An Appraisal of WTO’s Role in Promoting Substantive Fairness while Regulating Border Carbon Tax Adjustments

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Abstract: Border carbon tax adjustment (BCAs, hereinafter) plays an important role in the protection of the environment, especially in the effort to mitigate climate change. However, the compatibility of BCAs with the WTO rules is controversial as no case has been decided so far. One can only make predictions using existing WTO decisions on trade and non-trade concerns. Even in such cases, WTO has not shown its full problem solving capacity by eschewing substantive issues. Using primary and secondary sources, this article explores WTO’s role in fairly distributing carbon costs among countries. The article particularly attempts to shed light on the role of the WTO to protect the environment (climate change) in light of the principle of sustainable development and non-discrimination without at the same time unduly restricting international trade. To do so, it employs a qualitative and doctrinal research method that involves textual analysis of both primary and secondary sources of data. In terms of scope, since the WTO is about state-to-state relationships and the practical complexity of industry level distribution of border carbon tax, the article focuses only on country level border carbon tax adjustment issues. Accordingly, section I provides a short introduction followed by section II which briefly provides the meaning and rationale of BCAs. While Section III deals with the linkages between trade and environment especially under the WTO system, section IV addresses the legality of BCAs. Section V explores the substantive role of WTO in securing substantive fairness in the regulation of border carbon tax adjustment. Finally, the last section, section VI, concludes the article.

Keywords: Carbon Tax; Environment; WTO

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INTRODUCTION

The World Trade Organization (WTO) is an international institution that regulates trade relations of sovereign states. In the process of regulating international trade, the organization is bound, under its constitutive act, to ensure protection of the environment in light of the principle of sustainable development. The regulation of border carbon tax adjustment (BCAs) is one of the issues that the WTO is dealing in this respect. Border carbon tax adjustments refers to taxes imposed on imports from countries which do not have a carbon tax or have a lower
carbon tax than the importing country. The basic rationale of BCAs is to create an even playing field for domestic producers (relative to foreign producers) who are subject to carbon tax.

Even if no case is decided so far, the WTO has rules that govern BCAs. Just like any matters under the WTO, these rules are based on the principle of non-discrimination. According to this principle, a country is forbidden from discriminating against imports from other countries. Furthermore, any BCAs, under the WTO rules, shall be based on the carbon content of the imported product and not on the country of origin. But the exact implementation of such rules is a bone of contention till this day. While some countries argue that BCAs are indispensable to protect domestic producers against unfair competition, others contend that such taxes constitute a form of protectionism that runs afoul of the WTO rules.

Even if it is clear that BCAs help to protect the environment, especially by mitigating climate change, it is challenging to determine the appropriate level of border carbon tax adjustments. If the carbon tax is set too high, it will be seen as a form of protectionism contrary to the WTO rules. If, on the other hand, the tax is too low, it may not effectively level the playing field for domestic industries. It is also difficult to determine the carbon contents of an imported product not least because different countries employ different methods of calculating carbon emission. In addition it is also impossible to rely on other (foreign) countries carbon calculations since it is difficult to verify such calculations owing primarily to lack of transparency in these countries carbon reporting. It is likely that the issue of BCAs will continue to be debated under the WTO as countries continue to address climate change.

In terms of its organization, the research article contains six sections. While the first section makes the introduction, the second section provides the meaning and rationales of BCAs in short. Then, section three deals with the linkages between trade and environment especially under the WTO system, followed by the fourth section that addresses the legality of BCAs. Section five explores the substantive role of WTO in securing substantive fairness in the regulation of border carbon tax adjustment. Finally, the last section concludes the article.

METHOD
This research article seeks to investigate the role of the WTO in fairly distributing carbon cost among its members in light of sustainable development, climate justice and principle of non-discrimination. In this regard, the article employs a qualitative and doctrinal research methodology. It particularly makes a textual analysis drawing on primary (treaties, case law) and secondary (books, articles and reports) sources.

ANALYSIS AND DISCUSSION
Border Carbon Tax Adjustments (BCAS): Meaning and Reaionales
Border carbon tax adjustment (BCAs, hereinafter) is a vital (trade) instrument in the protection of the environment, especially climate change mitigation, hence in the achievement of sustainable development without distorting international trade. Basically, border carbon tax adjustments refers to taxes imposed on imports from countries which do not have a carbon tax or have a lower carbon tax than the importing country. Border
carbon tax adjustments refer to “measures aimed at adjusting climate policy costs that domestic industries incur compared to foreign producers in countries with different climate policies.” Accordingly, foreign producers will be subjected to equivalent costs incurred by domestic producers, often, followed by export tax rebate. Such scheme, *inter alia*, includes carbon taxes targeted to emission reduction. This article uses BCAs in the context of border carbon taxes.

Turning to their rationales, BCAs have both economic and environmental objectives. Their economic rationale is to prevent unfair competition. Compared to foreign producers subjected to no (less) carbon costs, domestic producers will lose competitive advantage out of extra carbon taxes. Environmentally, BCAs seek to internalize carbon costs, discourage carbon intensive consumptions, prevent carbon leakage, and free-riding. It must be noted that BCAs are trade instruments as they are applied at the border which can potentially distort trade. It is this fact that brings WTO at the center. The WTO can play an important role in regulating BCAs, especially in fostering substantive fairness while at the same time playing its role of promoting international trade and environmental protection. Most importantly, the WTO rules are based on the principle of non-discrimination and further requiring that any form of tax (includes carbon tax) shall be based on the carbon content of an imported product. The two most important issues for the organization in this direction are, therefore, how to determine the carbon content of an imported product and the appropriate levels of carbon tax.

**The Linkages between Trade and Environment**

This section tries to shed light on the linkages between trade and environment with the view to identifying the place of the environment under international trade law led by the WTO. Even if the WTO is primarily meant to regulate trade, it is also entrusted with the task of ensuring that international trade shall be carried out without affecting the environment in light of the principle of sustainable development. It is, therefore, imperative to evaluate if and to what extent trade and environment go in line both theoretically and practically (as it is provided under the WTO constitutive acts). This helps to shed light on the ability of the WTO to uphold substantive fairness in the regulation of BCAs, and hence promote environmental protection and sustainable development. Trade and environment are interrelated notions that have notable impact on one another. The expanding production and distribution of goods associated with the increasing globalization of trade has resulted in such environmental concerns as increased pollution and resource depletion. On the other hand, environmental policies and regulations can also impact trade since they affect the cost of production and availability of goods. There seems to be an apparent clash between trade and environment which is mainly rooted

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2 Id.

in the value divergences of Economists and Environmentalists. Economists, generally, see government intervention as an impediment to efficiency.\textsuperscript{4} Hence, there should be no (minimal) intervention on free trade. There is no need to worry about environmental protection since economic efficiency eventually solves environmental problems.

On the other hand, environmentalists advocate some form of regulation to safeguard environment against efficiency borne degradations.\textsuperscript{5} Free trade causes environmental degradation despite its positive impacts. The production and transportation of goods significantly affects the environment. For instance, the extraction of raw materials, the manufacturing process of goods and the transportation of goods result in the emission of greenhouse gasses that are attributed to climate change. In addition, there is an increasing deforestation and loss of biodiversity due to the growing demand for goods. It is also worth noting that trade rules can impact on environmental policies. For instance, while some trade agreements may limit countries ability to implement environmental regulations, others may offer an incentive for industries to engage in environmentally harmful practices. We cannot at the same time rely on individual consumers rational choices to selectively pick up environmentally friendly goods over environmentally unfriendly ones. Some form of government intervention, therefore, seems to be justified owing to market failure and consumers’ negligible product choices on environmental grounds.\textsuperscript{6}

Environmental policies and regulations can also have an impact on trade, both negatively and positively. With respect of the negative impact, environmental regulation can distort trade.\textsuperscript{7} For instance, environmental regulations that restrict the use of certain chemicals or require industries to reduce their emissions definitely increase the cost of production. This, in turn, makes these good more expensive and less competitive on the international market. On the other hand, environmental regulation might positively affect trade as in opening up new frontiers for trade. A case in point is the increasing production and export of solar panels and wind turbines associated with the growing demand for renewable energy. This has created new market opportunities for countries investing in renewable technology. It must also be noted that environmental policies cannot be effective without employing trade tools as a method of enforcement.\textsuperscript{8} This is so because the international trade regime provides for a strong dispute settlement procedure and trade sanction, none of which are available in the multilateral environmental regime.

As the global economy keeps on growing, it is equally important to look for ways to balancing economic growth, on the one hand, and environmental sustainability, on the other.


\textsuperscript{7} Daniel Bodansky & Jessica Lawrence. Supra note 5, pp. 510-12.

\textsuperscript{8} Id.
other. This can be achieved, among others, through the promotion of sustainable trade practice so much as through the adoption of environmental policies. On the face of the diverging views on the linkage between trade and environment, there comes the balancing role of the WTO’s. Critics maintain that WTO undermines environmental values since its texts subordinate environment to trade and it is dominated by economists.9 Others argue that WTO laws do not restrict national actions but policy choices to avoid protectionism. Trade is a means to an end; raising living standards parallel with the objectives of sustainable development. The GATT exception also accommodates environment.10 Although less successful, the committee on Trade and Environment was established to accommodate environmental protection under the WTO system.11

On the other side, some others suggest that environmental (climate change) measures should follow and be based on multilateral negotiations, but not based on unilateral actions (as in the case of border carbon tax).12 Multilateral environmental negotiation has, however, been unsuccessful for various reasons such as co-operation failure, diverging attitudes, and high cost of actions. The choice is not between “unilateral and multilateral actions but between action and inaction”.13 Others still recommend a separate institution for environmental cases since the trade and environment conflict undercuts impartial solutions.14 But separate institutions further cause fragmentation rather than solving the intricate issues that arise from the interconnection between trade and environment.15 Furthermore, countries would likely seek problematic unilateral measures to be scrutinized under the “tested and tried route” of the dispute settlement body.16 For instance, China and India are resisting EU’s carbon tax on their civil aviation.17 Indeed, the WTO has recently revealed its ability to balance trade and environment.18 The WTO offers adequate flexibility for national policies, too. The concern nowadays is rather on powerful countries and on how WTO can restrain them.19 In what follows, an analysis is made on the compatibility of border carbon taxes with the rules of the WTO.

11 Id.
16 James Harrison. Supra note 3, pp. 3-4 & 9.
19 James Harrison. Supra note 3, pp. 10-14.
The Copatibility of Bcas with the Rules of the WTO

In the above section, we tried to see the role of the WTO in balancing trade and environment through the adoption of sustainable trade practices. One such example is the adoption of border carbon tax (adjustment) with the view to holding producers accountable for their carbon footprint. This section seeks to examine the legality of BCAs in light of the WTO and thus its ability to safeguard the environment without at the same time distorting international trade. The key principle, here, is the principle of non-discrimination as laid down under the General Agreement on Trade and Tariffs (GATT). For the sake of complexity and dearth of materials, I would restrict myself to the discussion of the GATT. But some of the following discussions, particularly Article XX of the GATT, can still be maintained in the context of GATS. The legality, or otherwise, of BCAs is a controversial point among different scholars. Some commentators argue that BCAs violate Article II of the GATT since they are prohibited forms of indirect taxes targeting product and process methods (PPMs). In addition, Article XI of the GATT also prohibits non-tariff restrictions such as BCAs. In this sense, BCAs constitute disguised protection as no evidence supports competitiveness and leakage concerns.

On the other side, some other scholars argue that BCAs are not unlawful if like domestic and foreign products, and like foreign products are taxed equivalently. To them, Article II (2)(a) of the GATT does not prohibit charges on imported products consistent with Articles I and III(2) of the GATT. It is worth noting that national legislations are evaluated under Article III, but not XI, of the GATT if they apply to like domestic and foreign products. Moreover, competitiveness and leakage concerns cannot be totally excluded; particularly, in energy intensive sectors. Carbon taxes in limited countries would also cause leakage by reducing energy prices and increasing carbon consumptions abroad.

It is worth considering that products can, arguably, be distinguished using PPMs when determining whether they are like or otherwise not. The EC-Asbestoses case, for instance, adopted a flexible approach to determining likeness. This can be used to distinguish environmentally friendly and unfriendly products based on consumers’ preference to the former. But it is ambiguous whether PPMs can justify regulatory distinction as the appellate body in EC-Asbestoses case eschewed to examine them under Article III

20 “GATT.” General Agreement on Trade in Service (GATS), Annex 1B, Uruguay Round of Negotiation on WTO (1994), Article XIV.
22 Organization for Economic Co-operation and Development. Supra note 1, p. 20.

of the GATT.\textsuperscript{26} That is why the compatibility of BCAs with the WTO rules, rather, depends largely on their design and structure that it is so difficult to make swift conclusions.\textsuperscript{27} It is likely that BCAs can be justified under Article XX(b) of the GATT given the adverse impacts of climate change on humans, animals and plants; or under Article XX(g) of the GATT as climate is an exhaustible natural resource. Under the first provision, the measure shall substantially relate to its objective and shall be accompanied by comparable domestic taxes; while it faces less onerous requirement under the second.\textsuperscript{28} It, therefore, follows that BCAs have to be applied in less trade restrictive manner and require comparable efforts depending on countries different situations.\textsuperscript{29} The use of PPM standards, arguably, undermines sovereignty by enabling powerful nations to extraterritorially impose their laws on weaker ones.\textsuperscript{30} It is clear that Article XX of the GATT applies to measures within the jurisdiction of importing countries.\textsuperscript{31} Nonetheless, applying laws exterritorially after good faith negotiation can very well be possible if there is sufficient territorial nexus.\textsuperscript{32} It is already obvious that emissions, especially trans-boundary greenhouse gases, cause economic and environmental spill overs beyond national borders. Furthermore, the use of the word “national” only under Article XX(f) of the GATT indicates that the rest sub-provisions (excluding sub provision “f”) are intended not to be restricted nationally.\textsuperscript{33} Otherwise, Article XX of the GATT would be ineffective.\textsuperscript{34} States also have legitimate interest to protecting global commons like the climate.\textsuperscript{35} So far, the WTO had, however, been making decisions only on procedural grounds that limit its full problem solving ability. It should also engage in substantive issues and develop climate cost distribution mechanism that is fair to all concerned parties.\textsuperscript{36} The next section will carry on the task of examining the roles of the WTO in promoting substantive fairness in the regulation of BCAs.

**What Role Can the WTO Play in Promoting Substantive Fairness in the Regulation of BCAS?**

In the above section, we tried to see that BCAs are not automatically incompatible with the


\textsuperscript{27}Id at p. 28

\textsuperscript{28}Id at pp. 108-10


\textsuperscript{31}“GATT Dispute Panel Report.” *United States-Restrictions on Imports of Tuna*, Supra note 21, par. 5.25 & 5.32.


\textsuperscript{35}Daniel Bodansky & Jessica Lawrence. Supra note 5, p. 525

\textsuperscript{36}James Harrison. Supra note 3, pp. 11-14
rules of the WTO. It all depends on how these rules are designed. Accordingly, the WTO can play an important role in promoting just distribution of climate cost with carefully designed BCAs. It is, nonetheless, worth noting that resolving substantive questions regarding climate cost distribution requires looking beyond WTO-covered agreements. The problem, in this regard, is that the jurisdiction of the DSB under the WTO is limited to clarifying covered-agreements. In order to avoid political risks, interpretation of WTO laws should follow plain textual meanings without modifying the balance of rights and responsibilities of member states thereof.\(^\text{37}\) If that is the case, then it is impossible to refer to environmental agreements that lie outside of the WTO system despite the fact that environmental protection is one of the important goals of BCAs next to promotion of fair trade.

On the other hand, it can rightly be argued that since the trade regime is part of international law, it cannot be red in “clinical isolation” from other regimes. Moreover, the DSU restricts the jurisdiction of the DSB to hear cases brought under the covered-agreements rather than the applicable laws.\(^\text{38}\) This means that the WTO can assume jurisdiction over BCAs cases only if they are brought proving that they contravened trade agreements. Yet, in deciding the merit of the case, the WTO may refer to other branches of law (international environmental agreements) other that trade agreements. Looking at Article XX of the GATT, it seems clear that it is framed with the view to enabling the DSB to resolve the trade-and-environment nexus as and when the time comes.\(^\text{39}\) Indeed, cases on BCAs would be based on covered agreements (non-discrimination principle) as they are trade tools. Nonetheless, substantive principles outside WTO-agreements should be found elsewhere since some provisions (ex. the Chapeau) are unclear. Even when these principles do not exist in treaties, they should be searched in relevant rules of international law.\(^\text{40}\)

To see if and to what extent other branches of international law (such as international environmental law) is applicable to the international trade regime, it is wise to examine the intentions of the parties who in the first place set up the trade regime. So to do, we need to refer to the Vienna Convention on the Law of Treaties. Article 31(3)(c) of the Vienna Convention on the Law of Treaties embodies the principle of “systematic integration whereby international obligations should be interpreted coherently ad meaningfully having regard to their normative environment”.\(^\text{41}\) It was held that “parties” under Article 31(3) (c) of the Vienna Convention should be interpreted to establish the common intention of parties of a treaty without prejudice to the fact that Article 31(3)(c) is an expression of

\(^{37}\) Claus Ehlermann. “‘Six Years on the Bench of the ‘World Trade Court’: Some Personal Experiencesas Member of the Appellate Body of the World Trade Organization.” Journal of World Trade 36, no. 4 (2002): pp. 605-06 & 617


\(^{39}\) John Knox. Supra note 34, p. 49

\(^{40}\) Id at pp. 49-52 & 65

"systematic integration". Interpreting the word "parties" under such provision to refer to all WTO members undercuts systematic integration. Similarly, if such word is construed to refer to disputant parties, it will endanger the trade regime as any two countries may agree whatever they want to circumvent their trade obligations. A better way, therefore, is to find treaties and principles agreeable to most parties.

One possible solution is to apply the UN Convention on Climate Change, which lays down the common but differentiated principle (CBDR) in protecting the climate. According to this principle, while all states owe a common responsibility to protecting global commons like the climate, the exact level of their duty varies depending on various factors. Accordingly, imposing obligation on developing nations violates the common but differentiated responsibility principle.

It also constitutes an origin based distinction contrary to the Most Favored Nations (MFN) principle under the GATT. But cases dealt under Article XX of the GATT are exceptions to the non-discrimination principle. Border measures amount to arbitrary (unjustifiable) discrimination unless they require comparable efforts from countries based on their levels of development. Since environmental regulations reflect local conditions, imposing high standard on countries without considering their level of development and local priorities affects their market access. This eventually contravenes with the notion of sustainable development and raising living standards which are important goals of the international trade regime.

Relying on the CBDR principle is of no much help not least because it is not a precisely defined principle. The principle, by putting the responsibility to mitigate climate change on the developed countries and leaving the rest (developing ones), it only points to "an extreme of total or no responsibility". One can also hardly envisage the appellate body to credit lack of obligation under non-WTO agreements as it granted no credence to obligation under non-WTO agreements. Nor do Multilateral Environmental Agreements forbid unilateral actions. It cannot be, however, concluded that non-WTO agreements will be categorically rejected given WTO’s case-by-case approach.

On the other side, it is also argued that identical treatment of all countries circumvents the

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43 John Knox. Supra note 34, pp. 49-52 & 65.
44 Center for International Environmental Law & Friends of the Earth Europe. Supra note 1, p. 22.
49 James Harrison. Supra note 3, pp. 20-21.
50 For instance, the Rio Declaration was applied in WTO Appellate Body Report. (See for example, “WTO Appellate Body Report.” United States - Import Prohibition of Certain Shrimp and Shrimp Products. Supra note 32, par. 154 & 168.).
differential treatment of developing nations under the Enabling Clause. But the Enabling Clause does not allow preferential treatment for all developing nations except the poorest ones (LDCs) determined through an objective standard so to say. Moreover, domestic firms in developing nations would constrain policy options to exempt firms from non-LDCs. This pushes developed countries to design carbon taxes that need not be validated under the exception. It is not, however, indicated how such measure can be designed. Border measures would likely fall under the exception as indicated in Section IV above. The only relevance of the climate convention is its equity concern, though vague, which relates to the principle of distributive justice. The three components of this principle are equal, equitable and compensatory burden sharing. It is necessary to consider competing moral and philosophical values behind this principle in light of economic concepts to fairly allocate climate burdens. It is rightly argued that industrialized countries have the leading responsibility to take action as one component of justice entails compensation for past wrongs. These countries have had high stock of emission in the past especially during the industrial development, hence they owe for historical responsibility. Studies indicate that industrialized countries like the US had high past emission track records. But again this (historical responsibility) is thought to be morally objectionable because neither the people by then knew the consequences of their actions nor did the present generation have control over past actions. Instead, current CO2 emission should be the base of distribution of the burdens of climate change. It would be unfair to economically overburden developed nations when major emitting developing nations (such as China, for instance) are free-ridding. As of now, developing countries such as China, India, South Korea, Mexico, Indonesia, and South Africa are among the current top 20 global emitters. It must be noted that catastrophic climate change would occur if developing countries follow the industrialized nations’ growth pattern. Nor can one single state claim to be innocent by now. This shows that we need to think of a workable principle to allocate climate change burden among all nations depending on their levels of contribution (past and current) and ability (levels of development) to meet the principles of distributive justice. Nevertheless, the climate as a common resource creates a moral community in which all have equal share, not least because common resources require global interdependence. It follows that the benefits of industrialization acquired at the expense of others should be (re)distributed equitably. On the other side, an equal allocation of climate change


60 Id at pp. 395-99.
costs will overburden populous developing countries. It also disregards the poor who are vulnerable to and cannot easily adapt climate change. Equity requires climate burdens to be distributed fairly at per-capita levels. For instance, among the top 20 emitters China, Brazil and India would respectively rank 88th, 100th and 120th on per-capita emission basis. It may be countered that such benefits were not accepted [by choice] but merely received [without choice]. Developing nations have also benefited from past emissions by way of technology transfers. Population growth is the leading cause of emission in most developing nations. Per-capita consideration circumvents the impact of population growth on climate change. It benefits largely populated developing countries at the expense of less populous and/or high emitting nations. For example, while China’s, India’s, and Brazil’s per-capita emissions respectively drop by 31%, 47%, and 60%; Japan’s, US’s and EU’s per-capita emissions only fall by 9%, 17% and 19%. Still some other scholars suggest that the burdens of climate change should be borne by those who can afford to pay. This is called an ability-to-pay based burden distribution scheme. We have to use this method because of the urgency of climate change and resource disparities. Reducing emission in poor countries benefit everyone as climate change is global phenomena. However, there is no legally binding obligation on developed countries to help the poor in developing nations simply because they are rich.

Another approach to distributing the burdens of climate change looks the issue from consumption aspect on the ground that “each consumer is also a producer”. Marginal cost of abatement should not be equal across countries as there is difference in consumption patterns and levels of income. Equity considerations also question the manner of cost distributions within the developed in addition to the developing countries. There are natural variations (for example, land area, reliance on specified commodities) and varying past efforts in cutting carbon in developed countries. Domestic actions should be taken into account where they constitute comparable efforts under the chapeau.

CONCLUSION

As indicated in this research paper, each factors with in distributive justice (hence BCAs) reflect varying economic, political and philosophical values. These factors have to be weighed and balanced against each other and in light of WTO law to fairly distribute climate burdens. WTO’s goal should be pursued in accordance with the objective of sustainable development. Considering the impact of increasing current emission level on the climate and that no country can presently be innocent emitter, current emission is the first relevant factor in the allocation of climate change burdens through BCAs. Major emitting developing nations in the past decades should be included in addition to the developed nations. This would make climate measures effective by widening their global


reach and by minimizing overall costs. If not, bilateral measures cannot prevent leakage and leverage wider participation. Yet, some kind of differentiation is appropriate. Border measures should be evaluated with caution to avoid undue market restriction.

Second, comparable domestic efforts should be considered in the regulation of BCAs. Countries should be allowed to take their preferred actions so long as it contributes to tackle climate change. Environmental regulation varies across countries depending on their local situations. Some countries emit high in meeting the needs of their excessive population. The objective of joining the trade regime is to raise living standards. In this respect, the per-capita emission scheme allows countries to pay attention to their local priorities. Nonetheless, industries must face international competition to some extent to encourage them innovate efficient technology. Hence, per-capita emission should come after the above two criterions.

Another important factor to be considered in the regulation of BCAs is the pattern of consumption. From ethical angle, it is inappropriate to equally treat countries with varying consumption levels. This factor, however, is left for further research as it relates to an economic concept, i.e. whether taxes should be based on origin or destination principle. The other factors are historic emission and benefits account. Historic emission warrants caution as its moral justification is doubtful. This does not, however, mean that it deserves no value at all. Even if past emission could be innocent, it would be unfair to similarly treat all countries regardless of their past difference.

International law does not totally exclude non-fault liability. The ability to pay approach is not appealing either, though it seems to be more pragmatic. The rich cannot be bound to pay simply because inaction would result in adverse consequences. It is also implausible to argue that all developing countries cannot afford to take action. The allocation of climate change burdens following the level of development is controversial since no one is responsible for others poverty. Nor is the WTO meant to redistribute resources but to promote development. WTO’s preamble is clearly forward looking in that it seeks to promote living standards. Considerations of countries levels of development should work primarily in the context of LDCs. If that is not otherwise the case, the DSB would excessively pass its textual limit and risks political attack.

Weighing and balancing these factors (esp. current emission, comparable domestic actions, and per-capita emissions), the WTO would no more end up locking the distribution question into the developed/developing country dichotomy. Taken together, this will touch upon most (all) WTO members. And balanced against each other, they will be made acceptable to most/all countries. A politically palatable decision can be made by paying some to most/all countries. For instance, while the US can be disappointed on per-capita emission, it would accept current emission approach. While china dislikes current emission, it would be satisfied with per-capita consideration. The exact amount of burden allocation, however, should be left for a case- by-case decision owing to its complexity.

69 Henrik Horn and Petros Mavroidis. Supra note 6, pp. 4-6 & 22-23.

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