

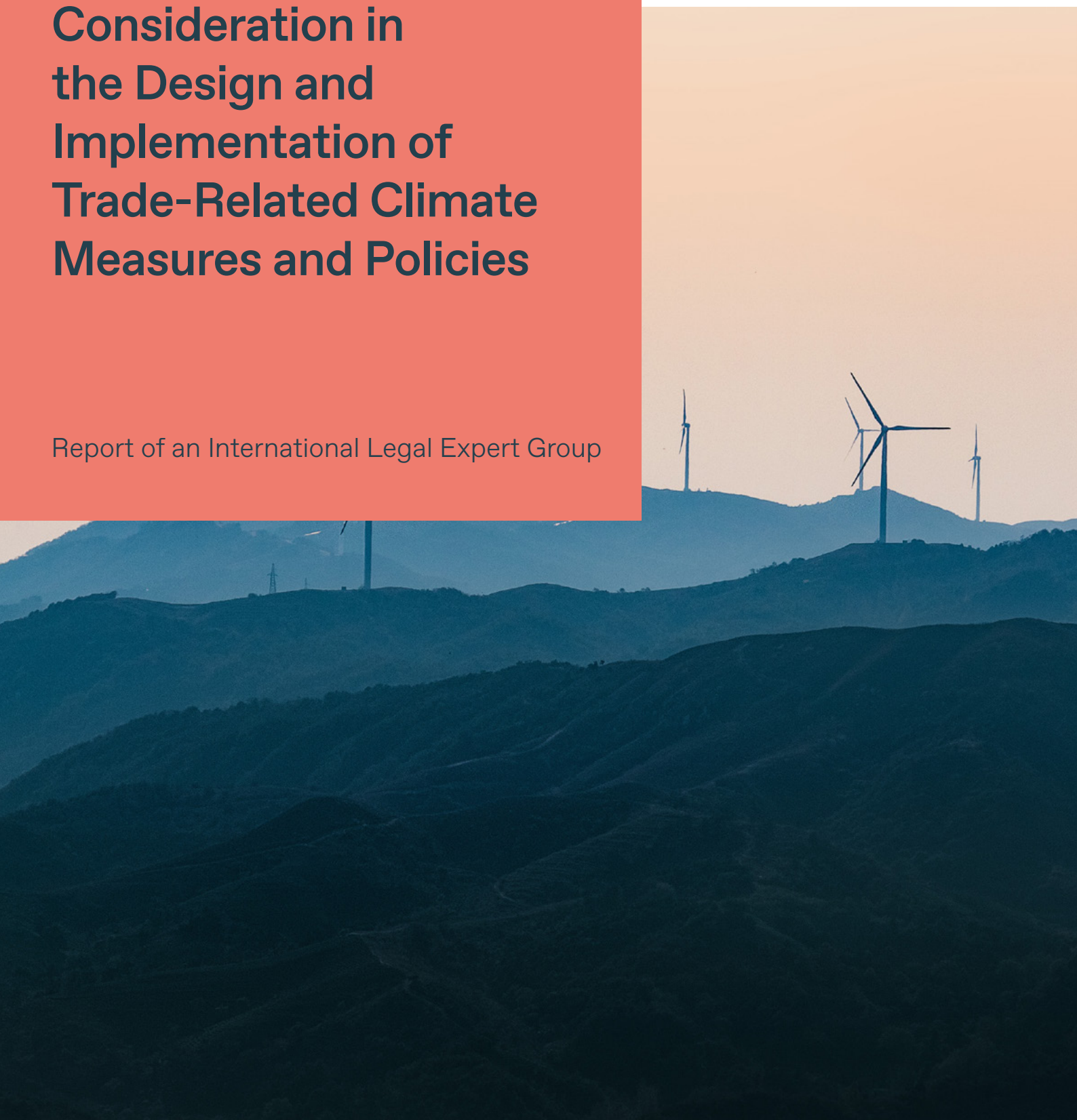
Report

September 2023

**TESS** Forum on Trade,  
Environment,  
& the SDGs

# Principles of International Law Relevant for Consideration in the Design and Implementation of Trade-Related Climate Measures and Policies

Report of an International Legal Expert Group



## About TESS

The Forum on Trade, Environment, & the SDGs (TESS) works to support a global trading system that effectively addresses global environmental crises and advances the sustainable development goals. To foster inclusive international cooperation and action on trade and sustainability, our activities seek to catalyse inclusive, evidence-based, and solutions-oriented dialogue and policymaking, connect the dots between policy communities, provide thought leadership on priorities and policy options, and inspire governments and stakeholders to take meaningful action.

## Acknowledgements

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## Disclaimer

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This report reflects a collective, cooperative effort among the international expert group members to contribute their expertise, offer guidance to policymakers and stakeholders, and serve as a conversation starter. The expert group brought together legal experts with a diversity of experience and perspectives. Although members may have differences on points of detail, the expert group endorses the general policy thrust and views reflected in this report. They participate in the expert group in their individual, not institutional, capacities. The views expressed in this report do not necessarily reflect the views of the institutions of the international expert group members.

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DEVELOPMENT STUDIES

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## Participating International Legal Experts

The experts on international law relevant to climate and trade who have participated in the international expert group responsible for this report are the following:

James Bacchus (USA)	Makane Moise Mbengue (Senegal)	David Unterhalter (South Africa)
Ujal Singh Bhatia (India)	Dan Bondi Ogolla (Kenya)	Peter L.H. Van den Bossche (Belgium)
Umberto Celli Junior (Brazil)	Nilufer Oral (Turkey)	Jorge E. Viñuales (Argentina)
Dominic Coppens (Belgium)	Jacqueline Peel (Australia)	Margaretha Wewerinke-Singh (The Netherlands)
Jennifer A. Hillman (USA)	Jan Yves Remy (St. Lucia)	Margaret A. Young (Australia)
Nicolas J.S. Lockhart (United Kingdom)	Tianbao Qin (China)	

The affiliations, titles, and links to the biographies of individual expert group members can be found in the Annex.

**Rapporteur:** Elena Cima

**Convenors:** Carolyn Deere Birkbeck and Christophe Bellmann

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## Preface

Faced with the urgent need to take action on the climate crisis, adapt to its impacts, and build climate-resilient development pathways, many governments and other stakeholders are exploring and debating where and how trade and trade policies can play a role.

Already, governments are implementing or considering a range of trade-related climate measures and policies, ranging from green industrial policies and initiatives to support decarbonization of supply chains to measures that promote the scale-up, diffusion, and uptake of environmental goods, services, and technologies key to climate mitigation and adaptation. Among these are an array of trade-related climate measures and policies, defined for our purposes as including those that tackle climate change mitigation and adaptation through border charges and quantitative restrictions as well as internal taxes, regulations, standards, and subsidies. Alongside such measures and policies, and in some cases prompted by them, there are calls to reform international trade rules to better enable, catalyse, and support efforts to respond at speed and scale to the climate crisis and to better guide governments and respond to the tensions that arise.

As governments seek to harness trade and trade policies for climate change mitigation and adaptation, and to foster climate resilience, a core challenge is how to advance climate ambition through trade-related actions, while ensuring approaches that are fair, equitable, and account for different national circumstances and capacities, including levels of development and climate vulnerabilities.

While there is growing recognition of the need for ambitious climate action and for trade policies to support climate action, the expanding array of trade-related climate measures and policies, and range of approaches to them, are generating international tensions in both the climate and trade arenas. A range of governments and stakeholders are expressing concerns, for instance, that the evolving patchwork of individual, national efforts will fragment trade in ways that undermine collective international climate action, and fail to provide businesses with the predictability and assurances they need to drive transformation of production and supply chains. Questions also arise about the effectiveness of trade-related climate measures and policies at achieving climate goals alongside concerns about their implications for development, competitiveness, and transparency, especially in a global context where governments face pressures to bolster national economies, national security, and employment. Some countries express fundamental misgivings about the use of unilateral approaches in lieu of multilateral cooperation on the climate-trade nexus. Trade-related climate measures and policies are also entangled in a wider geopolitical context in which major powers and allies are seeking to ensure access to critical raw materials, build or reinforce political alliances, and ensure the resilience of supply chains—such as through “friendshoring” and “nearshoring”, especially for products and services vital to their economies.

A cross-cutting concern is that trade-related climate measures and policies can disadvantage developing countries and their businesses, marginalizing them in the transition to a low-carbon economy and failing to foster the international cooperation urgently needed to ensure the priorities of climate action and sustainable development are met. Here, the concerns are especially high in developing countries that face significant costs and obstacles in meeting new climate-related requirements, lack affordable access to relevant technologies and finance, or lack the fiscal space and resources to support large-scale economic transformation.<sup>1</sup>

1. WTO, *World Trade Report 2022: Climate Change and International Trade* (2022); UNCTAD, *Trade and Environment Review 2021: Trade-Climate Readiness for Developing Countries* (2021); World Bank, *The Trade and Climate Change Nexus: The Urgency and Opportunities for Developing Countries* (2021).

Together, such tensions risk undermining the international cooperation required to achieve the world's climate and sustainable development goals and that underpins the multilateral trading system. Despite growing recognition that trade, including trade cooperation, will be vital to the response to the climate crisis,<sup>2</sup> the worlds of climate and trade diplomacy, and their respective spheres of international law, currently exist largely as parallel tracks, with few effective institutional processes for cross-fertilization.

In the work of the global climate regime, trade attracts little direct attention, although discussions (and tensions) on trade-related climate measures and policies do arise, such as in the United Nations Framework Convention on Climate Change (UNFCCC) Katowice Committee of Experts on the Impacts of the Implementation of Response Measures and the UNFCCC's Forum on Response Measures. At the World Trade Organization (WTO), discussions (and tensions) about the design and implementation of trade-related climate measures and policies arise in a range of committees, including the WTO Committee on Trade and Environment, the Council for Trade in Goods, and the Committee on Technical Barriers to Trade. While views vary, sometimes sharply, on how trade policies and measures should be used to contribute to climate change goals, a broad diversity of WTO members concur that greater trust and dialogue is required for members to cooperate in an inclusive, fair, transparent, and effective manner on the nexus of trade, climate, and sustainable development.

Recognition of the need to find cooperative pathways has spurred 77 WTO members to join the Trade and Environmental Sustainability Structured Discussions (TESSD), launched at the WTO in 2021. In the ministerial statement that launched the initiative, co-sponsoring WTO members called, among other elements, for "dedicated discussion on how trade-related climate measures and policies can best contribute to climate change and environmental goals and commitments while being consistent with WTO rules and principles."<sup>3</sup> At a December 2022 high-level meeting, co-sponsors further agreed to "hold exchanges on the development and implementation process of trade-related climate measures and policies, especially on the trade considerations involved in their design."<sup>4</sup>

During 2023, a range of governments have expressed interest in fostering more effective multilateral dialogue on issues of climate and trade, including in the context of the WTO Committee on Trade and Environment, proposing discussion of best practices and principles as a way to bolster shared understandings and dialogue.

## Purpose and rationale

As a contribution to such discussions, TESS convened an international legal expert group to provide guidance on principles of international law relevant to the design and implementation of trade-related climate measures and policies. The expert group was asked to consider whether a core set of recognized principles drawn from international law relevant to trade-related climate measures and policies could be identified and, if so, to reflect on their interpretation and relevance, and provide guidance on their implications for the design and implementation of trade-related climate measures and policies. The experts were asked to undertake this work, recognizing that, in international law generally, any principles and related rules come with a rich history surrounding their development, content, and legal status, and that perspectives on these issues evolve over time in light of practice and other changing circumstances. The

2. Coalition of Trade Ministers on Climate, Launch Statement, 17 January 2023; WTO, World Trade Report 2022: Climate Change and International Trade (2022), p. 6.  
3. Trade and Environmental Sustainability Structured Discussions (TESSD), Ministerial Statement on Trade and Environmental Sustainability, WT/MIN(21)/6/Rev.2 (14 December 2021).  
4. Trade and Environmental Sustainability Structured Discussions (TESSD), Statement by TESSD Co-convenors, INF/TE/SSD/W/21 (30 November 2022).

remit of the expert group's work was, therefore, not limited to principles that have attained the legal status of general principles of law or that form part of customary international law.

The expert group was convened, and undertook its work, with the desire to foster a constructive conversation and shared understandings among countries on existing legal principles in international law that can guide them when debating, designing, and implementing trade-related climate measures and policies.

The vision driving this work is that shared understandings on the relevant principles could:

- Promote and bolster dialogue and inclusive international cooperation on the design and implementation of trade-related climate measures and policies.
- Facilitate discussions both in the WTO, such as in the Committee on Trade and Environment and its other regular committees, as well as in the Trade and Environmental Sustainability Structured Discussions, with the goal of improving dialogue and cooperation among WTO members, and in the institutions of the climate regime, such as in the UNFCCC Forum on Response Measures and the Katowice Committee of Experts on the Impacts of the Implementation of Response Measures, among other international law processes relevant to climate change.
- Support reflection among wider academia, researchers, and stakeholders from civil society and business to encourage a broader, more inclusive debate.
- Reduce tensions, distrust and, if possible, avoid politically-charged disputes at the WTO on trade-related climate measures and policies that could undermine ambitious, effective climate action and weaken international cooperation in both international climate and trade fora.
- Promote international cooperation on climate, trade, and sustainable development with a view to achieving a just and inclusive global green transition in which all societies and peoples can thrive.

At TESS, this specific project and report is one part of a wider set of activities on climate, trade, and sustainable development. These wider activities include work on how trade rules and policies need to be rethought, reformed, updated, or clarified to drive ambitious climate action at speed and scale in ways that support the inclusive international cooperation vital to climate-resilient development, and fair and just transitions. Our activities also include work with partner organizations and experts on how trade and trade policies can support the national and regional climate goals and priorities of developing countries.

## The International Legal Expert Group

The expert group draws together leading international legal experts from the climate, environment, trade, and general international law communities, participating in their personal capacities (see Annex for the list of group members). The group is diverse in terms of its geographic representation and gender balance, including experts from academic institutions in both developed and developing countries. To inform the group's reflections and bolster its policy relevance and resonance, its work included consultations and roundtable discussions with a range of government representatives from a diversity of countries.

### **Dr. Carolyn Deere Birkbeck**

Founder and Executive Director, TESS

### **Christophe Bellmann**

Head of Policy Analysis and Strategy, TESS

## Executive Summary

Climate change presents unprecedented challenges and requires an urgent, ambitious global response at speed and scale. At the international level, governments recognize the climate crisis as a global threat to the environment and socio-economic welfare in all countries, which requires enhanced international cooperation. Governments also recognize that tackling the climate crisis requires ambitious and rapid transformations in the way that we produce and consume goods and services. In this context, there is growing attention to the role of trade and trade policies in the transition to a low-carbon economy, including both calls and efforts to harness “trade, trade policies, and international trade cooperation in addressing climate change.”<sup>5</sup>

Trade-related climate measures are among the policy tools that governments are increasingly using to address climate change. Such trade-related climate measures and policies—including border charges and restrictions, internal taxes, regulations, standards, and subsidies—have both climate change and trade dimensions.

At a time when states are considering trade-related climate measures and policies—and amidst rising political tensions about some of these measures—our report aims to offer independent guidance for governments and stakeholders on principles of international law that are relevant for consideration in the design and implementation of trade-related climate measures.

A core insight of our work is that trade-related climate measures and policies should be approached as legal hybrids. We see trade-related climate measures as implicating a number of areas of international law. More specifically, the rationale, design, and debates about these measures draw from different international law regimes, including those relating to the environment generally, climate change specifically, and international trade, along with the rules and principles of general international law, international human rights law, and international commitments to sustainable development.

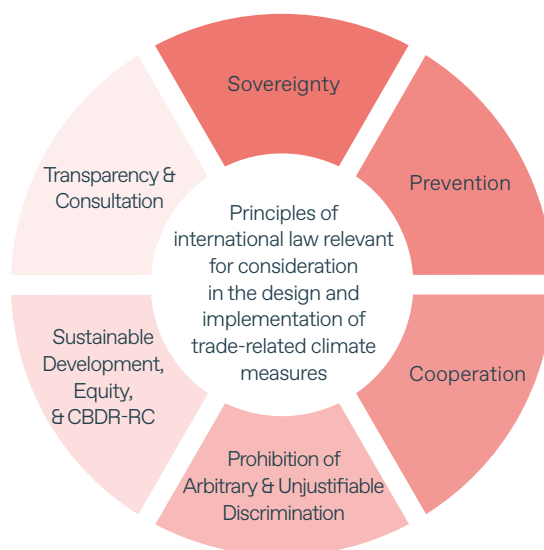
To this end, in the report, the group addresses a set of recognized principles of international law that we deem especially relevant for consideration in the design and implementation of trade-related climate measures and policies. In addition to highlighting the relevance of these principles, our report aims to provide governments with some general guidance, which we hope could be useful in the design and implementation of trade-related climate measures and policies, recognizing that the relevance of principles will depend on the type of measure and context.

We address the following principles in detail in the report itself: sovereignty; prevention; cooperation; prohibition of arbitrary and unjustifiable discrimination; sustainable development, equity, and common but differentiated responsibilities and respective capabilities; and transparency and consultation.

The set of principles that we address in this report is in no way intended to be exhaustive. We selected the principles following careful review of a broad range of possible principles, selecting those that we considered to be particularly relevant to, and deserving of consideration in, the design and implementation of trade-related climate measures and policies. In discussing them, we caution that we do not intend to make any definitive statement as to their legal status, including in the context of any particular international law regime. The group recognizes that the principles set out in the report may not have equal standing in international law. Nor does the order in which the principles are presented in the report suggest any particular hierarchy among them. The report also does not address the application of the principles to any particular measures, whether to determine their legality or otherwise.

5. WTO, *World Trade Report 2022. Climate Change and International Trade* (2022), p. 6; C. Deere Birkbeck, *Trade Ministers’ Coalition Seeks to Put Climate Action at the Heart of Global Trade Policies* (2023).

## Principles Addressed in the International Expert Group Report



Note: CBDR-RC stands for common but differentiated responsibilities and respective capabilities.

We present the principles in a general manner, recognizing that they potentially apply to a wide range of trade-related climate measures and policies, while acknowledging that each principle may apply differently depending on the specific measure at issue, the particular context, and other relevant factors.

With this in mind, we analyse the principles in a way that presents them as cumulative (governments should consider all of these principles when they design and implement trade-related climate measures and policies) and simultaneously applicable, in a mutually supportive and coherent manner, giving full effect to all relevant parts of international law, insofar as possible.<sup>6</sup> Our commentary recognizes the difficulties involved in achieving such coherence and adopts a modest reflective posture, rather than a prescriptive approach, to the implications of the principles we identify.

During our work, experts within our group highlighted the need to discuss reforms, updates, or clarifications on a range of different aspects of international law in order to support the global response at the speed and scale called for by the climate crisis. While recognizing the scope for climate action within existing trade and climate rules, the expert group agreed on the need to encourage critical reflection and dialogue on potential developments of international law to support climate action, both to promote trade that can further collective climate goals and to discourage trade that undermines them, all while fostering sustainable development.

We hope that our reflections on the following principles may play a useful role in further discussion around the design and implementation of trade-related climate measures and policies, providing a common reference point to inform and foster mutual understanding, dialogue, and international cooperation on trade-related climate measures and policies in the context of sustainable development priorities.

6. In international law, generally, and WTO law, specifically, there is a presumption that different parts of international law should, as far as possible, be interpreted and applied in a coherent and consistent manner. See e.g., Report of the Study Group of the International Law Commission (“ILC”), ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’. Doc. A/CN.4/L.702, 18 July 2006, p. 8, (“The principle of harmonization. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”), p. 14 (“Article 31(3)(c) [of the Vienna Convention on the Law of Treaties (“VCLT”)] gives expression to the objective of ‘systemic integration’”; G. Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between WTO Agreement and MEAs and other Treaties’, *Journal of World Trade*, 35(6) (2001), 1081-1131, 1129 (referring to the “general principle against conflicting interpretation (Article 31(3)(c) together with Article 30 of the [VCLT]”). Article 31(3)(c) of the VCLT requires a treaty interpreter to take into account “any relevant rules of international law applicable in relations between the parties”. The WTO Appellate Body confirmed that Article 31(1) of the VCLT has the status of a rule of customary international law, and is applicable to the interpretation of WTO law (Appellate Body Report, *US – Gasoline*, p. 16; in the same report, the Appellate Body held that WTO law “is not to be read in clinical isolation from public international law”, at p. 17). Referring to the above-mentioned ILC report on fragmentation, the Appellate Body also explained that “Article 31(3)(c) of the Vienna Convention is considered an expression of the ‘principle of systemic integration’ which, in the words of the ILC, seeks to ensure that ‘international obligations are interpreted by reference to their normative environment’ in a manner that gives ‘coherence and meaningfulness’ to the process of legal interpretation” (Appellate Body Report, *EC and Certain member States – Large Civil Aircraft*, para. 845). See also WTO Panel Report, *Indonesia – Autos*, para. 14.28 (“in public international law there is a presumption against conflict”), and footnote 649 (with references to the literature).



## Abbreviations

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CBDR-RC	Common but Differentiated Responsibilities and Respective Capabilities
COP	Conference of the Parties
GA	General Assembly
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse Gas
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
MFN	Most-Favoured-Nation
NDC	Nationally Determined Contribution
PPMs	Processes and Production Methods
S&DT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## PART A. Background to the Principles: Policy Context and Rationale

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Climate change is a “common concern of humankind”<sup>7</sup> that presents unprecedented challenges and requires an urgent, ambitious global response. At the international level, governments recognize the climate crisis as a global threat to both the environment and socio-economic welfare in all countries, which requires enhanced international cooperation. Governments also recognize that tackling the climate crisis will require ambitious and rapid transformations in the way in which we produce and consume goods and services. In this context, there are growing calls and efforts to harness “trade, trade policies and international trade cooperation in addressing climate change.”<sup>8</sup>

Trade measures are among the tools that governments are using to address climate change. Such trade-related climate measures and policies cover a broad range of measures, including border charges and restrictions, internal taxes, regulations, standards, and subsidies. Such measures have both climate change and trade dimensions.

A number of areas of international law apply to trade-related climate measures and policies. This international law includes, for all states, customary international law and general principles of law; the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, for parties to those agreements; and, the covered agreements of the World Trade Organization (WTO), for WTO members. Among others, international law relating to climate change also encompasses human rights law. States have recognized “the right to a clean, healthy and sustainable environment” as a human right and affirmed that the promotion of this right “requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.”<sup>9</sup> Given the impacts of the climate crisis on human rights, the Preamble of the Paris Agreement underlines the links between the protection of human rights and the climate system.<sup>10</sup>

Importantly, this report takes as its starting point the urgency of action on all aspects of the climate crisis. In this regard, we underline and recognize the urgency of action to achieve the 1.5 degrees Celsius temperature goal established by the Paris Agreement. In so doing, we also underline the importance of sustainable development, equity, and eliminating poverty in the global response to climate change, as recognized in both the UNFCCC and the Paris Agreement. The UNFCCC confirms that “[t]he Parties have a right to, and should, promote sustainable development.”<sup>11</sup> Adopted to enhance the implementation of the UNFCCC, the Paris Agreement builds on previous international cooperation regarding climate change mitigation and adaptation, as well as their consequences,<sup>12</sup> aiming to “strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty.”<sup>13</sup>

7. Preamble to the United Nations Framework Convention on Climate Change (UNFCCC) (May 9, 1992).

8. WTO, *World Trade Report 2022. Climate Change and International Trade* (2022), p. 6. See footnote 1, above.

9. UN GA Resolution, A/76/L.75.

10. Preamble to the Paris Agreement.

11. Article 3.4 of the UNFCCC. Also see Articles 2.1, 4.1, 6.1, 7.1, 8.1, and 10.5 of the Paris Agreement.

12. Article 2.1 of the Paris Agreement.

13. Article 2.1 of the Paris Agreement to the United Nations Framework Convention on Climate Change (Paris Agreement) (Dec. 12, 2015).

At the international level, numerous international resolutions, declarations, commitments, and reports have underlined that “sustainable development” has three dimensions, which are economic development, social development, and environmental protection.<sup>14</sup> Among the international instruments promoting sustainable development is the Rio Declaration on Environment and Development (Rio Declaration).<sup>15</sup>

Notably, the Rio Declaration provides, among other things, in Principle 12 that “States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.”<sup>16</sup> These references to sustainable development, and to a supportive and open international economic system, are reflected in the UNFCCC, where trade is also explicitly mentioned.<sup>17</sup> Sustainable development is likewise a key objective of the trade regime, as reflected in the Preamble to the Agreement Establishing the WTO.

## Purpose of This Report

At a time when countries are increasingly debating, adopting, and implementing trade-related climate measures and policies—and growing tensions are arising about such measures—this report aims to offer independent guidance for governments and stakeholders on principles of international law that are relevant for consideration in the design and implementation of trade-related climate measures and policies.

A core insight of our work is that trade-related climate measures and policies should be understood as legal hybrids; their design and the debates about them draw from the international law regimes relating to the environment generally, climate specifically, and international trade, along with rules and principles of general international law, human rights law, the law of the sea, and commitments to sustainable development that have been agreed by the international community.

To this end, in the following sections, we identify and review recognized principles drawn from existing international law, which we deem especially relevant for consideration in the design and implementation of trade-related climate measures and policies. In addition to shedding light on the relevance of these principles, the report aims to provide some guidance on how these principles could facilitate the design and implementation of trade-related climate measures and policies in a manner that bridges the different areas of international law coherently, while recognizing that the operation of the principles will depend on the particular context and the kind of measure at issue.

A number of caveats are important. First, the set of principles addressed in this report is not exhaustive. The principles highlighted in this report were selected because we consider them to be particularly relevant

14. World Commission on Environment and Development, *Our Common Future*, p. 43; Appellate Body Report, *US – Shrimp*, para. 129, footnote 107; UN GA Resolution, *A/RES/77/165*.

15. Since the adoption of the Rio Declaration in 1992, states have “reaffirm[ed] all the principles of the Rio Declaration”, and their “commitment to fully implement the Rio Declaration”. See UN GA Resolution, *A/RES/66/288* (“The Future We Want”), adopted on 27 July 2012, paras. 15, 16. See also UN GA Resolution, *A/RES/70/1* (“Transforming Our World: the 2030 Agenda for Sustainable Development”), adopted on 21 October 2015, paras. 11-12. See also e.g., J. E. Viñuales, ‘The Rio Declaration on Environment and Development’, in J. E. Viñuales (ed), *The Rio Declaration on Environment and Development – A Commentary* (OUP, 2015), p. 2 (“the [Rio] Declaration has become the canonical formulation of the legal concept of sustainable development as well as of the main principles of international environmental law underpinning treaties, treaty negotiations, domestic legislation, and a now substantial body of domestic and international jurisprudence”); P. Sands and J. Peel, *Principles of International Environmental Law* (CUP, 2018), p. 43 (The Rio Declaration “provided a framework for the development of environmental law at the national and international level, which has served as an important point of reference to guide decision-making”). The WTO Appellate Body and WTO panels have relied on the Rio Declaration in the interpretation and application of WTO law, in particular under Article XX of the GATT (see e.g., Appellate Body Report, *US – Shrimp*, paras. 154, 168; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 124; Panel Report, *US – Shrimp*, para. 7.52 and footnotes 661, 662; Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 7.2 and footnote 255; Panel Report, *China – Rare Earths*, paras. 7.262-7.263). See also International Court of Justice (ICJ) Advisory Opinion, *Legality of the Threat of Use of Nuclear Weapons*, 8 July 1996, paras. 30-31.

16. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. a/conf.151/26/Rev.1 (Vol. II), Annex I (Aug. 12, 1992), Principle 12.

17. Article 3.5 of the UNFCCC.

to and deserving of consideration in the design and implementation of trade-related climate measures and policies. Other principles that our group considered range from the polluter pays principle to the precautionary principle, and we also considered a range of best practices linked to principles, such as impact assessment. Second, in its review of the principles, this report does not intend to make any definitive statement as to the legal status of the principles within the context of any particular international law regime, including their relative standing and importance in international law.<sup>18</sup> We recognize that there are different views on and interpretations of the meaning and effect of these principles in particular circumstances, as is the case for most principles of international law in general. Third, the order in which the principles are presented in the report is not meant to indicate any particular hierarchy among them. Fourth, the principles are presented in a general manner, recognizing that they are relevant to a wide range of trade-related climate measures and policies, and that each principle may apply differently depending on the specific measure at issue and other relevant factors. The report also does not address the application of those principles to any particular measure, to determine their legality or otherwise.

Finally, the principles are presented and analysed as cumulative (that is, governments should consider each of these principles when they design and implement trade-related climate measures and policies) and as simultaneously applicable in a mutually supportive and coherent manner, giving full effect to all relevant parts of international law, insofar as possible. This aspect of the report's approach is consistent with the presumption, widely accepted in the field of international law generally and in WTO law, that different parts of international law should, as far as possible, be interpreted and applied in a coherent and consistent manner.<sup>19</sup> Indeed, as long ago as 1996, WTO members recognized that “due respect must be afforded to both [WTO agreements and multilateral environmental agreements] in the development of a mutually supportive relationship.”<sup>20</sup>

Our commentary recognizes the difficulties involved in achieving coherence between different regimes and offers a modest, reflective posture, rather than a prescriptive approach, to the implications of the principles we identify in terms of their relevance for any particular trade-related climate measure. Through this report, we aim to inform and spur a conversation on considerations and approaches that can foster international

18. For instance, the principles referred to in this report are not intended to be limited to “general principles of law”, which is a source of law identified in core international treaties. Nor does this report assert, or intend to imply, that the principles referred to are “general principles of law” or form part of customary international law. The report does, however, make the case that each of the concepts elaborated are principles, in the general meaning of the word, in light of international law and are relevant for consideration in the design and implementation of trade-related climate measures.

19. See e.g., Report of the Study Group of the International Law Commission (ILC), ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’. Doc. A/CN.4/L.702, 18 July 2006, p. 8, (“The principle of harmonization. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”), p. 14 (“Article 31(3)(c) [of the Vienna Convention on the Law of Treaties (VCLT)] gives expression to the objective of ‘systemic integration’”); G. Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between WTO Agreement and MEAs and other Treaties’, *Journal of World Trade*, 35(6) (2001), 1081-1131, 1129 (referring to the “general principle against conflicting interpretation (Article 31(3)(c) together with Article 30 of the [VCLT]”). Article 31(3)(c) of the VCLT requires a treaty interpreter to take into account “any relevant rules of international law applicable in relations between the parties.” The WTO Appellate Body confirmed that Article 31(1) of the VCLT has the status of a rule of customary international law, and is applicable to the interpretation of WTO law (Appellate Body Report, *US – Gasoline*, p. 16; in the same report, the Appellate Body held that WTO law “is not to be read in clinical isolation from public international law”; at p. 17). Referring to the above-mentioned ILC report on fragmentation, the Appellate Body also explained that “Article 31(3)(c) of the Vienna Convention is considered an expression of the ‘principle of systemic integration’ which, in the words of the ILC, seeks to ensure that ‘international obligations are interpreted by reference to their normative environment’ in a manner that gives ‘coherence and meaningfulness’ to the process of legal interpretation” (Appellate Body Report, *EC and Certain member States – Large Civil Aircraft*, para. 845). See also WTO Panel Report, *Indonesia – Autos*, para. 14.28 (“in public international law there is a presumption against conflict”), and footnote 649 (with references to the literature). On regime interaction, see A. Lang, ‘Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition’, in *Regime Interaction in International Law* (M. Young ed., CUP, 2012). Also see International Law Commission, ‘Draft guidelines on the protection of the atmosphere’, adopted by the International Law Commission at its seventy-second session, in 2021, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/76/10, para. 39) (The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, inter alia, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts).

20. Report (1996) 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, as cited by the Appellate Body Report, *US – Shrimp*, para. 168 (emphasis by the Appellate Body).

discussions on trade-related climate measures and policies to avoid, as far as possible, conflict and tensions. Instead, we hope to enhance international cooperation in tackling climate change and advancing sustainable development. Our group shares a common view that sustainable development, and eradication of poverty, should be integral to all action on climate and trade. We will not be able to achieve our shared climate goals without inclusive international cooperation that secures sustainable development.<sup>21</sup>

## Looking Beyond Principles

In highlighting the following principles, we fully recognize the importance of ongoing discussions on the extent to which existing international law regarding climate change and trade rules are fit for purpose, given the urgent and unprecedented challenges posed by the climate crisis. While this report is limited to identifying principles relevant for consideration under existing international law, our report should not be taken as an endorsement of the status quo in terms of international law relevant to the climate crisis. At the same time, our view is that the principles outlined in this report will continue to be relevant should international law be further developed in the future.

Although we express no collective views in this report on whether and how international law should be developed, we emphasize the need for intensified international cooperation on this topic. During our work, some experts highlighted the need for the development or clarification of a range of different aspects of international law, including in both the climate change and trade regimes, to support more proactively efforts to respond at speed and scale to the climate crisis, while accounting for the impacts of climate change, especially for those most vulnerable to those impacts. While the group recognizes that there is scope for action on climate mitigation and adaptation within existing international law, including through properly crafted trade-related climate measures and policies, all agreed on the need for critical reflection and dialogue on how international law can promote just and inclusive trade that supports collective climate change goals, and discourage trade that undermines them, all while fostering sustainable development.

Some members of our expert group emphasized, for instance, the need to consider options for the reform of international trade rules on subsidies—such as those relevant to agriculture, fossil fuels, energy, and the low-carbon transition—as well as wider green industrial policies, including rules on intellectual property and technology transfer. These reforms should, again, facilitate our collective ability to respond at speed and scale to the climate crisis, while ensuring that the low-carbon transition is just and inclusive for all countries and peoples.

Some within our group have called elsewhere for a “climate waiver” of certain trade rules to facilitate swift action on climate goals. Some also believe that international trade rules regarding processes and production methods (PPMs) are ripe for clarification because PPMs are an important source of emissions in the production of goods and services and, hence, national and international climate change policies often address how products are produced. They argue that the approach to assessing the “likeness” of products in international trade law should evolve to take account of the environmental and health impact of how products are produced, in line with possible changes in consumer attitudes to high-emitting products and services, and the potential evolution of multilateral environmental agreements. While other experts agree on the importance of PPMs to climate change policies, they argue the traditional approach to “likeness” in international trade law is appropriate, because they consider that the environmental and health impacts of products, including PPMs, can be fully addressed, whenever relevant, under the general exceptions

21. A similar view is reflected in the launch statement of the Coalition of Trade Ministers Coalition on Climate, which brings together over 58 trade ministers (as of September 2023) from countries in all regions and at different levels of development. See [www.tradeministersonclimate.org](http://www.tradeministersonclimate.org).

provisions in international trade law, which also ensure that these legitimate environmental and health objectives are not used as an arbitrary, unjustifiable, or disguised restriction on trade.

More broadly, some experts highlighted the importance of critical reflection on whether the prevailing approach in WTO law, which relies on “exceptions” to justify environmental action, is sufficient in the face of the perilous sustainable development implications of the climate crisis. Others welcome the balance that is struck in the exceptions, which they consider allows for a full and nuanced consideration of all factors relevant to the protection of health and the environment, while guarding against unwarranted trade restrictions.

Collectively, we recognize that trade and trade rules have a role to play as a catalyst and driver for the transition to a low-carbon global economy that promotes sustainable development for all. There are compelling arguments for aligning tariff schedules with climate goals and for trade policies to do more to promote the development, diffusion, affordability, and uptake of goods, services, and technologies critical to climate action in ways that support economic opportunities for developing countries. There is critical work to do to manage and coordinate differences in regulatory approaches, and the proliferating array of climate-related standards for the low-carbon transition, and to avoid tensions that can undermine climate, trade, and sustainable development goals.

There was also recognition within our group of the need for further development of international law relevant to climate change as well. Some members of the expert group emphasized, for example, that there is additional work needed on an adequate legal framework for addressing climate-related loss and damage, which has a range of trade dimensions and sustainable development impacts in developing countries. Others noted the importance of several advisory proceedings on the obligations of states in respect of climate change.<sup>22</sup> More broadly, expert group members emphasized the importance of adequate financing for implementation of the Paris Agreement. They also highlighted the need to carefully consider intersections between calls for the development of international law in different regimes. For instance, given that developed countries have not yet fulfilled their commitment to provide \$100 billion per year to support climate action in developing countries, there were questions about how calls for the development of trade rules on subsidies to support the green transition would address issues of fairness and inclusiveness, especially given that many developing countries cannot afford to grant such subsidies and yet are keen to enjoy the development dividend resulting from the green transition.

In sum, we hope our reflections on the following principles may play a useful role by providing a conversation starter and a common reference point that can inform and foster mutual understanding, dialogue, and international cooperation on trade-related climate measures and policies, including in domestic and international deliberations and processes.

22. These include the General Assembly’s request for an advisory opinion on the obligations of states in respect of climate change, which is currently before the International Court of Justice; the request for an advisory opinion submitted to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law; and the request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile. See ICJ, Request for Advisory Opinion transmitted by the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, *Obligations of States in respect of Climate Change*.

## PART B. Principles Relevant for Consideration

### 1. Sovereignty

The principle of sovereignty is one of the core principles of international law. It refers to the authority that states exercise over all people on, and all activities that take place within, their territory.<sup>23</sup> It includes regulatory sovereignty, namely states' exclusive authority to legislate over their territory and population. The principle of sovereignty is reflected in international law related to the environment and in international trade law.

Under the climate change regime, for instance, the Preamble to the UNFCCC reaffirms “the principle of sovereignty of States in international cooperation to address climate change.”<sup>24</sup> The Preamble also recalls that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

In the climate regime, the principle of sovereignty translates into the regulatory sovereignty and autonomy of states with regard to both the formulation of their climate change objectives (e.g. in terms of their emissions reduction targets) and the means to pursue them (e.g. the specific mitigation measures they adopt), keeping in mind the overall common objective in the Paris Agreement to limit the increase in global temperatures to well below 2° Celsius above pre-industrial levels and pursue efforts to limit such increase to 1.5° Celsius.<sup>25</sup> Under the Paris Agreement, each state has an obligation in Article 4.2 to “prepare, communicate and maintain” its nationally determined contribution (NDC) to the global response to climate change, with a further obligation to pursue “domestic mitigation measures” to achieve the objectives of its NDC.<sup>26</sup>

By ratifying the UNFCCC and the Paris Agreement, as with many international agreements, states also agree to limitations on their sovereignty in as much as the convention and agreement bind them to take certain actions (such as prepare, communicate, and maintain their own successive NDCs). In so doing, states retain autonomy to choose how and through what measures they will implement their NDCs.

In terms of international trade law, WTO law recognizes the sovereign right of WTO members to regulate in the public interest, including to enable climate action even if, in so doing, the measures restrict trade.<sup>27</sup> At the same time, WTO agreements also limit state sovereignty, in particular, as it concerns the design and implementation of the trade measures that states might choose to adopt.<sup>28</sup> A WTO member's “right to regulate”<sup>29</sup> is reflected in Article XX (General Exceptions) of the General Agreement on Tariffs and Trade (GATT)<sup>30</sup> and Article XIV of the General Agreement on Trade in Services (GATS). These two provisions provide a basis for WTO members to pursue a wide range of policy objectives even if, in so doing, the

23. S. Besson, ‘Sovereignty’, in *Max Planck Encyclopedia of Public International Law* (2011), para. 1.

24. See Preamble to the UNFCCC.

25. Article 2.1(a) of the Paris Agreement. See Preamble to the UNFCCC. Articles 4.2 and 4.11 of the Paris Agreement.

26. Article 4.2 of the Paris Agreement.

27. The same is true for international trade law more broadly, including regional trade agreements (RTAs) which often contain provisions that recognize the state's right to regulate.

28. See Report of the Panel, *China – Raw Materials*, para. 7.382. Beyond the WTO, see *S.S. Wimbledon* (U.K. and others v Germany), 1923 P.C.I.J. (ser. A) No. 1; *S.S. Lotus* (France v Turkey) PCIJ Series A No 10.

29. See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233.

30. In this report, all references to the GATT refer to GATT 1994. The original GATT was negotiated in 1947 (now referred to as “GATT 1947”) and first entered into force in 1948. The first major overhaul of GATT 1947 occurred through the Uruguay Round of GATT negotiations (from 1986 to 1994), which resulted in a number of modifications to the original GATT and the conclusion of a new version of the agreement, which widely referred to as GATT 1994.

measures depart from obligations in the GATT or the GATS.<sup>31</sup> A WTO member's right to regulate is also expressly recognized in the Agreement on Technical Barriers to Trade (TBT Agreement) as well as in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). According to the former, states can adopt trade-restrictive technical regulations to pursue legitimate policy objectives (including, as expressly stated, the protection of the environment),<sup>32</sup> while the latter allows WTO members to adopt "sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health."<sup>33</sup>

In general terms, under the principle of sovereignty, each state can decide for itself how a product should be produced within its territory, although this right is subject to the concomitant responsibility to ensure that activities within its territory, or under its jurisdiction or control, do not cause harm to the environment of other states or areas beyond national jurisdiction<sup>34</sup> (see this report's discussion of the principle of prevention). Among the range of trade-related climate measures and policies that governments are pursuing and considering, some measures seek to impose requirements relating to the way that products are produced domestically and in an exporting country in order to reduce emissions released in the production process. These "process and production method" (PPM) measures, common in national environmental standard-setting, may or may not have a bearing on the inherent characteristics of the product.

Under WTO law, when a measure has a bearing on the characteristics of a product (e.g. recycled content or labelling), it is well established in the case law that a member is entitled to justify the measure under Article XX, including on the grounds of environmental protection.<sup>35</sup> The application of Article XX is less settled, however, if the measures do not affect the inherent characteristics of a product (so-called non-product-related PPMs), such as the way in which products were produced, including emissions or other climate-related impacts arising during production.<sup>36</sup> In such instances, a country adopting trade measures based on non-product-related PPMs seeks to take account of how a product is produced in a third country.

The adoption and application of trade-related climate measures and policies that seek to take account of how a product is produced in an exporting country will impact that third country. In some cases, measures may seek explicitly to reduce emissions in third countries. Such measures may raise questions relating to sovereignty. Some take the view that these measures are an exercise of the importing state's sovereign right to control the kinds of products entering its territory, while others consider such measures to have extraterritorial effects in the exporting country, prompting concerns about violations of the exporting country's sovereign authority to regulate production in its territory.<sup>37</sup> Questions may also arise as to how these measures align with the approach adopted in the Paris Agreement. An importing country might choose, through such trade-related measures, to seek the reduction of specific sources of emissions in an exporting country, in a particular time

31. In addition, GATT Article XXI and GATS Article XIVbis allow WTO members to adopt otherwise GATT- or GATS-inconsistent measures that are necessary to protect their essential security interests.

32. Article 2.2 of the TBT Agreement. See also the Preamble to the TBT Agreement. See Panel Report, *EC – Sardines*, para. 7.120.

33. Articles 2.1 and 3.3 of the SPS Agreement.

34. See e.g., Principle 2 of the Rio Declaration and Preamble to the UNFCCC.

35. See *US – Tuna II (Mexico)* and *US – Tuna II (Mexico) (Art. 21.5 DSU)*, noting that the measure addressed product labelling in relation to a production method.

36. In WTO law, a PPM measure may be either a border or an internal measure, depending on the circumstances. Under the GATT, if it is a border measure, it is subject to Article II (if it is a charge) or Article XI (if it is a quantitative restriction); and, if it is an internal measure, it is subject to Article III as an internal tax (III:2) or an internal regulation (III:4); PPM measures are also subject to Article I of the GATT, whether they are border or internal measures. With respect to non-product-related PPMs, two unadopted GATT panel reports suggest that these are border measures that fall under Article II (fiscal charge) or XI (quantitative restriction), rather than internal market measures under Article III (GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted; and GATT Panel Report, *United States – Restrictions on Imports of Tuna II*, DS29/R, 16 June 1994, unadopted). The panel in DS21/R found that Article III "covers only measures affecting products as such"; the panel noted that, under the wording of Ad Note to Article III, Article III covers only measures "applied to both imported and like domestic products" (para. 5.11). A non-product-related PPM does not affect a "product" as such but affects how a product is produced; on the domestic side, a non-product-related PPM may also be applied to the producer in relation to the production process, rather than to a domestic product. Note that in *US – Shrimp*, the complainants successfully challenged a US shrimp harvesting measure under Article XI, and not Article III, of the GATT.

37. For an overview of such views, see M.A. Young, 'Trade Measures to Address Climate Change: Territory and Extraterritoriality', in *Research Handbook on Climate Change and Trade Law* (Edward Elgar, 2016).



frame, for a particular sector, using a particular type of policy instrument. Under the Paris Agreement each state, including the exporting country, is responsible for preparing, communicating and maintaining its own successive NDCs, which may address these issues, and for pursuing its own “domestic mitigation measures, with the aim of achieving the objectives of such [NDCs].”<sup>38</sup>

In this regard, the principles in Article 3(5) of the UNFCCC warrant consideration. Although Article 3(5) of the UNFCCC encourages cooperation towards an “open international economic system,” it also recognizes the right of states to adopt “unilateral” trade-related climate measures and policies, calling for them to avoid “arbitrary or unjustifiable discrimination or a disguised restriction on international trade.” This language in the UNFCCC, which is similar to that used in Principle 12 of the Rio Declaration, closely echoes the chapeau of Article XX of the GATT (see this report’s discussion of the prohibition on arbitrary and unjustifiable discrimination), thereby also suggesting an intention to foster coherence between the international climate and trade regimes.

Under WTO law, Article XX of the GATT and its chapeau provide important guidance on the relevance of the principle of sovereignty to the design and implementation of a unilateral trade-related climate measure involving a PPM. Although such a measure might depart from or violate one of several GATT obligations (such as those set out in GATT Articles I, II, III, or XI, as noted above), it may still be justifiable under Article XX of the GATT. Under WTO law, to enjoy justification, such a measure must meet the requirements of one of the paragraphs of Article XX of the GATT, as well as of its chapeau. Two paragraphs of Article XX are most relevant to trade-related climate measures: paragraph (b), which covers measures necessary to protect human, animal or plant life or health; and paragraph (g), which covers measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. In addition, paragraph (a), which covers measures necessary to protect public morals, and (d), which covers measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of the GATT, may be relevant depending on the facts.

In WTO law, as noted above, the relevance of the principle of sovereignty in the interpretation and application of Article XX of the GATT is not settled, particularly in relation to a non-product-related PPM. The Appellate Body has referred to this question as being whether there is an “implied jurisdictional limitation” in Article XX. Such a limitation, which could be said to rest on the sovereignty of the exporting WTO member, would circumscribe the ability of an importing WTO member, under Article XX, to justify certain types of measure that have extraterritorial effects. The Appellate Body has expressly left open this question on two occasions: in *US – Shrimp* and in *EC – Seal Products*. Although the Appellate Body has declined to address whether there is an implied jurisdictional limitation in Article XX, it has said that a WTO member can justify a measure with extraterritorial effects when there is a “sufficient nexus” between the member and the subject of the regulation.<sup>39</sup> In *US – Shrimp*, the Appellate Body found that the United States was entitled to adopt certain requirements related to production of shrimp harvested domestically and in exporting countries in order to protect certain endangered species of sea turtle that were also “known to occur in waters over which the United States exercises jurisdiction.”<sup>40</sup> This fact created a “sufficient nexus” for purposes of Article XX.

38. Article 4.2., Paris Agreement. Also see Article 4.4, which recognizes that developed country parties “should continue to take the lead by undertaking economy-wide emission reduction targets”; whereas developing country parties “are encouraged to move towards economy-wide emission reduction or limitation targets in the light of different national circumstances”.

39. Appellate Body Report, *US – Shrimp*, para 133.

40. *Ibid.*

In the case of trade-related climate measures and policies, including non-product-related PPMs, some measures seek to address greenhouse gas (GHG) emissions arising from, among others, the production, supply, use, and disposal of a product. In such instances, there is an important factual nexus between a WTO member taking such measures and the subject of the regulation, namely, GHG emissions. This is because the effects of such emissions, wherever and however they occur, are global. In the case of the climate crisis, emissions from all locations cumulate together in the atmosphere, contributing to global phenomena: an increase in the atmospheric concentration of carbon dioxide, atmospheric and ocean temperatures, acidification and deoxygenation of the oceans, and rising sea levels, with consequent changes in the Earth's climate, including the occurrence of extreme weather events around the world. That is, each state is adversely affected by the emissions of other states.

As a result, “due to the interconnected nature of the problem and its causes,” it is likely that there is a “sufficient nexus” between a trade-related climate measure that addresses emissions in third countries and the interests of the state taking the measure.<sup>41</sup> On this view, under the GATT, the general exceptions of Article XX are likely applicable to trade-related climate measures and policies adopted by WTO members to address emissions within their territory as well as beyond their borders. Importantly, under Article XX, in addition to establishing such a sufficient nexus, trade-related climate measures and policies must also meet all the other requirements contained in the relevant paragraphs as well as the chapeau of Article XX (or of Article XIV of the GATS in case this is the applicable agreement).

When trade-related climate measures and policies take the form of technical regulations, the relevant rules of the TBT Agreement also apply. Under the TBT Agreement, WTO members are free to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. However, the agreement states that members: “shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”<sup>42</sup> Under this provision, the objective of protecting the climate would be regarded as legitimate. In this context, the use of international standards may also be relevant as technical regulations that conform with international standards are presumed not to create unnecessary obstacles to trade.<sup>43</sup>

41. M.A. Young, ‘Trade Measures to Address Climate Change: Territory and Extraterritoriality’, in *Research Handbook on Climate Change and Trade Law* (Edward Elgar, 2016), p. 350.

42. Article 2.2 of the TBT Agreement. See also TBT Agreement, preamble. See Report of the Panel *EC – Sardines*, para. 7.120.

43. Article 2.5 of the TBT Agreement. See also UNCTAD, ‘Making Trade Work for Climate Change Mitigation: The Case of Technical Regulations’ (2022), p. 26. Very similar rules apply to national standards (see Article 4 of the TBT Agreement and the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement).

## 2. Prevention

The principle of prevention is a well-established customary norm of international law.<sup>44</sup> The prevention principle, as formulated in Principle 2 in the Rio Declaration, is presented as a limitation on the “sovereign right [of States] to exploit their natural resources pursuant to their own environmental and developmental policies.” This limitation requires states to ensure that “activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>45</sup> The principle of prevention has been recognized by the International Tribunal for the Law of the Sea (ITLOS) as an *erga omnes* obligation (with particular reference to obligations relating to the protection and preservation of the environment in areas beyond national jurisdiction). The *erga omnes* character of the obligation means it is “owed to the international community as a whole” and any state can have an interest in its implementation.<sup>46</sup>

The principle of prevention is understood as entailing an obligation of due diligence on states to do their utmost to protect the environment.<sup>47</sup> As an obligation of conduct, it requires states to adopt appropriate measures to prevent activities within their jurisdiction or control that cause significant transboundary harm to the environment, including in areas beyond national jurisdiction<sup>48</sup> and those areas such as the global commons that have no connection to state sovereignty.<sup>49</sup> According to the International Court of Justice (ICJ) in its Pulp Mills decision, which recognized the customary international law nature of the principle of prevention, the duty is to exercise due diligence to prevent “significant environmental damage, harm, or risk thereof” irrespective of whether it may occur.<sup>50</sup>

Customary law does not specify what concrete measures states are required to take in order to fulfil their due diligence duties. The standard of due diligence required is generally considered to be appropriate and proportional to the degree of risk of harm (severity and likelihood); it may change over time; and the economic level of states is one of the factors to be taken into account in determining whether a state has complied with its obligation of due diligence.<sup>51</sup> According to the ICJ in Pulp Mills, states are obliged to use “all the means at [their] disposal” to prevent activities within their jurisdiction or control causing significant environmental damage, harm, or risk thereof.<sup>52</sup> In the same decision, the ICJ clarified that these “means” include certain elements

44. It has been recognized as part of the corpus of international law by the ICJ in its *Advisory Opinion on the Legality of Nuclear Weapons* (1996), para. 29. See also ICJ, *Judgement, Case concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Reports 1997, p.41, para.53. ICJ, *Judgement, Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 2010 ICJ Reports 1, 38, para. 101.
45. The prohibition not to cause harm to the territory of other states was first established in the 1941 *Trail Smelter Arbitration* (United States v. Canada) (1938 and 1941) 3 R.I.A.A. 1905, p. 1965. The second environmental component (the prohibition not to cause harm to the environment beyond national jurisdiction) was introduced in 1972 in Principle 21 of the Stockholm Declaration. See L-A Duvic-Paoli and J.E. Viñuales, ‘Principle 2’, in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development* (OUP, 2015).
46. An *erga omnes* obligation is an obligation whose breach is of concern to all the members of the international community. See ITLOS, *Responsibilities and Obligations of States with respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Reports 10, 41, para. 180. See S. Maljean-Dubois, ‘The No-Harm Principle as the Foundation of International Climate Law’, in *Debating Climate Law* (B. Mayer and A. Zahar eds., CUP, 2021), p. 21.
47. Those treaties that incorporate this principle provide for further substantive specificities (e.g. what measures to adopt and how to implement them) and/or procedural specificities (what procedures to follow). See, for instance, the United Nations Convention on the Law of the Sea (UNCLOS) (1982), as well as the Protocol on Environmental Protection to the Antarctic Treaty (1991).
48. See e.g., ICJ, *Pulp Mills*, para. 197. See also the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Commentary to Article 4.3. The ITLOS Seabed Dispute Chamber defined the duty of due diligence as the duty “to deploy adequate means, to exercise best possible efforts, to do the utmost”, ITLOS, *Responsibilities in the Area*, para. 110.
49. The global commons have been defined as “those areas that lie beyond the national jurisdiction and control of states.” N. Oral, ‘The Global Commons and Common Interests’, in *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Enquiry* (M. Iovane ed., Oxford, 2021) p. 38. V. P. Nanda and G. W. Pring, *International Environmental Law and Policy for the 21st Century*, vol 2 (Brill Nijhoff 2013) 37. They include, for instance, the high seas, international air space or the Antarctic. See Articles 116-118, 192, and 194(2) of UNCLOS, as well as Article 2 of the Protocol on Environmental Protection to the Antarctic Treaty (1991).
50. *Pulp Mills*, para. 101. See also *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, International Tribunal of the Law of the Seas (ITLOS) Reports 2011, paras. 117-120.
51. See e.g., International Law Committee (ILC) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Commentary to Article 3.11.
52. *Pulp Mills*, para. 101.

such as cooperation, the adoption and enforcement of environmental legislation, as well as the conduct of an environmental impact assessment. Beyond these elements, the actual content of this duty and the “selection of the specific measures to exercise due diligence [remain within] the purview of the State of origin.”<sup>53, 54</sup>

The principle of prevention is reflected in the UNFCCC and Paris Agreements. Article 2 provides that the convention’s objective is to “achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”<sup>55</sup>

Among the principles set out in Article 3 of the UNFCCC, the Convention provides that states “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.”<sup>56</sup> In the Paris Agreement, states agree, amongst other things, to hold the increase in the global average temperature to well below 2° Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5° Celsius above pre-industrial levels.<sup>57</sup> In December 2022, the United Nations General Assembly reaffirmed the Paris Agreement’s temperature goal.<sup>58</sup>

As it concerns climate measures, the principle of prevention refers to a state’s duty to prevent activities within its jurisdiction or control from causing significant harm to the environment of other states or to areas beyond the limits of national jurisdiction through climate change.<sup>59</sup> Climate change is defined in the UNFCCC as meaning “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”<sup>60</sup> The objective of the UNFCCC, the principle expressed in Article 3.1., which calls on parties to “protect the climate system for the benefit of present and future generations of humankind,” and the temperature goal of the Paris Agreement, reflect the principle of prevention, by seeking to prevent “dangerous anthropogenic interference with the climate system” caused by the emission-generating activities of states parties. The “climate system” is defined in the UNFCCC as “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.”<sup>61</sup>

The principle of prevention operates as an affirmative obligation to act in public international law, which could also be relevant to a defence under GATT Article XX where a state adopts trade-related climate measures to fulfil its obligation to act with due diligence to prevent environmental harm through climate change.<sup>62, 63</sup> In such instances, all the elements of the principle of prevention, as outlined above, should be taken into account.<sup>64</sup> Alongside, alongside the principle of prevention, the other principles of international law reviewed in this report such as sovereignty and cooperation would also be relevant for consideration, reflecting our view that the principles discussed should be seen as working together and cumulatively.

53. J.E. Viñuales, ‘Due Diligence in International Environmental Law: A Fine-Grained Cartography’, in H. Krieger (ed.), *Due Diligence in the International Legal Order* (OUP, 2020). See also ICJ, *Pulp Mills*, para. 205.

54. See e.g., ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Commentary to Article 3.11.

55. Article 2 of the UNFCCC.

56. Article 3 of the UNFCCC.

57. Article 2.1(a) of the Paris Agreement.

58. UN GA Resolution, A/RES/77/165 (“Protection of Global Climate for Present and Future Generations of Humankind”), adopted on 14 December 2022, recital 5.

59. See ICJ, *Pulp Mills*, para. 101. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, para. 29. See also International Law Commission, ‘Draft guidelines on the protection of the atmosphere’, adopted by the International Law Commission at its seventy-second session, in 2021, Guideline 3.

60. Article 1.3 of the UNFCCC.

61. Article 1.3. of the UNFCCC.

62. The prohibition not to cause harm to the territory of other states was first established in the 1941 Trail Smelter arbitration. Trail Smelter Arbitration (*United States v. Canada*) (1938 and 1941) 3 R.I.A.A. 1905, p. 1965. The second environmental component (the prohibition not to cause harm to the environment beyond national jurisdiction) was introduced in 1972 in Principle 21 of the Stockholm Declaration. See L-A Duvic-Paoli and J.E. Viñuales, ‘Principle 2’, in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development* (OUP, 2015).

63. Such a consideration would be in line with Article 31.3(c) of the Vienna Convention on the Law of Treaties. Article 31. Notably, in its first report, the WTO Appellate Body ruled that Article 31 of the Vienna Convention embodies the general rule for the interpretation of treaties and has attained the status of customary international law. See *United States: Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 17, 29 January 1996.

64. See Preamble to the UNFCCC (8<sup>th</sup> recital), which reflects Principle 2 of the Rio Declaration, and reiterates the sovereign right of states to pursue their own environmental and developmental priorities before introducing the limitations associated with the principle of prevention.

### 3. Cooperation

Cooperation is a core principle of international law. One of its clearest expressions is the United Nations declaration concerning friendly relations and cooperation among states, which provides that countries have a duty to cooperate with one another.<sup>65</sup> The declaration emphasizes that “the development of friendly relations and cooperation between nations are among the fundamental purposes of the United Nations,” and that “States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such difference.”

Principle 7 of the Rio Declaration similarly provides that “States shall cooperate in a spirit of global partnership to conserve, protect, and restore the integrity and health of the Earth’s ecosystem.”<sup>66</sup> The UNFCCC acknowledges “that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response.”<sup>67</sup> Further, in 2022, the UN General Assembly recalled that “the global nature of climate change calls for the widest possible international cooperation.”<sup>68</sup>

The fifth principle in Article 3 of the UNFCCC further provides that “[t]he Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.”<sup>69</sup> This principle reflects, in large part, Principle 12 of the Rio Declaration.<sup>70</sup>

In international law related to the environment, the principle of cooperation has a second dimension: the duty to cooperate “in a transboundary context,” which reflects customary international law and includes *inter alia* the duty of notification and consultation with states potentially affected by an activity/event having consequences on the environment (Principles 18 and 19 of the Rio Declaration). In this spirit, the Paris Agreement states that “Parties shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.”<sup>71</sup> To increase transparency and facilitate discussions among parties related to the possible impacts of their climate mitigation measures on developing countries, a “Forum on the impacts of the implementation of response measures under the UNFCCC, the Kyoto Protocol and the Paris Agreement” was established in 2018, together with the Katowice Committee of Experts on Impacts of Implementation of Response Measures, which was created to support the forum by undertaking technical work.<sup>72</sup>

65. UN GA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970.

66. Preamble to the UNFCCC. Cooperation “in a spirit of global partnership” is just one dimension of cooperation in international environmental law. Another dimension is the duty to cooperate “in a transboundary context,” which reflects customary international law and includes *inter alia* the duty of notification and consultation with states potentially affected by an activity/event having consequences on the environment (Principles 18 and 19 of the Rio Declaration).

67. Preamble to the UNFCCC.

68. Referring to the UNFCCC and the Paris Agreement, the UN GA recalled in December 2022 that “the global nature of climate change calls for the widest possible international cooperation.” See UN GA Resolution, A/RES/77/165 (“Protection of global climate for present and future generations of humankind”), adopted on 14 December 2022.

69. Article 3.5 of the UNFCCC.

70. In addition, according to the UNFCCC, all parties shall cooperate “in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions ... in the conservation and enhancement, as appropriate, of sinks and reservoirs” of GHGs, “in preparing for adaptation to the impacts of climate change ... in scientific, technological, technical, socio-economic and other research ... in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change [as well as] in education, training and public awareness.” UNFCCC, Article 4.1(c), (d), (e), (g), (h), and (i).

71. Article 4.15 of the Paris Agreement.

72. See Decision 7/ CMA.1, Decision 3/CMP.14, Decision 7/ CP.24.

At the WTO, members have also highlighted the importance of the principle of cooperation. In the WTO Committee on Trade and Environment, WTO members have “endorse[d] and support[ed] 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.”<sup>73</sup> In regard to Article XX of the GATT, the WTO Appellate Body has clarified that “the chapeau of Article XX is ... but one expression of the principle of good faith”<sup>74</sup> and emphasized “the need for, and the appropriateness” of “concerted and cooperative efforts has been recognized in the WTO itself as well as in a significant number of other international instruments and declarations,”<sup>75</sup> including Principle 12 of the Rio Declaration, which it has highlighted as “[of] particular relevance.”<sup>76</sup> On this basis, the Appellate Body concluded that, “[c]learly, and ‘as far as possible’”, a multilateral approach is “strongly preferred.”<sup>77</sup>

We note that, under the GATT, the need to seek a multilateral approach only arises with regard to measures that are inconsistent with any of the GATT obligations. A WTO member is free, for instance, to pursue unilateral liberalization of its tariffs, so long as this is done on a most-favoured-nation (MFN) basis or in line with the Enabling Clause (discussed below).

The WTO Appellate Body has found that a lack of serious, good faith efforts to cooperate and/or negotiate a multilateral solution may result in a measure being applied in a manner constituting unjustifiable discrimination, and thus not being justifiable under Article XX of the GATT.<sup>78</sup> Similarly, the lack of such efforts to cooperate may also contribute to a measure being regarded as a disguised restriction on international trade. In this light, although a state may take unilateral action to address transboundary and global environmental challenges, such as climate change, consideration of the principle of cooperation would mean that the state is expected to cooperate with potentially affected states when it contemplates action.

To be consistent with requirements of the general principle of good faith and the chapeau of Article XX, cooperative efforts in regard to trade-related climate measures and policies would need to involve a meaningful process, conducted at the international level, giving all interested states an opportunity to engage in the process on the basis of sovereign equality. To be meaningful, the process would need to allow sufficient time and opportunity for full consideration and negotiation of potential international solutions to the transboundary or global challenge or problem, and in the spirit of Principle 12 of the Rio Declaration this solution “should, as far as possible, be based on international consensus.”<sup>79</sup>

73. Report (1996) 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. See also Appellate Body Report, *US – Shrimp*, para. 168.

74. Appellate Body Report, *US – Shrimp*, para. 158.

75. Appellate Body Report, *US – Shrimp*, para. 168.

76. Appellate Body Report, *US – Shrimp*, para. 168 and *US – Shrimp* (Article 21.5), para. 124. The analysis in this Report is based on Article XX of the GATT. Similar reasoning applies *mutatis mutandis* under other WTO agreements, such as under Article XIV of the GATS, and Articles 2.1 and 2.2 of the TBT Agreement.

77. Appellate Body Report, *US – Shrimp* (Article 21.5), para. 124. See also *US – Gasoline*, where the Appellate Body concluded that the measure constituted “unjustifiable discrimination” because the United States failed to “explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as a justification by the United States for rejecting individual baselines for foreign refiners.” Appellate Body Report, *US – Gasoline*, p. 28.

78. See Appellate Body Report, *US – Shrimp* (Article 21.5), paras. 133 and 134, where the Appellate Body said that unilateral action “is justified under Article XX of the GATT as long as ... the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied.” Note that in the Appellate Body Report, *US – Shrimp*, para. 171, the Appellate Body also referred to “serious efforts” and “cooperative efforts”.

79. See M. A Young, ‘Principle 12 – The Environment and Trade’, in J. E. Viñuales (ed), *The Rio Declaration on Environment and Development – A Commentary* (Oxford, Oxford University Press, 2015), pp. 325, 338.

In addition, particular considerations arise when states have previously cooperated to establish an international legal framework to address a transboundary or global environmental challenge or problem,<sup>80</sup> as they have in the case of climate change through, among others, the UNFCCC and the Paris Agreement.<sup>81</sup> In that event, a state contemplating action, such as a trade-related climate measure, should make special efforts—in terms of both substance and duration—to seek cooperation with all other parties to the existing international framework.

In the event that “serious, good faith efforts” at international cooperation do not implement or achieve an agreed international solution to a transboundary and global environmental challenge or problem, states may decide to take a unilateral measure, which Article XX permits, provided a number of requirements are met.<sup>82</sup> In that event, the WTO’s Appellate Body has found that ongoing efforts in international cooperation continue to be needed throughout a State’s domestic processes of preparing, adopting and implementing a unilateral act.<sup>83</sup> This could include, for instance: providing other states with sufficient advance notice of a proposed unilateral measure; furnishing appropriate time for comment and consultation; taking comments into account as far as possible; providing information on how a unilateral measure will operate in practice; and affording assistance to facilitate compliance with the measure, including granting sufficient time and technical or financial support for affected stakeholders to comply with the unilateral measure. Further, after the adoption of a unilateral measure, a state should continue to engage in “ongoing serious, good faith efforts” to seek an agreed international solution to the transboundary or global environmental challenge or problem.<sup>84</sup>

80. See *e.g.*, *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment) ICJ Reports 2014, p. 226, including [83], [240], and Judge ad hoc Charlesworth at [13]; see further M. A. Young and S. Rioseco Sullivan, ‘Evolution Through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice’ (2015) *Melbourne Journal of International Law* 310-342.

81. It should be noted however, that the international framework is increasingly a fragmented one extending significantly beyond the UNFCCC and Paris Agreement. States, for instance, are pursuing “coalitions of the willing” on a variety of different specific areas such as coal phase out and methane where consensus cannot be achieved in the UNFCCC framework.

82. See also Appellate Body Report, *US – Shrimp (Article 21.5)*, paras. 123-124 .

83. See Appellate Body Report, *US - Shrimp (Article 21.5)*, para. 152, where the Appellate Body said that unilateral action “is justified under Article XX of the GATT as long as ... the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied.” See also Appellate Body Report, *US – Shrimp (Article 21.5)*, paras. 123-124.

84. *Ibid.*

## 4. Prohibition of Arbitrary and Unjustifiable Discrimination

The principle of non-discrimination has been incorporated into a range of international legal instruments addressing the climate and environment, such as the Rio Declaration and the UNFCCC. According to Principle 12 of the Rio Declaration, for instance “[t]rade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.” Similarly, Article 3.5 of the UNFCCC clarifies that “[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”

The incorporation of language on non-discrimination in the UNFCCC reflects the central role of this principle in trade law, where it is well established as one of the fundamental principles of the WTO and appears in many of its agreements.<sup>85</sup> The preamble to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) refers to “the elimination of discriminatory treatment in international trade relations” as one of the two main means by which members may contribute to the objectives of the WTO.<sup>86</sup> The most relevant sources of non-discrimination principles are the obligations contained in the GATT, GATS, and TBT Agreement.<sup>87</sup> While the non-discrimination obligations of the GATS mirror those in the GATT,<sup>88</sup> the TBT Agreement represents a notable departure from the GATT “model” (discussed below).

In the GATT, the MFN treatment provision (Article I) requires that WTO members not accord to the imported goods of one member “an advantage, favour, privilege or immunity” that is not accorded “immediately and unconditionally” to the “like” goods of “any other country.” On the other hand, the national treatment provision (Article III) seeks to ensure that domestic and imported goods enjoy equal competitive conditions, so as to prevent governments from protecting their domestic products against competing imports. In the case of internal (market) regulation, domestic products cannot benefit from more “favourable” regulatory conditions than “like” imported products; in the case of internal taxes, domestic products cannot benefit from lower taxes than “like” imported products.<sup>89</sup> The purpose of non-discrimination obligations is to avoid measures being applied to afford protection to domestic production, and to ensure that a state’s policy choices do not adversely affect the competitive conditions for imported products in relation to domestic products (national treatment) or between imported products of different origins (MFN treatment).<sup>90</sup>

As far as the design and implementation of trade-related climate measures and policies is concerned, under WTO law, states can be allowed to discriminate on the grounds of origin when they are pursuing legitimate policy objectives, provided that their measures are “necessary” or “relat[e] to” a legitimate objective and are not applied in a manner that constitutes unjustifiable or arbitrary discrimination or a disguised restriction on international trade.<sup>91</sup> The legitimate policy objectives include environmental protection, such as climate

85. W.J. Davey, *Non-Discrimination in the World Trade Organization: The Rules and Exceptions* (Martinus Nijhoff Publishers, 2012), p. 55.

86. P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (CUP, 2021), p. 337.

87. Examples include Articles I, III, V, IX:1, XIII:1, XVII and XX of the GATT; Articles II and XVII of the GATS; Article 2.1 of the TBT Agreement; Article 2.3 of the SPS Agreement; and Articles 3 and 4 of the TRIPS Agreement.

88. Article II of the GATS sets forth the MFN obligation, which applies irrespective of any specific commitments made; and Article XVII sets forth the national treatment obligation, which applies in sectors with respect to which a member has made specific commitments. MFN is the same under the GATT and GATS. However, a difference exists between national treatment under the GATT and under the GATS. The difference is that national treatment under the GATT (Article III) has general application to all measures affecting trade in goods, national treatment under the GATS (Article XVII:1) “only applies to a measure affecting trade in services to the extent that a WTO Member has explicitly committed itself to grant ‘national treatment’ in respect of the specific services sector concerned.” See P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (CUP, 2021), p. 438.

89. K. Connolly and N. Lockhart, ‘An Introduction to Core Principles of International Trade Law’, in D. Bethlehem (ed.), *The Oxford Handbook of International Trade Law* (2<sup>nd</sup> ed., OUP, 2022), p. 441.

90. Appellate Body Report, EC – Asbestos, para. 89, quoting Appellate Body Report, *Japan – Alcoholic Beverages*, pp. 109 and 110.

91. Measures found to be in violation of the non-discrimination principle of the GATT may be justified under the “General Exceptions” of Article XX of the GATT, provided they are necessary for the protection of (see e.g., Article XX(a), (b), or (d) of the GATT) or relate to (see e.g., Article XX(g) of the GATT) certain legitimate policy objectives (including environmental protection) and are not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Whether the measure needs to be “necessary” or “relating to” the legitimate policy objective depends on the objective it is pursuing as indicated in the different paragraphs of GATT Article XX or GATS Article XIV. Moreover, some of these paragraphs may add further requirements.



change mitigation and adaptation, which is in keeping with the overarching objective of sustainable development enshrined in the Preamble of the WTO Agreement.

In terms of the relevance of the principle of non-discrimination to the design and implementation of a trade-related climate measure,<sup>92</sup> a key issue for consideration is whether products to which the measure is being applied are “like” each other or not. The issue of “likeness” is important when considering the relevance of the principle of non-discrimination to the design and implementation of trade-related climate measures and policies because it raises the question of whether products with different carbon footprints are “like” products. An ever-growing number of climate policy measures focus on non-product-related PPMs, such as the levels of GHG emissions associated with the production of products (for example to favour steel or electricity produced with renewable versus fossil fuel energy). Further, in pursuing their obligations under the UNFCCC and the Paris Agreement, a range of states are adopting or considering adoption of trade-related climate measures and policies that differentiate between products on the basis, for example, of the emissions released during the production, supply, use, or disposal of the product.

In the WTO context, the concept of “likeness”,<sup>93</sup> while not defined expressly in the text of the GATT, has been understood as “a determination about the nature and extent of a competitive relationship between and among products.”<sup>94</sup> This determination has been found to require an assessment of at least four key factors relating to the affected products: (1) physical characteristics, i.e. properties, nature, and qualities; (2) tariff classification; (3) end use; and (4) consumers’ tastes and habits.<sup>95</sup> This determination of “likeness” requires a “holistic” assessment of these four factors, as well as any other factor that may have a bearing on the nature and extent of the competitive relationship between two products, with no single factor being determinative. The assessment is also to be made on a case-by-case basis in light of all relevant facts.<sup>96</sup> The type of product may, for instance, be relevant—if the product is hot-rolled steel used in manufacturing, the relevant consumers are the manufacturers, not end consumers, who may evaluate the relevance of the carbon footprint differently.

Where trade-related climate measures and policies differentiate on the basis of non-product-related PPMs, like the carbon footprint, the products are likely to have the same physical characteristics, end uses, and tariff classification. These three factors indicate that products are “like”. With respect to the fourth factor, it is possible, though, that consumers, in some countries, may not regard products as “like” when they have different carbon footprints. In this regard, it is important to bear in mind that, with respect to consumer tastes and habits, a WTO panel has found that it is sufficient that a subset of consumers regard two products as competing (or non-competing), even if other consumers do not, for the products to be “like” (or not “like”).<sup>97</sup> Thus, for a likeness finding, it would suffice that some group of consumers regard products as competing, even when they have different carbon footprints. Of course, assessments of “likeness” may evolve over time, if the relevant facts regarding one or more of the four “likeness” factors change.

92. It should be noted that the national treatment provision only applies to internal measures, while the MFN treatment provision applies to both internal and border measures.

93. Regarding “likeness” under Art. III:2, see Appellate Body Reports, *Philippines – Distilled Spirits*, para. 170; and with regard to Art. III:4, see Appellate Body Report, *EC – Asbestos*, para. 99. On the scope of the non-discrimination obligations under Article III:2 as compared with Article III:4, the Appellate Body stated: ‘In view of [the] different language [of Articles III:2 and III:4], and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2 of the GATT 1994.’ See Appellate Body Report, *EC – Asbestos* (2001), para. 99.

94. Appellate Body Report, *EC – Asbestos*, para 99; Appellate Body Report, *Philippines – Distilled Spirits*, para. 170.

95. Appellate Body Report, *EC – Asbestos*, para. 118, and Appellate Body Report, *Philippines – Distilled Spirits*, para. 101.

96. Appellate Body Report, *EC – Asbestos*, para. 103.

97. Report of the Panel, *Philippines – Distilled Spirits*, para. 7.59.

With increased awareness of the urgency of the climate crisis, for instance, the preferences of consumers may evolve as a matter of fact, which could have a bearing on the assessment of “likeness”, particularly if preferences change for a large proportion of consumers. This “likeness” factor would also have to be assessed with the other three “likeness” criteria.

We note that a conclusion that products with different carbon footprints may be considered “like”, does not mean that a measure drawing a distinction between and among “like” products necessarily violates the obligation not to discriminate on the grounds of origin. Under the “competitive relationship” approach outlined above, not all differences in treatment of “like products” will amount to a violation of a WTO non-discrimination obligation. When products are “like”, an assessment of MFN or national treatment considers whether and how the measure differentiates between the two products. The key question is whether the difference in treatment modifies the “conditions of competition” to the detriment of imported products (i.e. where less favourable treatment is accorded to the products of one country or set of countries over others).<sup>98</sup> This issue would need to be considered in light of all the facts, taking into account the design, structure, and operation of the measure. Where there is an asymmetrical competitive advantage granted to domestic products (or products from some countries), the measure is discriminatory.<sup>99</sup>

The policy rationale behind a measure (for example whether it discriminates for climate-related reasons, such as in regard to carbon footprints) is typically not taken into account when assessing whether a measure violates the MFN treatment or national treatment requirements under Articles I and III of the GATT.<sup>100</sup> Instead, these factors are addressed when considering whether the measure can be justified under GATT Article XX. Under Article XX, the legitimate objectives are set forth in a series of paragraphs following the chapeau of the provision. In the context of trade-related climate measures, as explained above, the relevant paragraphs are: paragraph (b) (human, animal and plant life and health) and paragraph (g) (conservation of exhaustible natural resources), as well as potentially paragraphs (a) (public morals) and (d) (compliance with domestic laws).

In interpreting the word “necessary” in Article XX paragraphs (a), (b), and (d), the Appellate Body has established the need for a “weighing and balancing” of several factors—the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness.<sup>101</sup> Subsequently, there is a need to establish whether there is a reasonably available, less trade-restrictive alternative measure which makes an equivalent contribution to the policy objective pursued. If such an alternative measure exists, the measure at issue is not deemed “necessary.” This analysis takes into account the specific conditions of the country adopting the measure (recognizing that the same alternative measures cannot be expected to be reasonably available in all countries).

According to Article XX paragraph (g), to be deemed justified, a measure needs to “relat[e] to the conservation of exhaustible natural resources.” The “relate to” requirement is less demanding than the necessity requirement reviewed above as it merely requires a “close and real” relationship between the measure and the policy objective.<sup>102</sup> Article XX (g) further requires the measure to be “made effective in conjunction with restrictions on domestic production or consumption.” This clause has been interpreted by the Appellate Body to be a requirement of “even-handedness” in the imposition of restrictions, although

98. See Appellate Body Report, *Argentina – Import Measures*, para 5.217; Appellate Body Report, *China – Raw Materials*, para 7.455.

99. In this regard, it should be noted that these non-discrimination obligations cover both *de jure* and *de facto* discrimination. The latter covers measures which, on their face, are origin-neutral but have a discriminatory *effect* in practice. A WTO adjudicator’s task in assessing this type of discrimination is to identify the two relevant groups of like products; then compare their regulatory treatment.

100. See Appellate Body Report, *EC – Seal Products*, para 5.117.

101. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

102. The measure must be reasonably related to the objective and may not be disproportionately wide in its scope or reach. Appellate Body Report, *US – Shrimp*, para. 141. See also Appellate Body Report, *China – Raw Materials*, para. 355.

exactly identical treatment is not needed (that is, restrictions should apply to both imported and domestic products, even if the restrictions imposed are not necessarily exactly the same).<sup>103</sup>

Finally, the measure at stake needs to respect the chapeau of Article XX, which requires that the measure not be “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.” The chapeau does not deal with the content of a given measure but rather with the manner in which the measure is applied; that is, it is the application of the measure that should not be arbitrarily and unjustifiably discriminatory.

In the WTO context, the application of a measure may be found to constitute “arbitrary”<sup>104</sup> discrimination, among others, when it is applied in a rigid and inflexible manner without proper regard for differences in the conditions in other countries, or where there is not a sufficiently compelling relationship between the measure and its objectives. A trade-related climate measure may be found to entail arbitrary discrimination if it requires, through its treatment of imports, that third countries adopt the same regulatory approach as the importing country to lowering emissions, without considering the potential equivalence of different types of decarbonization measures prevailing in exporting countries.<sup>105</sup> Here, a core challenge for the design and implementation of trade-related climate measures and policies—and more broadly the applicability of the chapeau of Article XX—is the difficulty of comparing the equivalence and environmental effectiveness of different types of climate measures (such as between fiscal and non-fiscal measures).<sup>106</sup> This factor of considering equivalence is nonetheless important given that, under the Paris Agreement, each party is entitled to determine for itself what types of regulatory policies and instruments it will adopt to implement its NDC and decarbonize its economy.

A further example of arbitrary discrimination is where a state does not make serious efforts, in good faith, to negotiate solutions with affected trading partners before resorting to unilateral measures (see discussion under principle of cooperation).<sup>107</sup> The application of a measure may also be found to constitute “unjustifiable” discrimination when alternative measures exist that would be comparable in environmental effectiveness and render the discrimination avoidable (see discussion under principle of cooperation).

When a trade-related climate measure takes the form of a technical regulation, the TBT Agreement is relevant for consideration in addition to the provisions of the GATT (e.g. GATT Articles I:1 and III:4).<sup>108</sup> While other agreements, such as the GATS, follow the GATT “model”, Article 2.1 of the TBT Agreement (which contains both MFN and national treatment obligations) takes a different approach.

103. Appellate Body Report, *US – Gasoline*, p. 20.

104. Appellate Body Report, *US – Shrimp*, para. 177 ff. In other disputes, the Appellate Body has addressed the existence of arbitrary and unjustifiable discrimination together. This was for instance the case in *Brazil – Retreaded Tyres*, where the Appellate Body found that the application of a provisionally justified measure constitutes “arbitrary or unjustifiable discrimination” when the rationale of the measure bears no relation to its objective. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 232.

105. P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (CUP, 2013), pp. 596-7. G. Marceau and J. Trachtmann, ‘A Map of the World Trade Organization Law of Domestic Regulations on Goods’, in G. A. Bermann and P. C. Mavroidis (eds.), *Trade and Human Health and Safety* (CUP, 2006), p. 42.

106. This issue has been addressed by the Appellate Body (see e.g., *EC-Asbestos*, *US-Shrimp* and *Brazil-Taxation*).

107. Appellate Body Report, *US – Shrimp*, para. 160. See also Appellate Body Report, *US – Shrimp*, para. 286. Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 115-34.

108. See e.g., Appellate Body Report, *EC – Asbestos*, paras. 59ff., and especially paras. 80–81. Report of the Panel, *EC – Sardines*, para. 7.15. The TBT Agreement applies also to standards. For standards, the non-discrimination provision can be found in the Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3), para. D.

Under Article 2.1 of the TBT Agreement, when two products are “like”, a de facto difference in the conditions of competition to the detriment of an imported like product does not violate the non-discrimination obligation if the detrimental impact on imports stems “exclusively from legitimate regulatory distinctions”<sup>109</sup> (including public health or environmental protection).<sup>110</sup> This is because, although the TBT Agreement lacks a general exception clause (such as Article XX of the GATT), the purpose of the agreement is to strike a similar balance between trade liberalization and the members’ right to regulate.<sup>111</sup> In making its assessment of “legitimate regulatory distinctions,” therefore, the Appellate Body has taken into account factors similar to those considered under Article XX of the GATT, including whether a measure “is designed and applied in an even-handed manner,” whether it is properly “calibrated” to the relevant risk, and “whether it lacks even-handedness, for example, because it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.”<sup>112</sup>

In sum, to uphold the principle of avoiding arbitrary and unjustifiable discrimination, the design and implementation of trade-related climate measures and policies need to be guided by GATT Articles I, III and XX, designed and applied in an even-handed manner, avoid arbitrary and unjustifiable discrimination and disguised restrictions on trade, including by acting cooperatively and considering the equivalence of measures taken by trading partners (see also the principles of cooperation and the principles of sustainable development, equity and common but differentiated responsibilities and respective capabilities, discussed below).

109. Appellate Body Report, *US – Clove Cigarettes*, para. 174.

110. *Ibid.*

111. *Ibid.*, paras. 95-95 and 174.

112. Appellate Body Report, *US – COOL*, para. 340. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 297 and Appellate Body Report on *US – Cloves Cigarettes*, para. 215.

## 5. Sustainable Development, Equity, and Common but Differentiated Responsibilities and Respective Capabilities

The principles of sustainable development and equity are found across different areas of international law. Sustainable development is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>113</sup> As such, the principle of sustainable development incorporates two aspects of equity, intragenerational equity (“present”) and intergenerational equity (“future”). At the international level, numerous international resolutions, declarations, commitments, and reports have underlined that sustainable development has three dimensions, which are economic development, social development, and environmental protection, with no hierarchy between them.<sup>114</sup>

Sustainable development is a key objective of the international community, as reflected in the Rio Declaration (and especially Principles 3, 4, and 5),<sup>115</sup> as well as in the UN 2030 Agenda and the Sustainable Development Goals.<sup>116</sup> The Rio Declaration calls for “special priority” to be given to the “special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable.”<sup>117</sup> It further provides that “all States and people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development.”<sup>118</sup>

Sustainable development is also among the key objectives of the WTO, which adds “colour, texture and shading” to the interpretation of the WTO agreements.<sup>119</sup> In its Preamble, the WTO Agreement calls for “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the] respective needs and concerns [of Members] at different levels of economic development.”<sup>120</sup>

For its part, equity is a general principle of law. In the context of seeking sustainable development for all countries and peoples, the international community has recognized the need to protect the environment on the basis of the principles of equity and of common but differentiated responsibilities and respective capabilities (CBDR-RC). Principle 7 of the Rio Declaration first expressed CBDR-RC, providing that “[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”<sup>121</sup>

113. World Commission on Environment and Development, *Our Common Future*, I.3, para. 27.

114. World Commission on Environment and Development, *Our Common Future*, p. 43; Appellate Body Report, *US – Shrimp*, para. 129, footnote 107; UN GA Resolution, A/RES/77/165.

115. Since the adoption of the Rio Declaration in 1992, states have “reaffirm[ed] all the principles of the Rio Declaration”, and their “commitment to fully implement the Rio Declaration”. See UN GA Resolution, A/RES/66/288 (“The Future We Want”), adopted on 27 July 2012, paras. 15, 16. See also UN GA Resolution, A/RES/70/1 (“Transforming Our World: the 2030 Agenda for Sustainable Development”), adopted on 21 October 2015, paras. 11-12. See also e.g., J. E. Viñuales, ‘The Rio Declaration on Environment and Development’, in J. E. Viñuales (ed), *The Rio Declaration on Environment and Development – A Commentary* (OUP, 2015), p. 2 (“the [Rio] Declaration has become the canonical formulation of the legal concept of sustainable development as well as of the main principles of international environmental law underpinning treaties, treaty negotiations, domestic legislation, and a now substantial body of domestic and international jurisprudence”); P. Sands and J. Peel, *Principles of International Environmental Law* (CUP, 2018), p. 43 (The Rio Declaration “provided a framework for the development of environmental law at the national and international level, which has served as an important point of reference to guide decision-making”). The WTO Appellate Body and WTO panels have relied on the Rio Declaration in the interpretation and application of WTO law, in particular under Article XX of the GATT (see e.g., Appellate Body Report, *US – Shrimp*, paras. 154, 168; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 124; Panel Report, *US – Shrimp*, para. 7.52 and footnotes 661, 662; Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 7.2 and footnote 255; Panel Report, *China – Rare Earths*, paras. 7.262-7.263). See also ICJ Advisory Opinion, *Legality of the Threat of Use of Nuclear Weapons*, 8 July 1996, paras. 30-31.

116. *Transforming our world: the 2030 Agenda for Sustainable Development*, UN General Assembly Resolution, A/RES/70/1, 2015.

117. Principle 6.

118. Principle 5. Principles 5 and 6 of the Rio Declaration, together with the principle of common but differentiated responsibilities and respective capabilities (Principle 7 of the Rio Declaration) reflect the principle of intragenerational equity, which attempts to achieve justice between nations. See D. Tladi, ‘Intragenerational Equity: A New Name for International Environmental Justice?’, *Fundamina: A Journal of Legal History* (2003), p. 202.

119. Preamble to the WTO Agreement. Appellate Body Report, *US – Shrimp*, para. 153.

120. Preamble to the WTO Agreement.

121. Principle 7 of the Rio Declaration.

The principle of CBDR-RC includes two elements: on the one hand, that states have common responsibilities for environmental protection and, on the other hand, that these responsibilities are differentiated among states given their different socio-economic circumstances, and different historical and current emissions.<sup>122</sup> The reference to “respective capabilities” reflects the need to consider the different technical, technological, and financial capacities of states to contribute to environmental protection.<sup>123</sup>

The principle of equity and common but differentiated responsibilities expressed in the Rio Declaration has been regularly reaffirmed in the context of international environmental governance.<sup>124</sup> Across the range of international law instruments relating to the environment generally, the principle of CBDR-RC has evolved over time and is implemented in a variety of ways, including through the provision of technical and financial support to meet obligations, flexibility to adopt less onerous measures, as well as longer timeframes to fulfil obligations. Conceptually, in international environmental law, this “differentiated” treatment is a means to promote equity considerations and respond to the need to address deep inequalities.<sup>125</sup> As a principle of international environmental law, CBDR-RC has been described as both “deeply embedded in the climate regime” and “a fundamental part of the conceptual apparatus of the climate change regime such that it forms the basis for the interpretation of existing obligations and the elaboration of future international legal obligations within the climate change regime.”<sup>126</sup>

The Preamble to the UNFCCC refers explicitly to equity and the principle of CBDR-RC.<sup>127</sup> The Preamble also affirms that responses to climate change should avoid adverse impact on social and economic development, taking fully into account the legitimate needs of developing countries to achieve sustained economic growth and eradicate poverty.

In the operative part of the UNFCCC, the first of the principles advanced in Article 3 to guide the parties in their actions to achieve the objective of the convention and to implement its provisions is that states “should protect the climate system for the benefit of present and future generations of human kind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, developed country Parties should take the lead in combating climate change and the adverse effects thereof.”<sup>128</sup> The second principle in Article 3 of the UNFCCC calls for states to give “full consideration” “to the special needs and special circumstances of developing country Parties.”<sup>129</sup> The fourth principle in the same Article recognizes that the “Parties have a right to, and should, promote sustainable development” and that action to tackle climate change “should be appropriate for the specific conditions of each Party.”<sup>130</sup>

Article 4 of the UNFCCC focuses on the commitments of parties, and establishes certain obligations for states, which are enumerated in a series of subparagraphs. The extent of each state’s respective commitments under

122. P. Cullet, ‘Differentiation’, in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (2nd ed. OUP, 2021), p. 321.

123. A reference to states’ *common* responsibilities can be found in Principle 11 of the Rio Declaration, which recognizes the *common* responsibility of all states to “enact effective environmental legislation.” At the same time, it recognizes that this responsibility *is differentiated* in that the same standards of protection cannot be expected of all states given their differences. The same principle also adds that environmental actions “should reflect the environmental and developmental context to which they apply” and that “[s]tandards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”

124. See e.g., UN GA Resolution, A/RES/66/288 (“The future we want”), adopted on 27 July 2012, para. 16; UN GA Resolution, A/RES/70/1 (“Transforming our world: the 2030 Agenda for Sustainable Development”), adopted on 21 October 2015, para. 12.

125. P. Cullet, ‘Differentiation’, in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (2nd ed. OUP, 2021), p. 320. See also E. Hey and S. Paulini, ‘Common but Differentiated Responsibilities’, *Max Planck Encyclopaedias of International Law* (October 2021), para. 5, and P. Sands and J. Peel, *Principles of International Environmental Law* (CUP, 2018).

126. L. Rajamani, ‘The principle of common but differentiated responsibilities and respective capabilities in the international climate change regime’, in R. Lyster and R. Verchick (eds) *Research Handbook on Climate Disaster Law: Barriers and Opportunities* (Edward Elgar, 2018), p. 49.

127. Paragraphs 3, 6, 10, and 21 of the Preamble to the UNFCCC.

128. Article 3.1 of the UNFCCC. In other words, the UNFCCC states in Article 3 that the implementation of the agreement, and the pursuit of its objective, “shall be guided” by the principle of CBDR-RC. Also see e.g., Lavanya Rajamani, ‘The 2015 Paris Agreement: Interplay between Hard, Soft, and Non-Obligations’, 28 *J Envtl L* 337, 343 (2016).

129. Article 3.2 of the UNFCCC.

130. Article 3.4 of the UNFCCC. Article 3 contains two additional principles: the third calls for “precautionary measures” and the fifth calls for states to “cooperate to promote a supportive and open international economic system.”

Article 4 is qualified, in the chapeau to the provision, by “their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances.”

The principle of CBDR-RC played a prominent role in the Kyoto Protocol, which established binding emission limitations for Annex I parties but no new commitments for non-Annex I parties, which were developing countries.<sup>131</sup> Equity considerations and the principle of CBDR-RC are also reflected in the Preamble and a number of provisions of the Paris Agreement, drawing on language in the UNFCCC as well as the Rio Declaration.<sup>132</sup> Notably, Article 2.2 of the Paris Agreement provides that “[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”<sup>133</sup> The addition of the qualifying phrase “in the light of different national circumstances,” which does not appear in the Rio Declaration or the UNFCCC, recognizes that states face different circumstances from one another, and that these differences are relevant in determining their respective “responsibilities” and “capabilities.”<sup>134</sup>

The Paris Agreement recognizes that developing country parties “will take longer” to reach “peak” greenhouse gas emissions in the context of the goal to reach a balance between anthropogenic emissions by sources and removals by sinks in the second half of the century.<sup>135</sup> It requires all parties to determine their respective NDCs “reflecting [CBDR-RC], in the light of different national circumstances.”<sup>136</sup> According to the agreement, developed country parties “should continue taking the lead by undertaking economy-wide absolute emission reduction targets,” whereas developing country parties are “encouraged to move over time towards economy-wide” reduction or limitation targets.<sup>137</sup> Further, least developed countries and small island developing states are entitled to develop emission reduction strategies reflecting their “special circumstances.”<sup>138</sup>

In terms of implementation, the Paris Agreement provides that parties shall take into consideration “the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.”<sup>139</sup> While the Agreement provides for a common responsibility of all states to prepare and implement an NDC, it also states that “support shall be provided to developing country Parties” for the formulation and implementation of their NDCs. Parties also recognize in the agreement that “enhanced support for developing country Parties will allow for higher ambition in their actions.”<sup>140</sup> Under Article 9.1, “developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation;” under Article 9.2, other parties are also encouraged to provide support “voluntarily;” under Article 9.3, “developed country Parties should continue to take the lead in mobilizing climate finance;” under Article 10.2, parties “shall strengthen cooperative action on technology development and transfer;” and, under Article 11.3, “[d]eveloped country Parties should enhance support for capacity-building actions in developing country Parties.”<sup>141</sup>

131. Kyoto Protocol to the UNFCCC, 1997. Annex I parties were industrialized countries and economies in transition.

132. Paragraphs 3, 5, and 6 of the Preamble to the Paris Agreement.

133. See Article 2.2 of the Paris Agreement.

134. See e.g., C. Voigt and F. Ferreira, ‘Differentiation in the Paris Agreement’, 5(1-2) *Climate Law* (2016), pp. 58-74; and L. Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’, 65(2) *International & Comparative Law Quarterly* (2016), pp. 493-514. The different circumstances may, among others, pertain to levels of economic development, absolute and per capita contributions to global greenhouse gas emissions, and the capacity to mitigate, adapt, and cope with loss and damage.

135. Article 4.1 of the Paris Agreement. See also UN GA Resolution, A/RES/77/165 (“Protection of global climate for present and future generations of humankind”), adopted on 14 December 2022, recital 5.

136. Article 4.3 of the Paris Agreement.

137. Article 4.4 of the Paris Agreement.

138. Article 4.6 of the Paris Agreement.

139. Article 4.15 of the Paris Agreement.

140. Article 4.5 of the Paris Agreement.

141. In 2009, developed countries committed to a goal of mobilizing jointly \$100 billion per year by 2020 to address the needs of developing countries. In 2021, the parties noted “with deep regret” that developed countries had not yet met this goal and urged developed countries “to fully deliver” on this goal “urgently and through to 2025;” the parties also called for “significantly increasing support for developing country Parties, beyond USD 100 billion per year.” In 2022, the parties, again, expressed “serious concern” that the \$100 billion per year goal was not met, and “urge[d] developed country Parties to meet the goal.” The parties also agreed to establish new funding arrangements, as well as a dedicated fund in the context of these funding arrangements, to assist developing countries in responding to loss and damage. See COP15, Decision 2/CP.15 (2009); COP26, Glasgow Climate Pact, Decision 1/CMA.3 (2021); COP27, Sharm el-Sheikh Implementation Plan, Decision -/CP.27.

Against this background, it is also important to recall that in international law relating to the environment, including in the climate change regime, attention is paid more broadly to “the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable”.<sup>142</sup> For example, as noted above, the second principle in Article 3 of the UNFCCC includes similar language to that found in Principle 6 of the Rio Declaration, while Article 4(8) of the Convention calls for actions to support the implementation of Article 4 “to meet the specific needs and concerns of developing country Parties”, especially countries with particular vulnerabilities, including small island, land-locked and transit countries; countries with low-lying coasts, semi-arid, arid, and forested areas; and countries prone to natural disasters, drought and desertification. Similarly, in its guidance on the interrelationship among relevant rules relating to the protection of the atmosphere, the International Law Commission has noted that “special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, inter alia, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise”.<sup>143</sup>

In the trade regime, the principle of equity is expressed in several ways. In the preamble to the WTO Agreement, members recognize that “there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” The balance of rights and obligations under WTO law also account for the special situation and needs of developing and least-developed countries, setting forth a range of provisions to afford “special and differential treatment” (S&DT) to them. These provisions typically confer special rights and/or lesser obligations on developing and least developed countries.<sup>144</sup> Examples of S&DT provisions in WTO agreements are those that include: “provisions aimed at increasing the trade opportunities of developing country Members; provisions under which WTO Members should safeguard the interests of developing country Members; flexibility of commitments, of action, and use of policy instruments; transitional time-periods; technical assistance; provisions relating to LDC Members.”<sup>145</sup> A prominent example of S&DT in the WTO Context is the “Enabling Clause.” This decision, adopted in 1979, grants an exception to Article I of the GATT (MFN), authorizing developed countries to grant preferential (i.e. discriminatory) market access to goods from developing and least developed countries to promote their economic development.<sup>146</sup>

While CBDR-RC and S&DT each address the special situation and needs of developing and least developed countries, they differ in certain respects. CBDR-RC arises from the differences in the respective contributions to climate change and in capabilities to tackle it. While also concerned with issues of equity, S&DT addresses the fact that developing countries may benefit from or require flexibilities in the trade regime to promote their development and facilitate the implementation of trade obligations.

Turning now to the relevance of sustainable development, equity, and CBDR-RC principles to the design and implementation of trade-related climate measures and policies, there are a number of aspects to bear in mind. Our general view is that a mutually supportive and coherent approach to international law calls for account to be taken of rules and principles from different parts of international law relating to climate, the environment, and trade.<sup>147</sup> In so doing, as an aspect of good faith cooperation in the design and implementation of their trade-related climate measures, states should consider how they affect other states, in particular developing countries.

142. Principle 6 of the Rio Declaration.

143. International Law Commission, ‘Draft guidelines on the protection of the atmosphere’, adopted by the International Law Commission at its seventy-second session, in 2021, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/76/10, para. 39). This emphasis is also reflected in the General Assembly’s request for an advisory opinion on the obligations of states in respect of climate change, which is currently before the International Court of Justice. See ICJ, Request for Advisory Opinion transmitted by the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, Obligations of States in respect of Climate Change.

144. See ‘Special and Differential Treatment Provisions in WTO Agreements’, WT/COMTD/W/258 (2 March 2021) for a full list of S&DT provisions in the WTO agreements. The Enabling Clause is one prominent example of an S&DT provision. As an exception to Article I of the GATT (MFN), this provision permits a developed country to grant preferential tariff treatment to developing and least developed countries to promote economic development.

145. WTO (2023), Special and differential treatment provisions in WTO agreements and decisions: Note by the Secretariat, WTO/COMTD/W/271, p. 4.

146. ‘Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries’, Decision of 28 November 1979, L/4903.

147. Report (1996) 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. See footnote 20, above.



As regards the relevance of the principles of equity and CBDR-RC, we recall the undisputed relevance of CBDR-RC to the functioning and future of the climate regime.<sup>148</sup> Its status as a relevant principle is regularly affirmed by the Conference of the Parties to the UNFCCC and was underscored in March 2023, when the UN General Assembly recalled that the UNFCCC and the Paris Agreement, each of which are universally ratified instruments, “will be implemented to reflect equity and the principle of [CBDR-RC], in the light of different national circumstances.”<sup>149</sup>

Our observations with regard to the relevance of these principles to the design of trade-related climate measures and policies, lead us back to Article XX of the GATT. As highlighted previously, trade-related climate measures and policies may entail trade restrictions that, depending on the measure’s design, could depart from GATT obligations, such as Articles I, II, III, and XI.

However, as noted above, measures could be justified under Article XX, provided they meet the requirements of that provision, including the chapeau.<sup>150</sup> Under the chapeau of Article XX, an importing member is entitled to differentiate between exporting countries, provided its measure is not applied in a manner that would constitute a means of “arbitrary or unjustifiable” discrimination or “a disguised restriction on international trade” between countries where the same conditions prevail. The UNFCCC incorporates similar language in the principle expressed in Article 3(5), stating that “unilateral” measures “taken to combat climate change” “should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”<sup>151</sup> The Rio Declaration likewise incorporates this language in its Principle 12.<sup>152</sup>

To avoid designing and implementing a trade-related climate measure or policy in a manner that constitutes a means of “arbitrary or unjustifiable” discrimination, a WTO member is permitted under WTO law—indeed, required—to take into account differences in the circumstances in exporting countries.<sup>153</sup>

On this point, the Appellate Body has said that the chapeau of Article XX requires consideration of the “different conditions” that may arise in third countries, including “the appropriateness of [a] regulatory program for the conditions prevailing in those exporting countries.”<sup>154</sup> The proper consideration of different conditions in exporting countries assists a member taking a trade-related climate measure in its efforts to avoid the arbitrary or justifiable discrimination that would stem from treating two countries in the same way when they are, in fact, different in relevant ways.

148. The principle of CBDR-RC has been described as “a hallmark of the existing [climate] regime,” and, more generally, as “a linchpin of international environmental law.” See P. Cullet, ‘Principle 7 – Common but Differentiated Responsibilities’, in J. E. Viñuales (ed), *The Rio Declaration on Environment and Development – A Commentary* (Oxford, Oxford University Press, 2015), pp. 239, 242. Most multilateral environmental agreements refer to CBDR in the preamble or operative provisions (or both), although the role of CBDR varies depending on the nature of the problem being addressed.

149. UN GA Resolution, A/RES/77/276 (“Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change”), adopted on 29 March 2023.

150. We recall that a trade-related climate measure may be provisionally justified under paragraphs (a), (b), and (g) of Article XX. In that respect, while trade-related climate measures and policies could be provisionally justified under Article XX (a) (“necessary to protect public morals”), the availability of paragraph (a) to justify trade-related climate measures and policies depends on the “standards of right and wrong conduct” prevailing in a particular WTO member, which “vary in time and space” across WTO members (Panel Report, *US – Gambling*, paras. 6.461, 6.465). In any event, the considerations developed in this report would also be relevant to the design and implementation of trade-related measures that seek justification under paragraph (a).

151. Article 3.5 of the UNFCCC.

152. Principle 12 of the Rio Declaration.

153. Article 12 of the TBT Agreement provides that “Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from Developing Country Members.” This is especially relevant to trade-related climate measures because climate-related technical regulations can impact developing countries’ competitiveness and market access. See UNCTAD, *Making Trade Work for Climate Change Mitigation: The Case of Technical Regulations* (2022), p. 30.

154. Appellate Body Report, *US – Shrimp*, paras. 164 and 165. In *US – Shrimp*, the challenged measure was inconsistent with the prohibition on quantitative restrictions, under Article XI of the GATT. It is well-established that the Appellate Body’s reasoning on “arbitrary or unjustifiable discrimination” is also relevant in assessing measures under the chapeau that violate other provisions of the GATT, such as Article I of the GATT (MFN treatment) and Article III of the GATT (national treatment). For example, in *EC – Seal Products*, the Appellate Body held that the challenged measure was inconsistent with Articles I and III of the GATT. Referring to its reasoning in *US – Shrimp*, the Appellate Body recalled that “a measure may result in arbitrary or unjustifiable discrimination “when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.” The challenged measure included an exception to protect the economic and social interests of indigenous communities. The Appellate Body found that the administration of this exception entailed “significant burdens” on indigenous communities located in Canada and, for that reason, was not sufficiently tailored to the relevant conditions prevailing in Canada. This was one of the reasons why the exception gave rise to “arbitrary or unjustifiable discrimination” under the chapeau. See Appellate Body Report, *EC – Seal Products*, paras. 5.337-5.338.

In that regard, when assessing whether an exporting country faces “different conditions,” for the purposes of the chapeau of Article XX, the principle of CBDR-RC, in the light of different national circumstances, is a relevant principle for consideration, including in assessing the “appropriateness” of a regulatory program (such as a trade-related climate measure) for the conditions prevailing in an exporting country.<sup>155</sup>

In sum, when designing and implementing trade-related climate measures and policies, including “unilateral” measures, states should be guided by the principles of sustainable development, equity and CBDR-RC, in the light of national circumstances, as well as the other principles addressed in this report, like cooperation.<sup>156</sup> This approach would be in keeping with WTO members’ recognition that “due respect must be afforded to both [WTO agreements and multilateral environmental agreements] in the development of a mutually supportive relationship.”<sup>157</sup> For a country to apply a trade-related climate measure without taking into account CBDR-RC may contribute to the application of the measure being considered to constitute arbitrary and/or unjustifiable discrimination. Conversely, when a country adopts a trade-related climate measure, acting to take into account such factors will contribute positively to ensuring that it acts without arbitrariness and unjustifiability.

155. It is well established that a wide range of factors may be relevant under the chapeau of Article XX, including factors that stem from both binding and non-binding international legal instruments. For example, in *US - Shrimp*, the Appellate Body has taken account of provisions of conventions and treaties (such as the Convention on Biological Diversity, the Convention on the International Trade in Endangered Species of Fauna and Flora, the Convention on the Conservation of Migratory Species of Wild Animals, and the Inter-American Convention for the Protection and Conservation of Sea Turtles), as well as of several soft law instruments of international environmental law, including Principle 12 of the Rio Declaration and Agenda 21. Appellate Body Report, *US - Shrimp*, paras 168 and 169. See also Appellate Body Report, *US - Shrimp (Art. 21.5)*, para. 124. In *EC - Seals*, in interpreting Article 2.1 of the TBT (where some of the analysis was considered to apply to Article XX of the GATT as well) the Panel referred to other international law instruments such as the UN Declaration on the Rights of Indigenous Peoples, the UN GA Resolution 61/295 (2007), ILO Convention 169, and the Charter of the Inuit Circumpolar Council.

156. See Article 3(5) of the UNFCCC.

157. Report (1996) 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.

## 6. Transparency and Consultation

Transparency plays a key role in both international law relating to climate change and trade law as well as the broader field of international law relevant to the environment. In both regimes, transparency helps improve the effectiveness of decision-making, ensure the predictability of multilateral rules, while enhancing governance, and engender mutual trust and confidence amongst states that each will live up to its commitments.

International environmental law contains several duties related to transparency in the context of the adoption of domestic environmental measures. At least two broad categories of obligations can be identified, which are relevant for trade-related climate measures and policies: vertical transparency obligations, which require states to ensure transparency in environmental matters for members of the public, and horizontal transparency obligations, which include reporting and notification obligations requiring states to provide certain information to other states, either directly or via an international institution.

Vertical transparency obligations include obligations to make relevant information publicly available. International law encourages states to ensure transparency in environmental matters for members of the public.<sup>158</sup> The Rio Declaration, in Principle 10, endorses the participation of all concerned citizens in decision-making in environmental matters and the need for access to relevant information. It provides that: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”<sup>159</sup>

The 2022 UN Resolution on the Right to a Healthy Environment is also part of relevant international law, where states recognize in its preamble “that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and in environmental decision-making and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment.”<sup>160</sup> This preamble to the resolution also echoes Article 19 of the International Covenant on Civil and Political Rights (which is binding on most states), and which affirms the right of freedom of expression, including freedom to “seek, receive and impart information and ideas of all kinds.”<sup>161</sup> At the domestic level, citizens’ fundamental rights to information are guaranteed in many constitutions or statutes around the world.

Access to environmental information and data is critical to guarantee the public’s participation in environmental decision-making. The purpose of this principle is to ensure the effectiveness of environmental decision-making and the accountability of the public administration. The recognition of this principle at the international level is critical, considering that environmental activities and measures adopted domestically can produce effects across state borders and, therefore, the transparency concerns extend outside of each state.

158. There have been regional efforts to take forward these principles and translate them into obligations, such as in the European Union and Latin American regions. See e.g., UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter (Aarhus Convention), adopted in 1997 and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) which entered into force in 2021.

159. Principle 10 also refers to access to justice: “Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Reference to transparency can also be found in the World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development*, 26 August-4 September 2002, paras. 15(e), 20(o), 26(g), 30(c), 47(b), 62(g), 66(a) and 86(a), (b) and (e). UN, Rio+20: United Nations Conference on Sustainable Development, *The Future We Want*, A/CONF.216/L.1, 19 June 2012, paras. 10, 19, 65, 67, 75, 76(d), 76(g), 76(h), 77, 85(h), 86, 88(h), 117, 172, 173, 228, 248, 258, 259, 282 and 283.

160. See UN Resolution on the Right to a Healthy Environment, UN GA A/76/L.75 (26 July 2022), page 2.

161. See International Covenant on Civil and Political Rights (ICCPR) 1967.

Transparency is of particular importance in the specific case of climate change where, because it represents a transboundary global challenge and because all states are expected to contribute to its mitigation and adaptation (while applying the CBDR-RC principle), states and civil society at large have a legitimate interest in accessing information on the specific climate measures adopted by other states. Accordingly, this principle is present in both the UNFCCC and the Paris Agreement.<sup>162</sup> The principle of transparency is also codified in regional treaties devoted to the topic<sup>163</sup> as well as in human rights treaties, although in a general nature and not specific to environmental matters.<sup>164</sup>

In addition, the UNFCCC and the Paris Agreement contain horizontal transparency obligations, in the form of reporting obligations.<sup>165</sup> The goal of these requirements is to facilitate “the exchange of information on measures adopted by the Parties to address climate change and its effects”<sup>166</sup> as well as to allow the Conference of the Parties to assess “on the basis of all information made available to it ... the implementation of the Convention by the Parties, the overall effects of the measures taken pursuant to the Convention, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved.”<sup>167</sup>

In regard to international trade law, transparency of trade rules and procedures enables businesses engaged in trade to fully understand the conditions for, and constraints on trade, and to calculate commercial opportunities as well as costs of doing business. This openness promotes predictability in the application of rules and procedures, improves regulatory practices, and can help build and sustain trust among governments and stakeholders from business and civil society.<sup>168</sup> The logic of the transparency principle in the context of the multilateral trading system is that governance and efficient markets are both enhanced when participants know the regulatory conditions that impact their trade prospects. Transparency of rules also shields the autonomy and independence of administrative decision-makers from political interference.<sup>169</sup>

Under Article X(1) of the GATT, WTO members are required to promptly publish all trade regulations. Specifically, the provision—which is broad in scope—states that “[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to ... requirements, restrictions or prohibitions on imports or exports ... or affecting their sale, distribution, transportation,

162. Article 6 of the UNFCCC and Preamble of the Paris Agreement.

163. See e.g., UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter (Aarhus Convention), adopted in 1997 and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) which entered into force in 2021.

164. At the regional level, in its interpretation of the American Convention on Human Rights, the Inter-American Court of Human Rights has a rich jurisprudence when it comes to public participation (and consultation) of indigenous communities in relation to the safeguarding of the right to property. Some of the court’s decisions interpreted the treaty’s relevance in the context of certain cases concerning environmental issues. A notable example is *Saramaka People v Suriname* (2007), where the court stated that with respect to “large-scale development or investment projects that would have a major impact within [the indigenous territory]” the state must do more than consult with the indigenous community; it must “obtain their free, prior, and informed consent, according to their customs and traditions.” Transparency is an indispensable component of this requirement. See e.g., *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights Judgment of 31 August 2001; *Case of the Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgment of 28 November 2007; *Case of the Indigenous People Kichwa of Sarayaku v Ecuador*, Inter-American Court of Human Rights, Judgment of 27 June 2012. See also the following case at the African Commission on Human and Peoples’ Rights: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples’ Rights, 4 February 2010.

165. See e.g., Article 4.1 and 4.1 of the UNFCCC and Article 13 of the Paris Agreement.

166. Article 7.2(b) of the UNFCCC.

167. Article 7.2(e) of the UNFCCC.

168. See e.g., G. Marceau, “Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms”, in TLD Special issue on WTO Dispute Settlement Vol. 4, No. 1 (2012), p. 19-44 (with M. Hurley). On transparency more broadly at the WTO, see G. Marceau, ‘Is the WTO Open and Transparent? – A Discussion of the Relationship of the WTO with Non-Governmental Organisations and Civil Society’s Claims for More Transparency and Public Participation’, *Journal of World Trade*, 33(1) (1999).

169. R. Wolfe, ‘Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life’, (2013) WTO Staff Working Paper ERSD-2013-03, p. 3.

insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them” [emphasis added].<sup>170</sup> Article X(2) of the GATT further provides that “[n]o measure of general application taken by any Member ... imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments thereof, shall be enforced before such measure has been officially published.”

There are also context specific transparency rules in other WTO agreements which apply depending on the form of the trade measure. In the TBT Agreement, for instance, the transparency principle is expressed as an obligation that applies throughout the process of developing technical regulations, standards, and conformity assessment procedures, including with respect to proposed technical regulations. In addition, Article 3 of the GATS provides that “[e]ach Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement.”<sup>171</sup> Transparency is also required, for example, by the TRIPS Agreement. Article 63 provides that such measures “pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them.” The principle of transparency is also reflected in the WTO’s Trade Policy Review Mechanism, which serves the purpose of ensuring “the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.”<sup>172</sup>

In sum, the principle of transparency is highly relevant for consideration in the design and implementation of trade-related climate policies and measures, and is also vital for giving effect to the other principles discussed in this report (such as the principle of cooperation and consultation). To give practical effect to the principle of transparency, this report highlights the importance of prompt publication and review of trade-related climate measures and policies by all WTO members as well as of using available processes at the WTO and in the international climate regime to provide information, clarify, and discuss trade-related climate measures and policies. Such transparency is a prerequisite for cooperation and of early and ongoing efforts to consult with trading partners on proposed measures.

Consultation is also one of the key principles and features of the multilateral trading system. The principle of consultation is expressed in a number of provisions in WTO agreements and also in relation to WTO decision-making procedures and intergovernmental processes. For instance, Article 13 of the TBT Agreement establishes the TBT Committee to create a forum for consultations on proposed or adopted trade measures within the scope of technical regulations, standards, and conformity assessment procedures. Consultations are also a central aspect of negotiations at the WTO and feature in the renegotiation of tariffs,<sup>173</sup> negotiations

170. Notably, promptness is not an absolute concept, and should be assessed according to, inter alia, the length of time between the introduction of the measure and the date of publication and whether there has been undue delay and the circumstances of the specific case. The choice of means of publication is also important. The obligation to publish “in a manner as to enable governments and traders to become acquainted with them,” requires the information to be made generally available through an appropriate medium rather than simply making them publicly available. See Report of the Panel, *EC - IT Products*, paras. 7.1074 and 7.1082.

171. The relevant provisions regarding technical regulations are Articles 2.9, 2.10, 2.11 and 2.12 of the TBT Agreement.

172. Marrakesh Agreement Establishing the World Trade Organization, Annex 3.

173. Articles XII, XIII, XV, XXII, XXVII of the GATT.

on services,<sup>174</sup> intellectual property rights,<sup>175</sup> as well as in dispute settlement.<sup>176</sup> Consultations are means of facilitating exchanges of views and information between members, as well as the airing of concerns by members with an interest in, or affected by, the trade practice of other members. Such consultations may also help members to reduce and address tensions in ways that avoid costly trade disputes.

Specific consultation obligations apply under different WTO agreements. In the context of the TBT Agreement, for instance, consultation obligations require taking account of the special circumstances of developing countries when developing technical regulations.

As a matter of practice, WTO members can and do use a range of WTO processes to discuss and consult on trade policies, including trade-related climate measures and policies, including by providing information about and clarifying such measures and also raising concerns about them. Members can, and often do, engage in such consultations in WTO committees and councils that are responsible for overseeing the implementation of specific agreements, such as the TBT Committee, as well as, among others, the Committee on Trade and Environment and the Committee on Market Access (the terms of reference for which include “providing a forum for consultation on matters relating to tariffs and non-tariff measures”). The TBT Committee, for instance, provides members a forum where they can raise “specific trade concerns” with respect to measures that may affect their trade, which may include trade-related climate measures and policies.<sup>177</sup> Such discussions can contribute to improving the understanding of the rationale behind members’ measures by providing further information and clarification on details regarding their implementation and enforcement, beyond information provided in WTO notifications, for instance.<sup>178</sup> Such consultations can in turn help members to reduce and resolve tensions, without resorting to disputes. Another relevant process for consultations among members is the Trade Policy Review Mechanism, which provides not only for transparency in the form of a periodic review of WTO members’ trade policies and practices, but also processes through which members can ask questions and clarify and exchange views on these policies and practices.

174. Article XXII of GATS provides that member states “shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement.”

175. Article 24.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provides for consultation among member states on measures concerning intellectual property obligations both bilaterally and in the TRIPS Committee.

176. Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 4 which states that “Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.” Also, in Article XXII of the GATT, members agree that they “shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.” Members may also engage in consultations at the request of other member states on any matter for which it has not been possible to find a satisfactory solution through consultations under Article XXII.

177. K. Holzer, ‘Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee’, WTO Secretariat Working Paper ERSD-2018-11, WTO Secretariat (2018).

178. K. Cassehgari Posada, E. Ganne, and R. Piermartini, ‘The Role of WTO Committees through the Lens of Specific Trade Concerns raised in the TBT Committee’, WTO Secretariat Working Paper ERSD-2020-09, WTO Secretariat (May 2020).

## Annex. International Legal Expert Group Members

Professor James Bacchus (USA), Center for Global Economic and Environmental Opportunity, University of Central Florida, USA

Honorary Professor Ujal Singh Bhatia (India), National Law University Delhi, India, and Council on Economic Policies, Switzerland

Professor Umberto Celli Junior (Brazil), Ribeirão Preto Law Faculty, University of São Paulo, Brazil

Professor Dominic Coppens (Belgium), Professor of International Economic Law, Faculty of Law, Maastricht University, The Netherlands

Professor Jennifer A. Hillman (USA), Georgetown Law Center, Georgetown Institute of International Economic Law, Georgetown University, USA

Mr. Nicolas J.S. Lockhart (United Kingdom), World Trade Institute, University of Bern, Switzerland

Professor Dr. Makane Moise Mbengue (Senegal), Faculty of Law, University of Geneva, Switzerland, and School of Law, Sciences Po Paris, France

Dr. Dan Bondi Ogolla (Kenya), Member, Africa Group of Negotiators Expert Support (AGNES-Africa), Former Director of Legal Affairs, United Nations Framework Convention on Climate Change (UNFCCC)

Professor Dr. Nilufer Oral (Turkey), Centre of International Law (CIL), National University of Singapore, Singapore

Professor Dr. Jacqueline Peel (Australia), Melbourne Law School, The University of Melbourne, Australia

Professor Dr. Tianbao Qin (China), Research Institute of Environmental Law (RIEL), Wuhan University, China

Dr. Jan Yves Remy (St. Lucia), Shridath Ramphal Centre for International Trade Law, Policy and Services, The University of the West Indies, Barbados

Hon. Mr. Justice David Unterhalter (South Africa), Faculty of Law, University of Cape Town, Acting Justice of the Constitutional Court, South Africa

Professor Dr. Peter L.H. Van den Bossche (Belgium), World Trade Institute, University of Bern, Switzerland

Professor Dr. Jorge E. Viñuales (Argentina), Faculty of Law, Clare College, University of Cambridge, United Kingdom

Dr. Margaretha Wewerinke-Singh (The Netherlands), Amsterdam Law School, University of Amsterdam, The Netherlands

Professor Dr. Margaret A. Young (Australia), Melbourne Law School, The University of Melbourne, Australia

### Rapporteur

Dr. Elena Cima, Lecturer in International Energy and Environmental Law, University of Geneva

### Convenors

Dr. Carolyn Deere Birkbeck, Founder and Executive Director, TESS

Christophe Bellmann, Head of Policy Analysis and Strategy, TESS

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[info@tessforum.org](mailto:info@tessforum.org)

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Geneva Graduate Institute  
Chemin Eugène-Rigot 2  
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Switzerland

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