosphere.

This method, to use sources of international law as a baseline, in order to establish, the
justifiability of a measure (i.e. to justify CBDR modification of BCAs with reference to the
UNFCCC), was used by the Appellate Body in the US-Shrimp report. The Appellate Body
found that the sources of international law, *inter alia*: Principle 12 of the Rio Declaration
on Environment and Development,173 Article 5 of the Convention on Biological
Diversity,174 and The Convention on the Conservation of Migratory Species of Wild
Animals175) recognized “cooperative efforts” and thus found that the discrimination (not
to negotiate with some countries) was “unjustifiable.”

If the Appellate body would use sources of international law in the opposite direction, to
establish that a “discrimination” is “justifiable,” it would, likely, result in an approval of
CBDR modification of BCAs, provided that it would be established that such modification
was required by the CBDR principle. The UNFCCC may, consequently, constitute a
baseline for justifying BCAs that “rebates” products originating from developing
countries. However, a “discriminating” article XX measure must not just avoid being
“unjustifiable” in order not to violate the Chapeau, it must also avoid being “arbitrary.”
This implicates a requirement, in respect of the implementation and administration of

173Cited: “Unilateral actions to deal with environmental challenges outside the jurisdiction of the
importing country should be avoided. Environmental measures addressing transboundary or global
environmental problems should, as far as possible, be based on international consensus.”
174Cited: “...each contracting party shall, as far as possible and as appropriate, cooperate with other
contracting parties directly or, where appropriate, through competent international organizations, in
respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation
and sustainable use of biological diversity.”
175Cited: The contracting parties [are] convinced that conservation and effective management of
migratory species of wild animals requires the concerted action of all States within the national
boundaries of which such species spend any part of their life cycle.
CBDR modified BCAs of “basic fairness and due process,” which means that it would be critical that the process was transparent and predictable, and non-discriminatory in its procedures.

3.5.3.1.2 The “Flexibility Requirement”: an Exception From the “Three Element Definition”
In the “original Shrimp-report” the Chapeau was not only applied in accordance with the “tree element definition” (see section 4.3.1.1 above), the Appellate Body, also, expanded the scope of the Chapeau by stating that:

“...it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory 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.”

This statement was made in view of the fact that the US conditioned market access upon the requirement that the exporting country adopted a tuna protection regulation that was not merely comparable, but essentially the same, as the one that was applied to the United States shrimp trawl vessels. There were no consideration taking by the US of other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles.

The Appellate Body regarded this behaviour as “a discrimination” that was both “unjustifiable” and “arbitrary.” It, consequently, used the reverse connotation of the

177 Pauwelyn, supra note 56, p. 41.
178 US-Shrimp, supra note 32, para. 165.
179 Ibid., para. 164.
180 Ibid., para. 163.
181 Ibid.
182 Ibid., para. 164.
183 Ibid., para. 177.
“same conditions” language to determinate that it is not only a matter of “unjustifiable and arbitrary discrimination” when countries in which the same conditions prevail are being differently treated, but also when countries in which different conditions prevail are not treated with sufficient flexibility.184 This obligation under the chapeau, to consider different conditions in the exporting countries, is referred to as the “flexibility” requirement.185

One condition that likely will be necessary to consider, in respect of the application of BCAs, is whether the country of exportation already imposes a carbon tax or an allowances requirements scheme.186 This, in turn, may oblige the importing country to impose a lower (or no) import taxes or emission allowance requirements on imports originating from such countries. Recall that this contrasts with the Most-Favoured-Nation obligation, which, would require the opposite: that the imports must be treated the same, regardless of climate policy in the country of origin (see section 3.4.1).187 It, accordingly, seems like it is impossible to design BCAs that are eligible as both non-prima facie violations and Article XX exceptions. A domestic tax scheme that incorporates imported products but excludes those originating from countries, were they already has been taxed due to a domestic carbon tax, would violate the Most Favoured Nation Treatment obligation, while the opposite: a domestic tax scheme that incorporates imported products, inclusive those originating from countries were they already has been taxed due to a domestic carbon tax, would violate the Chapeau under Article XX.

Another scenario is if countries have alternative climate policies in place, but not a carbon tax or allowances scheme. They may have command-and-control regulations in place instead for example. Should such climate policies also generate an obligation for

\[\text{Gaines-PPMs, supra note 55, p. 430.}\]
\[\text{IISD-paper, supra note 50, p. 57.}\]
\[\text{Recall, nevertheless, that it seems like this would be possible to compensate on the export side, at least if the border carbon adjustment was characterized as a tax. (see section ???)}\]
the importing country to impose a lower (or no) import taxes or allowance requirements? Some analysts suggest so.\textsuperscript{188} This seems reasonably in view of the fact that Article 3.4 of the UNFCCC prescribes that climate polices “should be appropriate for the specific conditions of each Party.”

However, on the other hand, a requirement to “rebate” products origination from countries with other climate policies would constitute a threat to CBDR principle. The majority of products that would be able to require less stringent BCAs, due to their country of origin’s alternative mitigation strategies, are, likely, products originating from developed countries. This would, thus, result in a situation were products originating from developing countries, with identical carbon emissions as products originating from developed countries, would face a higher carbon tax or more stringent allowances requirements, since they would originate from countries with no alternative climate policies in place.

However, the flexibility requirement may not only have negative implications in respect of the CBDR principle. Pauwelyn has pointed out that the flexibility requirement may require the importing country to consider economic conditions, in light of the CBDR principle, so that imports originating from developing face a less strict adjustments.\textsuperscript{189} Nevertheless, in the subsequent Shrimp report (US-shrimp article 21.4), the Appellate Body declared in respect of a measure that “conditioned market access,” (i.e. import prohibitions):

\begin{quote}
“...to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory.”\textsuperscript{190}
\end{quote}

\begin{flushleft}
\textsuperscript{188}Kommerskollegium report, \textit{supra} note 45, p. 15.
\textsuperscript{189}Pauwelyn, \textit{supra} note 56, p. 39.
\textsuperscript{190}US-Shrimp Article 21.5, \textit{supra} note 185, para.144.
\end{flushleft}
It is, accordingly, in compliance with the flexibility requirement to apply import restrictions (described as “the heaviest weapon in a Members armory of trade measures”\textsuperscript{191}, as long as the country imposing the measure considers policies that were “comparable in effectiveness.” This, clearly, indicates that it would be in compliance with the flexibility requirement to apply BCAs without any consideration of economic conditions, as long as the measure would consider policies that were “comparable in effectiveness.”

\textbf{3.5.3.2 Disguised Restriction on International Trade}

In the Shrimp Turtle case, the 21.5 panel considered whether the US shrimp embargo was a disguised restriction; the complainants had invoked the legislative history of the US measure, arguing that there were some legislators who viewed the embargo as a means of enhancing the competitiveness of the US shrimp industry.\textsuperscript{192} The panel, instead of examining the legislative history with respect to the intent of the measure, focused on its objective characteristics, asking itself whether the burden imposed on imported products or their producers was greater than in the case of domestic products or producers.\textsuperscript{193} Thus, in the case of BCAs, the question with respect to a disguised restriction would be whether the measure is applied in such a way so as to impose a disproportionate burden on imports.

\section*{4 Conclusion}

\subsection*{4.1 Concluding remarks on the WTO legality aspects}

The review in the previous chapter has illustrated that it is ambiguous whether PPM based BCAs would be eligible as a \textit{non-prima facie} violation. The contemporary jurisprudence does not, nevertheless, preclude the possibility that so may be the case

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{191}US –Shrimp, \textit{supra} note 32, para.171.
\item \textsuperscript{192}Howse & Eliason, \textit{supra} note 29, p. 19.
\end{enumerate}
\end{footnotesize}
(Section 3.1.1 to 3.41). Additionally, the relevant WTO jurisprudence clearly indicates that it would be possible to provisionally justify PPM based BCAs under Article XX (g) (Section 3.6.2 to 3.6.2.3). It is unclear what obligations the Chapeau may imply, though. The uncertainty relates, primarily, to the ambiguity of the “flexibility requirement” (Section 3.6.3.1.2). Does the flexibility requirement implicate a requirement to impose lower, or no, BCAs on imports originating from countries that have other climate policies in place (such as command-and-control regulations)?

This Chapter has also reviewed the interplay of the CBDR principle and BCAs in light of the WTO. The Enabling Clause in conjunction with the Article XX exception of the GATT may enable CBDR modification of BCAs, so that they can be applied less stringent in respect of imports originating from developing countries, without violating the Most-Favoured-Nation obligation or (in the case of Article XX justification) violating the chapeau (Section 3.4.2, 3.4.3, 3.5.3.1.1. and 3.5.3.1.2). In the case of Article XX justification it has even been suggested, by some scholars, that the Chapeau requires CBDR modification of BCAs. However, in view of the uncertainty of whether the CBDR principle actually restricts BCAs, and in conjunction with the current case law, it seems quite unlikely that the Appellate Body would introduce such a requirement (Section 3.5.3.1.2).

4.2 Conclusion in light of the subsequent Kyoto-protocol

In view of the legal analysis, above, it can be concluded that there is a significant likability that it is WTO compatible to implement BCAs without consideration of the CBDR principle. However, it has also been illustrated that BCAs, in the eyes of substantial number developing countries, constitutes a violation of the CBDR principle (see Section 2.3). The author’s overriding conclusion, in view of these facts, is that the lack of sufficient legal guidance in respect of the relationship between BCAs and the CBDR principle risks resulting in situation were the UNFCCC will be significantly undermined. In view of this risk, the policymakers, working with the subsequent Kyoto-protocol, should seek to regulate, more precise, the relationship between the CBDR principle and unilateral trade measures (such as the BCAs).
Bibliography


Kommerskollegium (Swedish National Board of Trade), *Climate measures and trade: Legal and economic aspects of border carbon adjustment*, 2009.


