



Osgoode Hall Law School of York University

Osgoode Digital Commons

Articles & Book Chapters

Faculty Scholarship

2022

Designing an Equitable Border Carbon Adjustment Mechanism

Ivan Ozai

Source Publication:

canadian tax journal / revue fiscale canadienne (2022) 70:1, 1-33

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Environmental Law Commons](#), and the [International Trade Law Commons](#)

Designing an Equitable Border Carbon Adjustment Mechanism

Ivan Ozai*

PRÉCIS

Partout dans le monde, les responsables des politiques sont de plus en plus nombreux à envisager l'adoption d'un ajustement à la frontière pour le carbone (AFC) afin de niveler la tarification du carbone sur les biens étrangers avec les politiques sur le carbone appliquées à la production nationale. La Commission européenne a proposé récemment de mettre en œuvre un mécanisme d'ajustement carbone aux frontières dans l'Union européenne, une initiative qu'ont suivie à leur tour les États-Unis et le Canada. Ce mécanisme vise à répondre aux préoccupations relatives à la compétitivité et à la délocalisation des émissions résultant de l'absence d'un prix mondial du carbone ou d'un système de tarification du carbone coordonné à l'échelle internationale. Bien qu'elle puisse aider à résoudre ces problèmes, la mise en œuvre d'un AFC soulève des inquiétudes quant à son effet sur les pays en développement. Un AFC imposera probablement un trop lourd fardeau aux pays en développement ayant une capacité limitée à réduire leurs émissions et violera ainsi le principe des responsabilités communes mais différenciées (PRCD) établi dans la Convention-cadre des Nations Unies sur les changements climatiques. L'objectif principal de cet article est d'examiner les exigences normatives du PRCD et de déterminer ses répercussions juridiques sur la conception d'un AFC. L'article propose en outre des lignes directrices pour la mise en œuvre d'un AFC respectant le PRCD et répondant à son objectif ultime de réduire les émissions mondiales de gaz à effet de serre tout en soutenant les besoins de développement des pays moins riches.

* Of Osgoode Hall Law School, York University, Toronto (e-mail: iozai@yorku.ca). I wish to thank Alice Pirlot, Allison Christians, Sara Slinn, Gus Van Harten, Dayna Scott, Ximena Sierra-Camargo, André Trevisan, André Damaceno, and participants in seminars held at McGill University's Faculty of Law, York University's Osgoode Hall Law School, and Universidade Alto Vale do Rio do Peixe, for helpful comments. I am also grateful to the editors of this journal, particularly Frances Woolley for her comments and encouragement during the preparation of this article, to two anonymous referees for their remarks and suggestions, and to Chen Yu Zhao for his research assistance.

ABSTRACT

Policy makers worldwide have increasingly considered the adoption of a carbon adjustment at the border to equalize carbon pricing on foreign goods with carbon policies imposed on domestic production. The implementation of a border carbon adjustment (BCA) in the European Union has been recently proposed by the European Commission, followed by similar plans in the United States and Canada, as an instrument designed to address concerns about competitiveness and emissions leakage resulting from the absence of a global price on carbon or an internationally coordinated carbon-pricing system. Despite its potential to address these issues, the implementation of a BCA raises concerns with respect to its impact on developing countries. A BCA will likely impose a disproportionate burden on developing countries with limited capacity to cut back emissions and thus violate the principle of common but differentiated responsibilities (CBDR) established in the United Nations Framework Convention on Climate Change. The main goal of this article is to examine CBDR's normative requirements and determine its legal implications for BCA design. The article further offers policy guidelines for implementing a CBDR-compliant BCA that addresses its ultimate purpose of reducing global greenhouse gas emissions while also supporting the development needs of less affluent countries.

KEYWORDS: CARBON PRICING ■ DEVELOPING COUNTRIES ■ INTERNATIONAL TRADE ■ TRADE POLICY ■ GATT ■ WTO

CONTENTS

Introduction	3
Border Carbon Adjustments and Developing Countries	6
Implications for Developing Countries	6
The UNFCCC Principle of Common but Differentiated Responsibilities	8
The WTO's Most-Favoured-Nation Principle	9
Resolving the MFN-CBDR Conflict	11
Can Article XX of the GATT Accommodate CBDR?	11
Conventional Rules for Resolving Conflicts of Norms	15
The Hierarchical Rule	15
The Specialty Rule	16
The Chronological Rule	17
The Purposive Approach	19
Practical Implications of CBDR	22
Enforceability and Binding Force	22
Enforceability	22
Binding Force: Soft-Law Nature	24
Binding Force: Vagueness	25
Expected Outcomes of a Dispute Settlement Process Under the WTO	26
Applying CBDR in BCA Design	27
Mechanisms for Differentiation	27
Degrees of Differentiation	29
Criteria for Differentiation	29
Conclusion	33

INTRODUCTION

Concerns about anthropogenic climate change have grown around the world. Public opinion that increasingly supports urgent action has motivated governments to strengthen policies to reduce greenhouse gas (GHG) emissions.¹ But policy makers have identified two potential problems resulting from the absence of global coordination or a common price on carbon. A country adopting more stringent carbon policies may face loss of competitiveness of its carbon-intensive industries as a result of partial displacement of domestic production by imports of goods from countries with less stringent policies. Further, potential relocation of production to those other countries may shift rather than reduce global GHG emissions, a phenomenon commonly known as “carbon leakage.”²

These concerns have prompted policy makers to consider a bygone controversial academic idea—a tax at the border that would adjust prices of imports originating in countries with less stringent carbon policies according to carbon prices adopted domestically.³ A border carbon adjustment (BCA) would equalize carbon prices on domestic and foreign carbon-intensive goods. Accordingly, it would eliminate any competitive advantage of a foreign product resulting from carbon price differences and counteract potential incentives for relocation that a domestic carbon policy could produce. For jurisdictions adopting a cap-and-trade system, in which the government issues a limited number of tradable permits capping allowed GHG emissions, a BCA would take the form of a requirement for importers to purchase emission allowances based on the carbon intensity of the imported goods. Finally, a BCA could also include an export rebate, which would in practice offset the effect

-
- 1 At the end of 2020, the UN Development Programme and the University of Oxford undertook what has been claimed to be the largest survey of public opinion on climate change ever conducted. The survey, with 1.2 million respondents across 50 countries, showed that 64 percent of respondents see climate change as a global emergency, with the following regional numbers: Western Europe and North America (72 percent), Eastern Europe and Central Asia (65 percent), the Arab States (64 percent), Latin America and the Caribbean (63 percent), Asia and the Pacific (63 percent), and sub-Saharan Africa (61 percent). See Cassie Flynn et al., *People’s Climate Vote: Results* (New York and Oxford, UK: United Nations Development Programme and University of Oxford, January 2021).
 - 2 Although some relocation is expected to occur, which will erode the effectiveness of individual countries’ climate policies in reducing global emissions, there is no established empirical evidence demonstrating that global emissions would be entirely frustrated by relocation. Although some relocation may occur, other factors such as business environment, market proximity, corporate regulation, labour laws, and tax policies are all relevant to businesses’ decisions to relocate.
 - 3 The concept of a border adjustment to address international externalities resulting from domestic carbon policies has been discussed in the literature since the 1970s. See, for example, James R. Markusen, “International Externalities and Optimal Tax Structures” (1975) 5:1 *Journal of International Economics* 15-29 ([https://doi.org/10.1016/0022-1996\(75\)90025-2](https://doi.org/10.1016/0022-1996(75)90025-2)).

of carbon policies on domestic producers, to make their products more competitive with foreign products.⁴

The introduction of a BCA would produce two main effects.⁵ First, it would shift the balance of trade in favour of the implementing country in relation to its trading partners with less stringent carbon policies. Second, as a result, it would change the incentives for the implementing country's trading partners to adopt stricter carbon policies. Because economies trading with the implementing country would have their export prices adjusted for the carbon prices of the implementing country, a BCA would effectively compel those economies to adopt carbon taxation at levels similar to those in the implementing country. Otherwise, their production (or at least their exports) would still be taxed, but tax revenues would be collected by the country that has implemented the BCA instead of benefiting the exporting country.⁶

This externality would produce the desirable consequence of leading the world to reduce global emissions but would also harm developing countries with limited capacity to cut back emissions. There is broad agreement that a BCA imposes a disproportionate burden on developing countries.⁷ Less clear are the legal implications

4 Plans to implement a BCA are currently under consideration in the European Union, the United States, and Canada. For the European Union's most recent proposal, see European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism, COM/2021/564 final, July 14, 2021 (herein referred to as "the EU CBAM proposal"). For the United States, see United States, Senate, A Bill To Amend the Internal Revenue Code of 1986 To Establish a Border Carbon Adjustment for the Importation of Certain Goods, S 2378, 117th Cong., 1st sess., July 19, 2021 (referred to as the Fair, Affordable, Innovative, and Resilient Transition and Competition Act, or the FAIR Transition and Competition Act) (herein referred to as "the FAIR Act"). For Canada, see Canada, Department of Finance, "Exploring Border Carbon Adjustments for Canada," 2021 (www.canada.ca/en/department-finance/programs/consultations/2021/border-carbon-adjustments/exploring-border-carbon-adjustments-canada.html) (herein referred to as "Canada's consultation paper").

5 For potential objectives of a BCA policy other than those discussed here, see Alice Pirlot, "Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?" (2021) *Journal of Environmental Law* 1-28 (<https://doi.org/10.1093/jel/eqab028>), pointing out that BCAs are sometimes also advocated as a tool for fostering compliance with the Paris agreement, advancing international leadership, internalizing carbon emissions linked to consumption, and generating revenue.

6 A similar point can be made for a BCA in the form of purchase emission allowances. The BCA would produce in the exporting country an effect similar to a cap-and-trade regime, but the exporting country would be forgoing potential revenue from allowance auctions.

7 The proposal currently under discussion in the European Union recognizes that "[m]any countries in the Global South, and on the African continent in particular, are exposed to possible risks": the EU CBAM proposal, *supra* note 4, at 30. Canada's consultation paper, *supra* note 4, discusses exemption of developing countries from a BCA. The bill under consideration in the United States proposes an exemption, but only to listed least-developed countries among the Organisation for Economic Co-operation and Development's (OECD's) official development assistance recipients (see the FAIR Act, *supra* note 4). For the OECD's development assistance

of a BCA with respect to international climate law. The United Nations Framework Convention on Climate Change (UNFCCC), which is currently ratified by 197 parties, states that commitments to reduce GHG emissions should be differentiated between developed and developing countries, with the former taking the lead by adopting more ambitious emission reduction targets and the latter being allowed to commit to lower targets until they meet their development needs.⁸ The requirement for differentiation is articulated in the form of the principle of common but differentiated responsibilities (CBDR). Still, many questions remain unresolved.

It is not clear whether CBDR would contradict the World Trade Organization's (WTO's) requirement of non-discrimination, particularly the most-favoured-nation (MFN) principle, which prohibits a WTO country from providing different treatment among WTO trading partners beyond the exceptions allowed in WTO law.⁹ Should the contradiction exist, uncertainty remains as to how the normative conflict between CBDR and WTO law ought to be resolved. If CBDR is finally regarded as applicable to BCAs, it is unclear whether the principle has binding force in international law. If it does, questions persist as to CBDR's legal implications in the absence of an adjudicatory body to enforce the UNFCCC. Additional questions remain regarding CBDR's requirements for BCA design, namely, whether differentiation should be made between developed and developing countries or more granularly within each of these groups, whether CBDR would require the exemption of less affluent countries or allow for compensating mechanisms, and what criteria should be applied for differentiation. The main contribution of this article is to address these questions by analyzing the interplay between CBDR and MFN, and the resulting legal and policy implications for BCA design.

The remainder of this article is organized as follows. The next section examines the impact of BCAs on developing countries and discusses the two main international-law principles applying in this context, namely, CBDR and MFN. The following section analyzes the normative conflict between CBDR and MFN. It demonstrates that the main conventional rules for resolving conflicts of norms do not provide a satisfactory solution, thus requiring a more nuanced approach. The last section examines CBDR's status in the international legal system. It argues that common views about the binding force and enforceability of CBDR rest on a misunderstanding of the concept of soft law and the general nature of legal principles. The last section also investigates the normative content of CBDR to derive policy guidelines for applying differentiation

recipients' list, see Organisation for Economic Co-operation and Development, "DAC List of ODA Recipients" (www.oecd.org/dac/financing-sustainable-development/development-finance-standards/daclist.htm).

- 8 United Nations, United Nations Framework Convention on Climate Change, 1992, at paragraphs 3(1) and 4(1).
- 9 Among other WTO norms, the principle of non-discrimination, which includes the MFN and national treatment principles, constrains the ability of countries to adopt trade measures that compromise fair conditions of trade. Accordingly, a BCA should in principle comply with the principle of non-discrimination.

in BCA design—in particular, to determine what mechanisms to use, which countries to include, and how to determine the criteria for differentiation. The article concludes that failing to adequately implement CBDR in the design of a BCA risks stifling international cooperation and hindering one of the principal purposes of a BCA, the reduction of global GHG emissions.

BORDER CARBON ADJUSTMENTS AND DEVELOPING COUNTRIES

Implications for Developing Countries

There are three main design options for a BCA:

1. an import duty to equalize the costs that national policies impose on domestic producers relative to the costs borne by foreign producers,
2. a requirement for importers to purchase emission allowances, and
3. an export rebate.

These policies may be adopted separately or in conjunction. Also, any carbon price paid in a foreign country should be deductible against the BCA. These measures address competitiveness and leakage concerns by raising costs on imports from (or reducing costs on exports to) countries with less stringent climate policies. The main international *economic* effect of a BCA is to impose on foreign-produced goods the same level of carbon prices imposed domestically. The main international *policy* effect is to compel countries with lower carbon prices to raise them to the level adopted in the country implementing the BCA.

These effects raise concerns with respect to developing countries. Developing countries tend to have less stringent climate policies, and their production is generally more carbon-intensive than that of member countries of the Organisation for Economic Co-operation and Development.¹⁰ As a result, developing countries are expected to be more significantly affected by a BCA.¹¹ The impact of a BCA will be even

10 See Aaditya Mattoo and Arvind Subramanian, *Greenprint: A New Approach to Cooperation on Climate Change* (Washington, DC: Center for Global Development, 2013), at 104. The second problem may be avoided if, instead of using the exporting country's actual emissions, the calculation of a BCA is based either on the importing country's average emissions for the same product or on the "best available technology" principle (which estimates what the emissions would be if the best available technology were used). For an overview of the alternatives for calculating BCAs, see Paola Rocchi, Mónica Serrano, Jordi Roca, and Iñaki Arto, "Border Carbon Adjustments Based on Avoided Emissions: Addressing the Challenge of Its Design" (2018) 145 *Ecological Economics* 126-36 (<https://doi.org/10.1016/j.ecolecon.2017.08.003>).

11 See Glen P. Peters and Edgar G. Hertwich, "CO₂ Embodied in International Trade with Implications for Global Climate Policy" (2008) 42:5 *Environmental Science & Technology* 1401-7; and Giles Atkinson, Kirk Hamilton, Giovanni Ruta, and Dominique van der Mensbrugge, "Trade in 'Virtual Carbon': Empirical Results and Implications for Policy" (2011) 21:2 *Global Environmental Change* 563-74.

more consequential to newly industrialized and industrializing developing countries, which tend to be net carbon exporters. It has been suggested, not without reason, that these countries are the primary target of a BCA.¹² Some have praised the impact on these countries as one desired outcome of a BCA.¹³

From a global perspective, addressing climate change requires consideration of two interrelated concerns: reducing global carbon emissions and meeting the development needs of developing countries. Although a BCA might potentially address the former, it would significantly undermine the latter. Requiring less affluent countries to achieve emission reductions at a level similar to that of developed economies overlooks historical and ethical considerations. From a historical viewpoint, such a requirement fails to acknowledge the responsibility of developed countries for the harms resulting from their higher emissions in the past. From an ethical viewpoint, it neglects the fact that per capita emissions in many developing countries are remarkably lower than those in the developed world.¹⁴ In practice, emission cuts in developing countries would have an impact on energy costs and consumption distribution, further reducing per capita income in those countries beyond levels that are already low.¹⁵ Imposing such a level of reduction in emissions would also result in prohibitive costs for developing countries attempting to fulfill their need for substantial expansion in energy, transportation, agricultural production, and urbanization.¹⁶

12 See, for example, Arvind P. Ravikumar, “Carbon Border Taxes Are Unjust,” *MIT Technology Review*, July 27, 2020 (www.technologyreview.com/2020/07/27/1005641/carbon-border-taxes-eu-climate-change-opinion); and Valentina Durán Medina and Rodrigo Polanco Lazo, “A Legal View on Border Tax Adjustments and Climate Change: A Latin American Perspective” (2011) 11:3 *Sustainable Development Law & Policy* 29-34 and 43-45, at 31. Studies on the distribution of a BCA’s impact on the developing world are not conclusive. Some have suggested that it would impose a greater burden on emerging economies and might potentially benefit some low-income countries owing to the trade diversion effect; see Matthias Weitzel, Michael Hübler, and Sonja Peterson, “Fair, Optimal or Detrimental? Environmental vs. Strategic Use of Border Carbon Adjustment” (2012) 34:2 *Energy Economics* S198-207. Others have argued that lower-income countries would be significantly affected; see, for example, Clara Brandi, *International Trade and Climate Change: Border Adjustment Measures and Developing Countries*, German Development Institute Paper no. 11/2010 (Bonn, Germany: German Development Institute, 2010).

13 See, for example, Aaron Cosbey, *Border Carbon Adjustment* (Winnipeg: International Institute for Sustainable Development, 2008), at 1: “A final justification for a BCA is that it might act as an effective threat to encourage developing countries to take on hard commitments in the climate change negotiations—in the manner of trade sanctions, or threats of trade sanctions.”

14 World Bank, “CO₂ Emissions (Metric Tons per Capita)” (2020) World Development Indicators (<https://data.worldbank.org/indicator/EN.ATM.CO2E.PC>).

15 *Ibid.*, at 10.

16 Mattoo and Subramanian, *supra* note 10, at 8.

The UNFCCC Principle of Common but Differentiated Responsibilities

The concern to achieve a reduction in global emissions without hindering development in less affluent countries is articulated in the CBDR principle. Some have traced the earliest expressions of the principle to the 1972 Stockholm declaration, which stated that standards valid for developed countries were inappropriate for developing countries owing to unwarranted social costs.¹⁷ The more recent form of the CBDR principle was most clearly articulated in the 1992 Rio declaration on environment and development.¹⁸ The principle was then expressed in treaty form in the UNFCCC.¹⁹ Several subsequent agreements have included reference to CBDR.²⁰

CBDR has two normative components. “Common responsibilities” suggests that the risks associated with climate change affect every person and nation in the world.²¹ As a result, all countries share the responsibility to “cooperate in good faith and in a spirit of partnership.”²² “Differentiated responsibilities” indicates that shared responsibility must be differentiated between countries on the basis of two factors: historical

17 United Nations, Declaration of the United Nations Conference on the Human Environment, 1972. See Friedrich Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge, UK: Cambridge University Press, 2009), at 182-83.

18 Principle 7 of the 1992 Rio declaration reads, “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In 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.” United Nations, General Assembly, “Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992),” document no. A/CONF.151/26 (Vol. I), August 12, 1992 (herein referred to as “the 1992 Rio declaration”).

19 See the UNFCCC, *supra* note 8, particularly articles 3(1) and (2), which read as follows:

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

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

20 See, for example, United Nations, General Assembly, “Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment: Report of the Secretary-General,” document no. A/73/419, November 30, 2018, at 12-13.

21 It has been noted that the term has roots in international-law expressions such as “common heritage” and “common concern of mankind.” See Christopher Stone, “Common but Differentiated Responsibilities in International Law” (2004) 98:2 *American Journal of International Law* 276-301, at 276, note 2.

22 The expression appears in principle 27 of the 1992 Rio declaration, *supra* note 18.

responsibility for current environmental degradation, and capability to address the problem.²³ Both factors require developed countries to “take the lead in combating climate change and the adverse effects thereof.”²⁴ While commonality of obligations requires the participation of all countries, it is the differentiation within such obligations that makes CBDR politically relevant.²⁵

A BCA that applied uniformly to all countries (which I will call “a uniform BCA”) would violate CBDR, notably because its implementation would compel exporting countries to adopt similar carbon policies to the ones in place in the implementing country. A uniform BCA would unilaterally impose the implementing country’s carbon policy on developing countries’ exporters and thus equalize emission reduction commitments across the world, pushing for equal rather than differentiated responsibilities. To comply with CBDR, a BCA has to apply differently between developed and developing countries, either by setting a lower rate or price for the latter or by fully exempting them. (I will call this “a differential BCA.”) The details of BCA design will be discussed in a later section of this article, but one legal problem that merits discussion at this point is the coexistence of CBDR with other international-law rules. CBDR’s requirement of a differential BCA may conflict with WTO law, particularly with the MFN principle. As will become clear below, the normative conflict is between two principles (CBDR and MFN) and between two treaties (the UNFCCC and the General Agreement on Tariffs and Trade [GATT]).²⁶ This issue is discussed in the next section.²⁷

The WTO’s Most-Favoured-Nation Principle

The main problem with a differential BCA is that, *prima facie*, it seems to conflict with the WTO’s MFN principle. This principle is often viewed as the cornerstone of the WTO multilateral trading system.²⁸ It states that each WTO party should grant to

23 See Derek Bell, “Global Climate Justice, Historic Emissions, and Excusable Ignorance” (2011) 94:3 *Monist* 391-411, at 391, pointing out that the differentiation component of CBDR is based on both historical emissions and ability to pay.

24 The expression appears in article 3(1) of the UNFCCC; see *supra* note 19.

25 Duncan French, “Developing States and International Environmental Law: The Importance of Differentiated Responsibilities” (2000) 49:1 *International & Comparative Law Quarterly* 35-60, at 46.

26 General Agreement on Tariffs and Trade, 1947 (www.wto.org/english/docs_e/legal_e/gatt47.pdf). The MFN principle is established by article I of the GATT; see *infra* note 29.

27 A broader discussion relating to the legality of BCAs, either uniform or differential, under WTO law is concerned with the question of whether they would conform with the GATT’s principle of national treatment, which prohibits a country from treating domestically produced goods more favourably than foreign-produced goods. Analysis of this question is beyond the scope of this article.

28 Warren F. Schwartz and Alan O. Sykes, “Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System” (1996) 16:1 *International Review of Law and Economics* 27-51; and Kyle Bagwell and Robert W. Staiger, *The Economics of the World Trading System* (Cambridge, MA: MIT Press, 2004), at 71.

every other WTO party the most favourable treatment granted to any country with respect to imports and exports.²⁹ As a corollary, it calls for equal treatment of foreign countries.

MFN's origin can be traced back to the 12th century.³⁰ Its primary economic goal was to minimize market distortion worldwide. By making trade restrictions uniform across the world, MFN allocates the production of goods according to the economic principle of comparative advantage. Another purpose of MFN is to prevent exploitive behaviour based on information asymmetry and to eliminate barriers that could prevent the conclusion of mutually beneficial agreements.³¹ From a political viewpoint, MFN should prevent the emergence of specific discriminatory groups and, as a consequence, reduce tensions among different countries.³²

Two exceptions to MFN established in WTO law may potentially be seen as providing the policy space to accommodate CBDR and, consequently, a differential BCA. The first exception is the set of WTO-law provisions that allow developed countries to treat developing countries more favourably than other WTO members. These are commonly called "special and differential treatment" provisions (SDTs), and they are generally established in part IV of the GATT and in what is commonly known as "the enabling clause."³³

Although SDTs share similarities with CBDR's scope of providing differential treatment to developing countries, there is general agreement that SDTs are not so broad as to accommodate a differential BCA, given their specific requirements.³⁴ Part IV

29 Article I(1) of the GATT, *supra* note 26, reads, "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

30 John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1989), at 158.

31 See Schwartz and Sykes, *supra* note 28, at 41.

32 *Ibid.*

33 The enabling clause is the common reference to the 1979 GATT decision that provides the legal basis for the generalized system of preferences (GSP). The GSP allows developed countries to offer non-reciprocal preferential treatment to imports originating from developing countries. See World Trade Organization, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, WTO document no. L/4903, November 28, 1979 (www.wto.org/english/docs_e/legal_e/enabling_e.pdf) (herein referred to as "the enabling clause").

34 See Sarah Davidson Ladly, "Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities" (2012) 12:1 *International Environmental*

of the GATT includes more favourable non-tariff measures applicable to developing countries, but these do not allow for differential import duties. The enabling clause does allow for differential tariff measures, but it does not easily accommodate a differential BCA because of specific requirements under the UN's generalized system of preferences.³⁵ Further, SDTs have the more specific purpose of promoting international trade and therefore are considered incompatible with CBDR's purpose and normative justification.³⁶

The second exception to MFN is established in article XX of the GATT and has been at the centre of discussions around the normative conflict between MFN and CBDR. The next section will focus on this second exception and analyze whether it can be interpreted so as to reconcile MFN and CBDR.

RESOLVING THE MFN-CBDR CONFLICT

Can Article XX of the GATT Accommodate CBDR?

Many commentators have expressed concern about the MFN-CBDR conflict.³⁷ These two principles conflict not only in the context of the design of a BCA but also more broadly as principles that primarily pursue two apparently contradictory goals. Whereas CBDR aims to differentiate countries on the basis of equity and historical responsibility, MFN aims to treat every country equally regardless of any inherent or contextual difference. The solution often proposed to address this contradiction is to interpret GATT rules so as to accommodate MFN's coexistence with CBDR without conflict.

Agreements: Politics, Law and Economics 63-84; and Alice Pirlot, *Environmental Border Tax Adjustments and International Trade Law: Fostering Environmental Protection* (Cheltenham, UK: Edward Elgar, 2017), at 271.

35 The enabling clause, *supra* note 33, at paragraph 2(a) refers to “[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.”

36 See, for example, Pananya Larbprasertporn, “The Interaction Between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments” (2014) 6:1 *Goettingen Journal of International Law* 145-70, at 153.

37 See, for example, Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law, Prepared by the Nicholas Institute for Environmental Policy Solutions, Duke University*, NI Working Paper no. WP 07-02 (Durham, NC: Duke University, Nicholas Institute for Environmental Policy Solutions, 2007); Fabio Morosini, “Trade and Climate Change: Unveiling the Principle of Common but Differentiated Responsibilities from the WTO Agreements” (2010) 42 *George Washington International Law Review* 713-48, at 724; Michael Hertel, “Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities” (2011) 45:3 *Journal of World Trade* 653-78; Ladly, *supra* note 34, at 79; Patrick Low, Gabrielle Marceau, and Julia Reinaud, “The Interface Between the Trade and Climate Change Regimes: Scoping the Issues” (2012) 46:3 *Journal of World Trade* 485-544, at 515; Larbprasertporn, *supra* note 36, at 165; and Pirlot, *supra* note 34, at 168-72.

Many have argued that article XX of the GATT allows for a more nuanced understanding of the equal treatment required by MFN. The primary role of article XX, entitled “General Exceptions,” is to determine a list of circumstances in which WTO members are allowed not to adhere to the GATT’s general clauses, such as when necessary to protect human, animal, or plant life; to protect national treasures; or to conserve exhaustible natural resources. In its introductory clause, article XX states that these exceptions to the general agreement are allowed as long as they do not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”³⁸ It has often been argued that article XX offers a more refined version of the MFN’s requirement for non-discrimination by implicitly accepting “justifiable” discrimination among countries not experiencing “the same conditions,” which could be read as making room for CBDR by allowing differentiation between developed and developing countries.³⁹ Proponents of this interpretation often refer to the WTO Appellate Body’s decision in *United States—Shrimp* as supporting the view that article XX would provide accommodation for CBDR.⁴⁰

This interpretation would imply a reinterpretation of MFN. Instead of understanding MFN as requiring absolute uniformity of treatment among countries, the refined, more flexible version would still require uniformity but allow differentiation according to CBDR. The problem with this interpretation is that it requires a significantly intricate legal exercise. It uses *a contrario* reasoning to draw an implicit conclusion from the interpretation of an exception phrase (which requires that a measure does not constitute unjustifiable discrimination) of an exception clause (which allows listed exceptions to the general agreement).⁴¹ While the above interpretation of article XX may prove successful before WTO adjudicative bodies, there is a chance that it might

38 The chapeau of article XX (General Exceptions) reads, “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.” See *supra* note 26.

39 See, for example, Pauwelyn, *supra* note 37; Morosini, *supra* note 37; Ladly, *supra* note 34; Low et al., *supra* note 37; Larbprasertporn, *supra* note 36; and Jennifer A. Hillman, “Changing Climate for Carbon Taxes: Who’s Afraid of the WTO?” (Washington, DC: German Marshall Fund of the United States, 2013), at 11-12. See also Hertel, *supra* note 37.

40 The decision reads, “[I]t is not acceptable . . . for one WTO Member . . . to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.” See WTO Report of the Appellate Body: *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, October 12, 1998, at paragraph 164 (herein referred to as “*United States—Shrimp*”).

41 The use of *a contrario* reasoning in legal interpretation is itself highly contested. Taking conclusions from exceptions requires assuming the intentional silence of the legislator, and thus makes this type of argument intrinsically weak. See Henrike Jansen, “E Contrario Reasoning: The Dilemma of the Silent Legislator” (2005) 19:4 *Argumentation* 485-96.

not. Supporters of this interpretation acknowledge its limited prospects.⁴² Others take the opposite view and argue that the understanding of the Appellate Body in *United States—Shrimp* with respect to what is considered to be “different conditions” is not comparable to “different levels of economic development.”⁴³ According to this view, an interpretation of article XX that would accommodate CBDR (and a differential BCA) is unlikely to be adopted by WTO adjudicative bodies.

The literature so far has often failed to analyze what results from concluding that article XX of the GATT does not provide the space to accommodate CBDR. Two alternative consequences seem to have been entertained:

1. We would have to accept the existence of the MFN-CBDR conflict so that countries would have to decide to adhere to one of them in violation of the other.⁴⁴
2. There is no space for CBDR to produce any legal consequence regarding the implementation of a BCA.⁴⁵

The basis for conclusions 1 and 2 is often not explicitly discussed, but both conclusions seem problematic, for different reasons. Conclusion 1 leaves the conflict unresolved. It suggests that there are no legal mechanisms available in international law to resolve a conflict between two legal principles. Further, it suggests that governments would persist, subject to an insoluble dilemma that leaves them with no choice but to violate one of these principles. Conclusion 2 seems to take a limited view of the MFN-CBDR conflict and assumes that it is up to CBDR to conform to the WTO regime and not to MFN to conform to the climate change regime. It takes for granted that a legal norm established in a multilateral environmental agreement (the

42 See, for example, Ladly, *supra* note 34, at 79: “While it is possible that a liberal interpretation of Article XX could support a BCA structured in a manner consistent with the principle of CBDR, this is far from a certain outcome.”

43 See *supra* note 40, and, for example, Larbprasertporn, *supra* note 36, at 167-69.

44 This view seems to have been implicitly accepted, for example, in Ladly, *supra* note 34, at 79, pointing out that a WTO panel adjudicating a dispute relating to a BCA should not fail to recognize CBDR as an international obligation arising from the UNFCCC. See also Pirlot, *supra* note 34, at 271: “Second, in the case where WTO law is interpreted more strictly, as generally prohibiting differentiation between developed and developing countries, countries wishing to adopt environmental BTAs [border tax adjustments] would face difficulties in complying both with the WTO law non-discrimination principle as well as with the CBDR principle.”

45 This view seems to have been endorsed, for example, in Larbprasertporn, *supra* note 36, at 162-63: “Although the C[B]DR principle is to be taken into account when interpreting WTO provisions, it cannot alter the clear meaning of Article I GATT [which establishes the MFN principle] and oblige developed countries to differentiate between exporting countries. Consequently, in this case, the C[B]DR principle cannot override the MFN and prevent the implementation of the BTAs [border tax adjustments] upon developing countries.”

UNFCCC) should defer to a legal norm established by a multilateral trade agreement (the GATT) in a case where they conflict. The entire enterprise of attempting to demonstrate that WTO law would have room to accommodate CBDR seems to assume that the GATT has some form of priority over the UNFCCC, and thus fails to acknowledge that there is no absolute hierarchy or priority order between the UNFCCC and the GATT.⁴⁶

If one concludes that article XX is unable to resolve the MFN-CBDR conflict, a more plausible representation of the legal consequence is that

3. the persisting normative conflict warrants further legal analysis to reach a final resolution.

Legal analysis of apparently conflicting norms generally requires two main steps. The first step (which I will call “conflict avoidance”) is to analyze whether the apparently conflicting norms can be interpreted so as to avoid a real conflict. (The attempt to interpret article XX of the GATT to accommodate CBDR is an example of this enterprise.)⁴⁷ If step one is successful, the legal analysis ends by concluding that no real normative conflict exists. If conflict avoidance is not achieved, the normative conflict is established, and the subsequent step (which I will call “conflict resolution”) consists of using one of the recognized methods in legal jurisprudence to determine which of the two norms should prevail and which should defer. The main goal of conflict resolution is to choose which of the conflicting norms has priority in the specific case under consideration.⁴⁸ The discussion that follows will focus on conflict resolution.

46 For a broader analysis of the legal relationship between WTO law and multilateral environmental agreements, see Richard G. Tarasofsky, “Ensuring Compatibility Between Multilateral Environmental Agreements and GATT/WTO” (1997) 7:1 *Yearbook of International Environmental Law* 52-74; Ryan L. Winter, “Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?” (2000) 11:1 *Colorado Journal of International Environmental Law and Policy* 223-56; Shawkat Alam, “Intersections Between Climate Change and the World Trade Organization,” in Veerle Heyvaert and Leslie-Anne Duvic-Paoli, eds., *Research Handbook on Transnational Environmental Law* (Cheltenham, UK: Edward Elgar, 2020), 352-67; and Indira Carr, “International Trade Rules and Environmental Effects,” in Erika Techera, Jade Lindley, Karen N. Scott, and Anastasia Telesetsky, eds., *Routledge Handbook of International Environmental Law*, 2d ed. (London, UK: Routledge, 2020), 372-86.

47 See Douglas Walton, Fabrizio Macagno, and Giovanni Sartor, *Statutory Interpretation: Pragmatics and Argumentation* (Cambridge, UK: Cambridge University Press, 2021), at 249-50, pointing out that the choice, among possible interpretations, of an interpretation of a norm that avoids its conflict with another is grounded on the principle that the law provides a coherent system regulating community life without antinomies.

48 These two steps are also commonly adopted in resolving domestic normative conflicts. See, for example, Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007), at 305-7 and 309-13.

Conventional Rules for Resolving Conflicts of Norms

The methods to resolve conflicts of norms at the international level are not as well established as they are in domestic jurisprudence, mostly because of the fragmented nature of international law.⁴⁹ Treaties are not a product of the will of a single legislative body but rather constitute agreements between multiple parties that often overlap but rarely fully coincide. International law lacks a general constitution to determine treaty-making powers and limits. Furthermore, there is no global authority in charge of interpreting international norms and resolving conflicts of norms or treaties. Despite the theoretical sophistication of scholarly discussions on the topic, there is limited consensus as to what methods are accepted as adequate to resolve these conflicts.⁵⁰

The Hierarchical Rule

The hierarchical rule, also known as *lex superior*, is one of the main rules for resolving conflicts between two legal norms. In international law, it determines that a norm established by a treaty of higher rank prevails over another norm established by a treaty of lower rank regardless of their content or the time at which each treaty was concluded or entered into force. The applicability of this rule in international law is limited because there is normally no hierarchy between treaties. In international law, hierarchical superiority is generally attributed to *jus cogens* or peremptory norms, which are considered to bind all states, including objecting states, and to override any other norms.⁵¹ Although there is no consensus on what norms constitute *jus cogens*,

49 See Martti Koskeniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15:3 *Leiden Journal of International Law* 553-79; Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law" (2003) 25:4 *Michigan Journal of International Law* 849-63; and Eyal Benvenisti and George W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) 60:2 *Stanford Law Review* 595-632.

50 See, for example, Alfred von Verdross, "Forbidden Treaties in International Law" (1937) 31:4 *American Journal of International Law* 571-77; Dinah Shelton, "Normative Hierarchy in International Law" (2006) 100:2 *American Journal of International Law* 291-323; W. Czapliński and G. Danilenko, "Conflicts of Norms in International Law" (1990) 21 *Netherlands Yearbook of International Law* 3-42; Jan B. Mus, "Conflicts Between Treaties in International Law" (1998) 45:2 *Netherlands International Law Review* 208-32; Christopher Borgen, "Resolving Treaty Conflicts" (2005) 37:3 *George Washington International Law Review* 573-648; Gabrielle Marceau, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties" (2001) 35:6 *Journal of World Trade* 1081-1131; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, UK: Cambridge University Press, 2003); and C. Wilfred Jenks, "The Conflict of Law-Making Treaties" (1953) 30 *British Year Book of International Law* 401-53.

51 See article 53 of the 1969 Vienna convention, entitled "Treaties conflicting with a peremptory norm of general international law ('jus cogens')," which states, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm

only a few norms have been accepted and recognized by the international community as *jus cogens*, given its broad authority and reach (such as human rights,⁵² the right to self-determination,⁵³ the right to development,⁵⁴ free trade,⁵⁵ and territorial sovereignty).⁵⁶ Another case of hierarchical priority is the self-proclaimed superiority of the UN charter over any other international agreement.⁵⁷

There is no reason to consider giving hierarchical primacy to either the UNFCCC or the GATT. While they represent relevant agreements within their respective regimes, they do not constitute peremptory norms. In this regard, the WTO Appellate Body has often pointed out that GATT rules must not be read in isolation from other international-law norms, implying that the former are not to take precedence over the latter.⁵⁸

The Specialty Rule

The specialty rule, also known as *lex specialis*, determines that in a conflict between two norms in which one is more general and the other more specific, the latter should prevail. The reasoning behind this rule is that the specific norm is better able to take account of particular circumstances. The specific norm is understood as an implied exception to the more general norm.⁵⁹

from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969, UN doc. A/Conf. 39/27 (herein referred to as “the 1969 Vienna convention”). See also Evan J. Criddle and Evan Fox-Decent, “A Fiduciary Theory of *Jus Cogens*” (2009) 34 *Yale Journal of International Law* 331-87.

52 Verdross, *supra* note 50.

53 Shelton, *supra* note 50.

54 Shashank Upadhye, “The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law” (2000) 8:1 *Cardozo Journal of International and Comparative Law* 61-102.

55 Michael H. Allen, “Globalization and Peremptory Norms in International Law: From Westphalian to Global Constitutionalism?” (2004) 41:3 *International Politics* 341-53.

56 Patricia Y. Reyhan, “Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?” (1996) 60:3 *Albany Law Review* 771-99.

57 Article 103 of the UN charter states, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Despite controversies about the precise implications of article 103, there is general agreement about its priority over other international treaties. See Czaplinski and Danilenko, *supra* note 50, at 14-15; Mus, *supra* note 50, at 216-17; and Borgen, *supra* note 50.

58 See, for example, WTO Report of the Appellate Body: United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, April 29, 1996 (herein referred to as “US—Gasoline”), at paragraph 16.

59 The specialty rule is widely accepted in international law. See United Nations, General Assembly, “Fragmentation of International Law: Difficulties Arising from the Diversification

While the specialty rule is a generally accepted maxim for resolving conflicts of the general-specific type, it is not applicable in conflicts of the general-general and specific-specific types. Although the scope of MFN and of CBDR may overlap in some instances, such as the case of a BCA, one is not a special case in relation to the other. Therefore, the specialty rule does not apply.

The Chronological Rule

The third conflict resolution rule deserving consideration is the chronological rule, also known as *lex posterior*, according to which the treaty that is later in time should prevail when in conflict with another treaty. Among the conventional rules for resolving conflicts of norms, the chronological rule is the only one formally codified in the 1969 Vienna convention.⁶⁰ Articles 30(1) and (3) of the Vienna convention state that when two treaties relating to the same subject matter and signed by the same parties conflict with one another, the treaty that is earlier in time should defer to the one that is later.⁶¹

If applied to the MFN-CBDR conflict, the chronological rule would give priority to CBDR, stated in the 1992 UNFCCC, over MFN, stated in the 1947 GATT. However, as noted above, article 30 of the Vienna convention imposes two conditions for applying the chronological rule:

1. the parties of the two conflicting treaties coincide, and
2. the two treaties relate to the same subject matter.

Condition 1 articulates the self-evident notion that if a country is not party to a treaty, that treaty should not hold it obliged. Article 30(4) of the Vienna convention introduces desirable flexibility by stating that even if the parties to the two conflicting treaties are not entirely the same, the chronological rule still applies to the parties that overlap—that is, to the countries that are parties to both treaties.

and Expansion of International Law, Report of the Study Group of the International Law Commission,” document no. A/CN.4/L.682, April 13, 2006, at 36-37. See also Marceau, *supra* note 50, at 1092-93: “While this principle does not appear in the Vienna Convention, it has been recognized and applied in a number of cases by the ICJ [International Court of Justice] and is recognized by the doctrine.”

60 Generally called “the treaty on treaties,” the 1969 Vienna convention, *supra* note 51, establishes general rules for drafting, amending, operating, and interpreting treaties. Articles 30 to 33 of the convention provide a set of rules for interpreting and solving conflicts between treaties.

61 Articles 30(1) and (3) of the 1969 Vienna convention read:

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of State parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. . . .

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Because there is a significant overlap between UNFCCC parties and WTO members, condition 1 would generally not prevent the application of the chronological rule to the MFN-CBDR conflict.

Condition 2 establishes that the chronological rule applies only in conflicts between two treaties relating to “the same subject matter.” Determining when two treaties relate to the same subject matter has proved to be problematic.⁶² At the time of its introduction in 1969, article 30(3) was not regarded as a legal innovation. Rather, the chronological rule was perceived to be merely a codification of an existing rule of customary international law.⁶³ The specific requirement of “the same subject matter” is reported to have been inserted during the drafting of article 30 by request of Ian Sinclair, the British delegate to the Vienna conference in 1969, to prevent the application of the chronological rule in a conflict between a general and a specific rule, in which case the specialty rule should take priority.⁶⁴

There are two main interpretations for “the same subject matter” requirement in article 30. A stricter interpretation requires that both treaties relate to the same area of regulation and thus pertain to the same legal regime.⁶⁵ Following this interpretation, a treaty relating to trade law and a treaty relating to environmental law would not relate to the same subject matter. Therefore, a conflict between norms of the GATT and the UNFCCC would not be within the scope of article 30, and the chronological rule would not be applicable to resolve that conflict. A broader interpretation acknowledges that treaties generally relating to different regimes may have specific provisions addressing a common issue. According to this view, to establish whether two norms have “the same subject matter,” one should look into the interests involved in the specific provisions in conflict instead of considering the scope of the legal instruments in their entirety.⁶⁶ Following this interpretation, the MFN-CBDR conflict would still not be under the scope of article 30 because MFN and CBDR address different policy concerns and interests.

One could further argue that although article 30 does not apply to the MFN-CBDR conflict, the chronological rule could still apply because it is a well-established rule for resolving conflicts between norms and is generally accepted in the international-law literature.⁶⁷ Although this is true, the same-subject-matter limitation is not without

62 See Shelton, *supra* note 50, at 293, note 16.

63 Mus, *supra* note 50.

64 Ana Gemma López Martín, “The Application of Successive Treaties Relating the Same Subject-Matter: Analysis of Article 30 of the Vienna Convention on Law of Treaties” (2017) 10 *Anuario Colombiano de Derecho Internacional* 51-84, at 61. See also Czaplinski and Danilenko, *supra* note 50, at 20.

65 See, for example, Borgen, *supra* note 50, at 580; and Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed. (Manchester, UK: Manchester University Press, 1984), at 98.

66 See, for example, “Fragmentation of International Law,” *supra* note 59, at 129-30.

67 The chronological rule is generally accepted in the literature as a corollary of the principle of contractual freedom of states. See, for example, Pauwelyn, *supra* note 50, at 327-28: “In most instances, the contractual freedom of states will be decisive. In other words, the latest expression

reason. Instead, it derives from the normative foundation of the chronological rule. The chronological rule is premised on the idea that the legislator is aware of earlier decisions made on a given subject matter and has opted to derogate them. Suppose that treaty A regulates a specific subject matter and later the same parties sign treaty B to establish new rules on the same subject matter. The application of the chronological rule to resolve potential conflicts between these two treaties builds on the premise that the parties that agreed to the second treaty were (or should have been) aware that when signing treaty B, they were derogating any incompatible rule agreed to in treaty A. They were, after all, regulating the same subject matter and would be presumed to have expressed the intent to change what had been previously agreed to in treaty A.

A far-removed scenario exists when different (although significantly overlapping) parties sign two treaties on unrelated legal regimes, such as environmental law and trade law. When the UNFCCC was signed in 1992, one could not easily make the case that the parties were aware of all potential conflicts with the GATT signed in 1947 and were deliberately or presumably agreeing to derogate any GATT rule that might be incompatible with the UNFCCC. Although the chronological rule profusely applies in the interpretation of domestic legislation, the fragmented nature of international law reduces the ability of governments to foresee any potential future conflicts. That treaties are not products of the same source of law (that is, a single legislative body), but rather agreements made by different countries in a different context, limits the scope of the chronological rule in international law.

Moreover, understanding that the chronological rule should apply in this case could imply that the UNFCCC has overall priority over the GATT and, as a consequence, that one regime (environmental law) has absolute priority over the other (trade law) on a merely chronological basis. One further problem is that both MFN and CBDR have been reaffirmed in several later multilateral and bilateral agreements. Determining which date to consider for the purposes of the chronological rule would be a fairly arbitrary exercise. It would likely require the interpreter to reconsider which principle prevails every time a new agreement restates one of them.

The Purposive Approach

The discussion above shows that the three main rules for resolving conflicts between norms are unable to resolve the MFN-CBDR conflict satisfactorily. As relevant and valuable as they are for resolving conflicts of norms, the hierarchical, specialty, and chronological rules have often proved insufficient to provide a solution in all cases.⁶⁸ In international law, their insufficiency is more frequent owing to the fragmented nature of international law. It is difficult to presume that the parties concluding

of the states' intentions will count and prevail. This latest expression of intention may, for example, be found in explicit conflict clauses set out in a treaty provision or be activated as a result of the *lex posterior* [chronological] principle.”

68 Norberto Bobbio, *Teoría General del Derecho* (Bogotá: Temis, 2002), at 196-205.

a treaty are cognizant of potential conflicts with other treaties signed by only partially overlapping parties, especially treaties relating to different regulatory areas.⁶⁹ In such a case, the interpreter needs to find alternative criteria to address the unresolved conflict, an exercise that generally requires a more nuanced approach.⁷⁰

One promising alternative is to apply what has been called “the purposive approach.”⁷¹ It borrows from the traditional purposive interpretation method, which generally requires interpreters to read the text so as to satisfy its purpose, including both the purpose of the particular provision to be interpreted and the purpose of the whole document of which it is a part.⁷² Purposive interpretation entails identifying the purpose or policy that the text embodies and then determining the result that is most consonant with that purpose or policy.⁷³ Similarly, the purposive approach to resolving treaty conflicts aims to interpret the conflicting treaties and norms so as to avoid frustrating the treaties’ purposes. It requires analyzing when one treaty frustrates the purpose of another and resolving the conflict so as to best preserve the purposes of the conflicting norms.⁷⁴

Applying the purposive approach to the MFN-CBDR conflict would warrant reconciling the two principles so as to allow them both to optimally fulfill their individual purposes. More concretely, we can consider two alternative design options: a differential BCA (which applies differentially according to countries’ respective levels of development) and a uniform BCA (which applies uniformly to all countries). A differential BCA would favour CBDR whereas a uniform BCA would favour MFN. To apply the purposive approach, we could ask

1. would a differential BCA (which builds on CBDR) frustrate the purposes of MFN, and
2. would a uniform BCA (which builds on MFN) frustrate the purposes of CBDR?

By analyzing these two questions, we will be more aptly prepared to determine which principle should apply to a BCA so as to optimally fulfill the purposes of both principles.

69 See “Fragmentation of International Law,” supra note 59, at 130: “For example, the argument from *lex posterior* [the chronological rule] or *lex specialis* [the specialty rule] seems clearly more powerful between treaties within a regime than between treaties in different regimes. In the former case, the legislative analogy seems less improper than in the case of two treaties concluded with no conscious sense that they are part of the ‘same project.’”

70 See Jenks, supra note 50, at 407, pointing out that as useful as conventional rules are for resolving conflicts of norms in international law, they have no absolute validity, and an interpreter will generally have to reconcile different rules and principles in light of the circumstances of the particular case.

71 See Borgen, supra note 50.

72 Aharon Barak, *Purposive Interpretation in Law*, trans. Sari Bashi (Princeton, NJ: Princeton University Press, 2005), at 86-88; and Sullivan, supra note 48, at 194-95.

73 William N. Eskridge Jr., “The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell” (1993) 61:6 *George Washington Law Review* 1731-53, at 1743.

74 Borgen, supra note 50, at 633.

A differential BCA would likely not defeat MFN's principal purpose. The principle's central role in the world trading system is to reduce power asymmetries and enhance bargaining efficiency in the context of incomplete information.⁷⁵ It reduces power asymmetries by constraining bilateral opportunism in the negotiation of tariff concessions. In the absence of MFN, for example, two countries with sizable markets could negotiate a bilateral agreement to raise common duties for third parties and thus effectively exercise monopsony power.⁷⁶ MFN enhances bargaining efficiency by, for example, preventing a country from making substantial concessions to another in the first rounds of negotiation owing to a concern that the other country may subsequently make more favourable concessions to a third party. In the absence of MFN, a country would find it more beneficial to wait until other parties have negotiated and then concede on the basis of these previous negotiations. Generalization of this strategic behaviour would lead to countries withholding concessions, thus preventing the conclusion of a mutually beneficial agreement.⁷⁷

Since MFN's primary purpose is to avoid favouritism or unjustified discrimination, a differential BCA will not frustrate MFN's purposes if differentiation is based on transparent and justified criteria. If a differential BCA builds on CBDR so as to distinguish countries on the basis of CBDR's normative foundations, it should not frustrate MFN's main purposes. Further, MFN's scope has been steadily mitigated owing to the proliferation of preferential trade agreements, which are negotiated on a bilateral, regional, or cross-regional basis among different groups of WTO members. Article XXIV of the GATT accepts these agreements as exceptions to MFN, allowing members of the customs unions or free-trade areas to treat each other more favourably than other WTO members. The existence of more than 300 preferential trade agreements today does not seem to prevent MFN from fulfilling its central role.⁷⁸ Similarly, although the GATT does not directly include consideration for CBDR, several articles of the GATT (particularly articles XVII, XVIII, XXXVI, XXXVII, and XXXVIII) except MFN to accommodate special and differential treatment, in order to foster development in developing countries. Given MFN's flexibility to accept several justifiable exceptions, a differential BCA would not significantly threaten MFN's operation and effectiveness.

Conversely, a uniform BCA would evidently defeat CBDR's main purpose. A uniform BCA would penalize developing countries with less stringent carbon policies and effectively compel them to adopt carbon policies similar to those of the country implementing the BCA, thus frustrating CBDR's purpose of balancing global emission reductions with support for developing countries' development needs. The unilateral

75 Bagwell and Staiger, *supra* note 28, at 5.

76 Michael J. Trebilcock and Joel Trachtman, *Advanced Introduction to International Trade Law*, 2d ed. (Cheltenham, UK: Edward Elgar, 2020), at 42.

77 See Schwartz and Sykes, *supra* note 28, at 41.

78 See Fred Trost, "Reconciling Regional Trade Agreements with the Most Favoured Nation Principle in WTO-GATT" (2008) *Macquarie Journal of Business Law* 43-72.

nature of BCAs also seems to contradict one of the main purposes of CBDR, which is to achieve cooperation “in good faith and in a spirit of partnership,” as expressed in principle 27 of the 1992 Rio declaration.⁷⁹ It therefore seems to be beyond question that a purposive approach assigns priority to CBDR and, in principle, to a differential BCA.⁸⁰

An alternative approach that will not be analyzed at length here is proportionality, which is commonly used to resolve conflicts between norms, particularly between principles.⁸¹ Applying the multistep proportionality test would entail a similar, although less straightforward, exercise. The final and most important step of the test (proportionality *stricto sensu*) requires weighing the benefits and harms of adopting a given policy measure. Thus, the proportionality approach would take into consideration the benefits to CBDR of adopting a differential BCA against the harms that such differentiation would impose on MFN. Accordingly, it would lead to results similar to what the purposive approach would achieve, namely, the priority of CBDR over MFN.⁸²

PRACTICAL IMPLICATIONS OF CBDR

Enforceability and Binding Force

One aspect of CBDR that this article has not addressed so far is the practical implications of its normative priority. While I have concluded that CBDR trumps MFN in theory, two legal aspects could potentially undermine its practical consequences: the enforceability and the binding force of the principle. The following will address these points.

Enforceability

One might agree with the normative priority of CBDR but argue that the principle is not enforceable in practice. While a violation of WTO law generally allows members to bring a dispute before the WTO Dispute Settlement Body, no equivalent adjudicatory body exists to enforce the UNFCCC. As a result, although CBDR overrides MFN in

79 See the 1992 Rio declaration, *supra* note 18.

80 The discussion so far has assumed that a differential BCA is the only policy available to governments to implement a BCA that complies with CBDR. In a later section of this article, I will further compare a differential BCA with other alternative policy design options that could potentially incorporate CBDR (see “Applying CBDR in BCA Design”).

81 The proportionality test originated in German administrative courts and rapidly spread to jurisdictions across the world, including Europe, Canada, New Zealand, South Africa, Israel, and Latin America, and has been applied in treaty-based regimes, agreements, and organizations, such as the European Union, the European Convention on Human Rights, and the WTO. See Moshe Cohen-Eliya and Iddo Porat, “American Balancing and German Proportionality: The Historical Origins” (2010) 8:2 *International Journal of Constitutional Law* 263-86.

82 For a broader analysis of proportionality and its role in rights adjudication worldwide, see Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47:1 *Columbia Journal of Transnational Law* 72-164.

theory, a developing country would in practice find no forum to challenge a measure that violated CBDR. Therefore, it could be argued that the practical question to ask on this matter is not which principle has normative priority, but rather whether WTO adjudicative bodies would find CBDR to be consistent with WTO rules (and thus find a differential BCA to be WTO compliant) or inconsistent (and thus find a differential BCA to be WTO non-compliant). For example, judging whether a BCA is CBDR compliant would not be under the jurisdiction of WTO adjudicative bodies, whose mandate is limited to analyzing whether WTO law has been violated.⁸³ Accordingly, while a uniform BCA would violate CBDR, a developing country would not be able to challenge it before WTO adjudicative bodies.

Although this view may seem reasonable at first glance, it fails to consider all of the legal implications of CBDR's normative priority over MFN. The absence of specific judicial bodies to settle disputes involving environmental matters does not leave CBDR inconsequential. As noted above, the WTO Appellate Body has often clarified that GATT rules should not be read in isolation from international law.⁸⁴ This implies that WTO adjudicative bodies should recognize circumstances in which non-WTO law trumps WTO law and refrain from applying the latter. To be sure, the mandate of WTO adjudicative bodies is to apply WTO law. But in doing so, they have to interpret WTO law within the broader international legal system, not as an isolated enterprise within the WTO regime. Therefore, while WTO adjudicative bodies are unable to directly enforce non-WTO law, they are also barred from violating it.

If legal analysis demonstrates that CBDR has normative priority over MFN, the result is that WTO adjudicative bodies could not simply disregard CBDR's priority. In practice, if a developed country were to challenge a differential BCA implemented by another country on the basis that it violates MFN, a WTO adjudicative body would have to refrain from recognizing MFN as the applicable law in the case because of its deference to CBDR. The adjudicative body would reach a sort of WTO non liquet, in which it would fail to decide the merits of an admissible case owing to the absence of suitable law.⁸⁵

83 See Marceau, *supra* note 50, at 1082 and note 3: "Thus the relationship between the WTO Agreement and other treaties can be discussed only by taking into account the applicable law before WTO adjudicating bodies, that is the law that panels are mandated to examine, i.e. the WTO law. . . . The question put to the panel is: 'Has WTO law been violated?'"

84 See, for example, *US—Gasoline*, *supra* note 58.

85 See Marceau, *supra* note 50, at 1104: "Thus the WTO adjudicating bodies, although they have to perform all the necessary reasoning to establish the state of international law and the applicable law between the two WTO Members, do not seem to have the constitutional capacity to reach any standard recommendations in situations where another treaty provision has superseded (and thus added to or diminished) a WTO provision. Since there would be no applicable WTO provision, the panel would be faced with a form of WTO *non-liquet*, if this concept is defined [as] a situation where there is no law on the matter." For a similar interpretation, see Koskeniemi and Leino, *supra* note 49, at 572, noting that "in a case involving members that have between themselves contracted this other obligation, WTO bodies

Binding Force: Soft-Law Nature

The second point that could be considered to undermine CBDR's practical consequences is uncertainty about its binding force. Some have described CBDR as having a soft-law nature and producing no binding effect.⁸⁶ In general, this description of CBDR is based on a misunderstanding of the meaning and legal force of soft law. The term "soft law" is highly problematic in international law. Some subscribe to a limited definition, arguing that soft law refers to statements included in non-treaty documents, such as guidelines or recommendations issued by international technical bodies.⁸⁷ (I will call this "the non-treaty definition.") Others define soft law more broadly to include any non-binding international statement, regardless of the type of legal document by which it is introduced; accordingly, a norm may be soft law even if it is adopted in a treaty. (I will call this "the non-binding-force definition.") The latter is regarded as the most commonly accepted definition of soft law.⁸⁸ But it is likely the least useful because it defines the term tautologically on the basis of its legal consequence: that is, a legal statement is defined as soft law if it is non-binding, whereas the determination of whether a legal statement is non-binding hinges on whether it is defined as soft law.

The existence of these two overlapping but diverging definitions leads to some confusion when determining whether CBDR has binding force. Those who have regarded CBDR to be soft law generally adopt the non-binding-force definition of soft law. In effect, CBDR could not be regarded as soft law according to the non-treaty definition because the concept is explicitly codified in several treaties. Conflating these two definitions, some have argued, for example, that the International Court of Justice (ICJ) would not likely consider CBDR to have binding force because of its soft-law nature. However, while it is correct that the ICJ has regarded soft law not to be binding, it has done so in regard to its non-treaty definition, which does not apply to CBDR.⁸⁹ The court has drawn a clear distinction between treaty and non-treaty statements, and has recognized that while the latter have no binding force, the former

may conclude that there are no WTO rights or obligations at all and thus to declare a 'WTO *non liquet*.'

86 See, for example, Hertel, *supra* note 37, at 665-66; Ladly, *supra* note 34, at 79; and Ellen Hey, "Common but Differentiated Responsibilities," in Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, vol. 2 (Oxford, UK: Oxford University Press, 2012), 444, at 447.

87 See, for example, Christine Chinkin, "Normative Development in the International Legal System," in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford, UK: Oxford University Press, 2000), 21-42, at 30; and Borgen, *supra* note 50, at 642-44.

88 See, for example, Andrew T. Guzman and Timothy L. Meyer, "International Soft Law" (2010) 2:1 *Journal of Legal Analysis* 171-225, at 172-74.

89 See Hartmut Hillgenberg, "A Fresh Look at Soft Law" (1999) 10:3 *European Journal of International Law* 499-515.

do.⁹⁰ Therefore, the ICJ is likely to interpret CBDR as having binding force, at least in respect of the signatories to the UNFCCC.

Binding Force: Vagueness

Some have regarded CBDR as not having binding force, not by virtue of its legal nature, but owing to its generality and vagueness. In this case, what is usually meant by “no binding force” seems not to be that CBDR has no legal implication or force, but rather that it does not precisely determine what the obligation is at a granular level. For example, as stated in the UNFCCC, it is unclear how much differentiation CBDR requires. Does it require distinguishing between two groups (developed and developing countries), or does it require further differentiation within these groups—that is, differentiation among developed countries and among developing countries?⁹¹ It is this vagueness that has prompted some to consider CBDR as having no binding effect. Still, proponents of this view do not generally negate CBDR’s implications as a legally consequential norm.⁹²

Confusion arises because this argument is based on a definition of binding force that does not correspond to its most common meaning in jurisprudence. Binding force is generally taken to mean the quality, attributable to a legal statement, of obliging persons subject to that statement. Thus, having binding effect means having legal force, or being obligatory.⁹³ But proponents of the view that CBDR has no binding effect actually mean something else entirely. They do not deny that CBDR is obligatory. What they suggest is only that CBDR is vague and requires further legal interpretation to determine its scope and legal implications.⁹⁴

90 Xiaoqin Zhu and Jinlong He, “International Court of Justice’s Impact on International Environmental Law: Focusing on the Pulp Mills Case” (2012) 23:1 *Yearbook of International Environmental Law* 106-30, at 109-10.

91 For a discussion and historical perspective, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, UK: Cambridge University Press, 2010), at 154 et seq.

92 See, for example, Hertel, *supra* note 37, at 654: “Although the principle of CBDR is unlikely to amount to a legally binding rule within the international climate change regime, it is argued that it is of sufficient weight to inform the interpretation of discrimination under Article 3(5). Such an interpretation would prohibit unilateral trade measures requiring developing countries to adopt GHG [greenhouse gas] mitigation policies that are comparable in effect to those adopted by developed countries.” See also Lady, *supra* note 34, at 79: “As such, it appears that a panel would have to consider the principle of CBDR as a relevant international legal obligation, at a minimum as a principle of soft law, which must inform its interpretation of the applicable WTO obligations. This would be even more so the case if the parties to a dispute regarding a BCA were both parties to the UNFCCC, as the CBDR obligation would be unequivocal, as a matter of treaty law.”

93 See, for example, Ekow N. Yankah, “The Force of Law: The Role of Coercion in Legal Norms” (2007) 42 *University of Richmond Law Review* 1195-1255.

94 There is broad consensus that differentiation based on CBDR is mandatory and can take a variety of forms. What requires more analysis is how to differentiate states according to the principle. See Brunnée and Toope, *supra* note 91, at 154-55.

The vagueness of CBDR is unremarkable. It is in the nature of legal principles to be general and thus vague. In opposition to rules, which are norms that require a specific action, nothing more and nothing less, principles are defined as norms that command optimization. Compliance with a principle means fulfillment of its requirement to the highest degree possible. The degree of fulfillment of a principle will depend on the context and legal possibilities (such as countervailing principles and rules).⁹⁵ This does not remove a principle's legal force. It means that one has to consider the various circumstances of the case to determine the degree to which the principle can be practically applied. Therefore, that consideration of CBDR is mandatory in designing a BCA is uncontroversial. What warrants further analysis is the precise requirements for BCA design.⁹⁶ The next section will briefly address this question.

Expected Outcomes of a Dispute Settlement Process Under the WTO

The discussion above suggests that WTO adjudicative bodies are likely to consider CBDR if they are prompted to analyze an implemented BCA. One possible interpretation, outlined in an earlier section, would be to accept CBDR under article XX of the GATT. However, even if WTO adjudicative bodies chose not to interpret article XX as accommodating CBDR, they would still be required to consider the principle as part of the international legal system. Despite the limits of the mandate of WTO adjudicative bodies, the normative priority of CBDR has relevant legal consequences. While it is true that a developing country would have no *procedural grounds* to initiate a dispute against a uniform BCA before the WTO (because no WTO law would have been violated), a developed country would have no *substantive grounds* to challenge a differential BCA before the WTO (because, given the normative priority of CBDR over MFN, the adjudicative body would find itself in a non liquet situation, in which no WTO law is applicable to resolve the dispute).

To be sure, one cannot disregard the possibility that a WTO panel or the Appellate Body may interpret MFN strictly (so as not to adopt the accommodating interpretation of article XX) and may also fail to regard CBDR as relevant law for the analysis of a BCA (so as not to consider CBDR's priority over MFN). In such a case, WTO adjudicative bodies would consider a differential BCA to violate MFN. Admittedly, the limits of the mandate of these adjudicative bodies are not well established, and it is difficult to predict how they may decide.

Although possible, this strict interpretation of WTO law and this limited view of the role and mandate of WTO adjudicative bodies seem rather unlikely, particularly in light of the political consequences. Such an understanding would implicitly endorse the adoption of uniform BCAs by governments of developed countries, thus

95 Robert Alexy, "On the Structure of Legal Principles" (2000) 13:3 *Ratio Juris* 294-304.

96 For a position similar to the one advocated here, see Hillgenberg, *supra* note 89, at 500: "Precision or lack thereof is not, however, an appropriate criterion for determining whether an agreement is binding or not."

leading them to engage in explicit violation of the UNFCCC. The absence of legal sanction would not remove the political consequences of unlawful behaviour. The explicit violation of CBDR, which is widely regarded as the foundational principle of the UNFCCC, would lead to political distrust and likely stifle international cooperation on a subject matter (climate change) that can only be tackled effectively as a cooperative enterprise. A (uniform) BCA that violated the cornerstone of the UNFCCC would likely hamper rather than promote the reduction of global carbon emissions.⁹⁷

Applying CBDR in BCA Design

The main legal implication of the analysis advanced so far is that a government planning to implement a BCA should take CBDR into consideration. The ensuing question is what CBDR requires as a matter of concrete application. The UNFCCC does little to clarify CBDR's practical consequences. Still, one can draw some helpful guidelines from the general purpose of the principle and its articulation in the UNFCCC's text. The discussion that follows will briefly address three main questions:

1. What mechanism should be used for differentiation?
2. Which countries should be included in differentiation?
3. How might the criteria for differentiation be determined?

Mechanisms for Differentiation

The first question concerns the suitable instrument for differentiation. I have so far assumed that differentiation would be advanced through the differentiated application of a BCA, which would require different rates for different countries. This would entail a reduction or full exemption for developing countries. But some have advocated for an alternative policy design that would impose a uniform BCA across the world and offset the negative impacts on developing countries through compensatory mechanisms.⁹⁸ For instance, in the most recent proposal for an EU BCA, the

97 In this respect, it has been noted that “environmental protection will ultimately be self-defeating if it fails to take into account the socio-economic realities, particularly of countries in the South”: French, *supra* note 25, at 42.

98 See, for example, Johanna Lehne and Oliver Sartor, *Navigating the Politics of Border Carbon Adjustments* (London, UK and Brussels: E3G, September 2020) (www.e3g.org/publications/navigating-the-politics-of-border-carbon-adjustments), suggesting that adopting capacity-building measures as compensation for a uniform BCA would be sufficient to comply with CBDR. See also Karl Steininger et al., “Justice and Cost Effectiveness of Consumption-Based Versus Production-Based Approaches in the Case of Unilateral Climate Policies” (2014) 24 *Global Environmental Change* 75-87, proposing that, in addition to technology transfer, import duty revenues from BCAs should be channelled to the developing world; and Julien Bueb, Lilian Richieri Hanania, and Alice Le Clézio, *Border Adjustment Mechanisms: Elements for Economic, Legal, and Political Analysis*, WIDER Working Paper no. 20/2016 (Helsinki: United Nations University World Institute for Development Economics Research, 2016), at 8-9, advocating against an exemption for developing countries.

European Commission has acknowledged the potential negative impacts on exporting developing countries, particularly least-developed countries, but has argued that an exemption would encourage those countries to increase their emission levels.⁹⁹ The proposal has suggested instead the adoption of “compensating mechanisms” to provide developing countries with technical assistance, technology transfer, capacity building, and financial support, in compliance with CBDR.¹⁰⁰

The proposal for a uniform BCA with compensatory mechanisms fails to recognize that CBDR entails two separate, cumulative normative requirements:¹⁰¹

1. the requirement to differentiate commitments and standards between developing and developed countries (article 4(2)(a)) and
2. the obligation for more affluent countries to provide financial and technical assistance to less affluent ones to help them implement their obligations (articles 4(1)(c) and (3)).

Addressing the second requirement does not diminish or displace the first. Since developed countries are already under the obligation to provide developing countries with technological and financial assistance, compliance with that obligation does not authorize developed countries to unilaterally compel developing countries to undertake similar commitments with respect to their carbon policies. Further, technology transfer and financial assistance are critical to achieving satisfactory reduction of global emissions, but they will likely produce positive results in the mid- and long term. In contrast, a uniform BCA would produce immediate negative impacts on developing countries that would not, at least in the short term, be offset by developed countries’ “compensatory” assistance. Therefore, a uniform BCA would violate CBDR regardless of any concurrent assistance provided by the country implementing the BCA.

99 The EU CBAM proposal, *supra* note 4, at 30.

100 *Ibid.*

101 See, for example, Christina Voigt and Felipe Ferreira, “Dynamic Differentiation’: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement” (2016) 5:2 *Transnational Environmental Law* 285-303, pointing out that the obligations under CBDR are complementary; and French, *supra* note 25, at 38-45. See also Philippe Sands, “International Law in the Field of Sustainable Development” (1994) 65:1 *British Yearbook of International Law* 303-81, pointing out that CBDR has also been considered to imply that developing countries’ obligations to reduce emissions are conditional on their receipt of resources and assistance. Some have interpreted CBDR as embodying three separate types of normative requirements: (1) differentiation between developed and developing countries with respect to the central obligation of reducing carbon emissions; (2) differentiation with respect to delayed implementation of compliance and reporting schedules; and (3) assistance from developed to developing countries in the form of capacity building, financial resources, and technology transfer. See Lavanya Rajamani, *Differential Treatment in International Environmental Law* (New York: Oxford University Press, 2006), at 93-94.

Degrees of Differentiation

Although uniform treatment of all countries would be an evident violation of CBDR, an often-disputed question is how much to differentiate. Would differentiation in two groups—developed and developing countries—or even three—developed, emerging, and least-developed countries—satisfy CBDR? Or does CBDR require further differentiation among countries within these groups? In the past, most developing countries favoured dividing countries into two broad groups, but many countries, both developed and developing, have more recently endorsed the idea of differentiation within groups.¹⁰² For instance, the Bali action plan, negotiated between UNFCCC parties in 2007, proposed that the determination of countries' commitments to reducing emissions take into account several factors, including social and economic conditions.¹⁰³ The plan further refers to “nationally appropriate mitigation actions,” indicating that CBDR would lead not only to further differentiation among groups but also to individual levels of commitment per country.¹⁰⁴ Earlier agreements, such as the 1994 sulphur protocol and the 1997 Kyoto protocol, had already shown signs of acceptance of the more nuanced approach when they adopted differentiated commitments with individual emission reduction targets for each party.¹⁰⁵

From a normative viewpoint, differentiation of countries based on discrete, artificial groupings makes little sense. CBDR's normative requirement to distinguish countries on the basis of their historical contributions and existing capabilities seems to warrant more nuanced differentiation. Accordingly, a differential BCA that differentiates countries at a granular level is more likely to comply with CBDR.

Criteria for Differentiation

A further complex issue is determining what criteria to use for differentiation. As explained earlier, CBDR is based on two moral justifications: historical responsibility for the current environmental degradation and capability to address the problem. There are two distinct but overlapping versions of the notion of historical responsibility. According to one account, the burden of addressing the damage should be shared among those who have most contributed to the problem (the “polluter pays” principle). According to the other account, the burden should be borne by those who

102 Brunnée and Toope, *supra* note 91, at 156 et seq.

103 United Nations, Framework Convention on Climate Change, “Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007: Addendum—Part Two: Action Taken by the Conference of the Parties at Its Thirteenth Session—CONTENTS: Decisions Adopted by the Conference of the Parties,” document no. FCCC/CP/2007/6/Add.1, March 14, 2008, at 3, under the heading “Bali Action Plan” (<https://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf>).

104 *Ibid.*

105 French, *supra* note 25, at 40.

have most benefited (the “beneficiary pays” principle).¹⁰⁶ In the context of anthropogenic climate change, there is considerable overlap between contributors and beneficiaries, but there is a tendency to assign contribution to the past and benefit to the present.¹⁰⁷ Both accounts of historical responsibility suggest that the inhabitants of developed countries have given cause and benefited from emissions that today allow them to enjoy a higher standard of living.¹⁰⁸ The capacity-based justification builds on the ability-to-pay principle, according to which the burden should be shared among parties on the basis of who is able to contribute at a lower cost.¹⁰⁹

From a practical perspective, differentiation in BCAs might be achieved in a number of ways. One possible approach is to apply differential requirements to foreign countries on the basis of their different levels of per capita income (to account for capability) and per capita emissions (to account for historical responsibility) in relation to the per capita income and per capita emissions of the country implementing the BCA. Under this approach, the BCA uses a varying rate adjustment, which I will call “the differential adjustment” (*DA*). *DA* will apply to the standard BCA—that is, the import duty’s rate (if ad valorem), the import duty’s amount per unit (if specific), the required allowance purchases, or the export rebate—already adjusted according to the level of carbon policy adopted in the foreign country.¹¹⁰ *DA* has an upper limit of 1 because any amount higher than 1 would increase the standard BCA and thus

106 See Daniel Butt, “The Polluter Pays? Backward-Looking Principles of Intergenerational Justice and the Environment,” in Jean-Christophe Merle, ed., *Spheres of Global Justice* (Dordrecht, the Netherlands: Springer, 2013), 757-74.

107 See Christian Barry and Robert Kirby, “Scepticism About Beneficiary Pays: A Critique” (2017) 34:3 *Journal of Applied Philosophy* 285-300, at 293: “Indeed, proponents of beneficiary pays often begin their description of cases by stipulating that the contributor to harm is no longer around, the clear implication being that were they still with us, they, rather than the beneficiary, should bear the costs of addressing harm.” Another unresolved moral problem is determining whether contribution and benefit should be attributed to producers or consumers. For discussion, see Robyn Eckersley, “The Politics of Carbon Leakage and the Fairness of Border Measures” (2010) 24:4 *Ethics and International Affairs* 367-93; and Steinger et al., supra note 98.

108 See Henry Shue, “Global Environment and International Inequality” (1999) 75:3 *International Affairs* 531-45, at 536: “[U]ndeniably, the industrial states’ contributions to global warming have continued unabated long since it became impossible to plead ignorance. It would have been conceivable that as soon as evidence began to accumulate that industrial activity was having a dangerous environmental effect, the industrial states would have adopted a conservative or even cautious policy of cutting back greenhouse emissions or at least slowing their rate of increase. For the most part, this has not happened.”

109 See Simon Caney, “Climate Change and the Duties of the Advantaged” (2010) 13:1 *Critical Review of International Social and Political Philosophy* 203-28.

110 The adjustment according to the level of carbon policy adopted in the foreign country is already expected to be computed in any standard BCA, since the adjustment mechanism is generally designed to apply only to countries with less stringent carbon requirements than the implementing country.

violate the WTO national treatment principle.¹¹¹ Additionally, for equity and practicality reasons, a minimum threshold may be established so as to exempt countries with significantly low per capita income or per capita emissions.

DA would be the weighted average of the ratio of the per capita income of the foreign country (Y_f) to that of the implementing country (Y_i) and the ratio of the per capita emissions in the foreign country (E_f) to that in the implementing country (E_i). The weight of each factor (per capita income and per capita emissions) will be attributed on the basis of equity and policy reasons, and is represented by α (weight of per capita income) and β (weight of per capita emissions), such that α and β sum to 1. For instance, if per capita income and per capita emissions are to be equally relevant for differentiation, each will have a value of 0.5. This formula can be expressed as follows:

$$DA = \alpha \cdot \frac{Y_f}{Y_i} + \beta \cdot \frac{E_f}{E_i}, \quad (1)$$

where DA equals 1 for all $DA > 1$.

An alternative approach would be to remove per capita emissions altogether. There are two reasons why disregarding per capita emissions seems preferable. First, current per capita emissions are a poor proxy for historical responsibility. Although most of the greatest polluters in the past still play a significant role in today's emissions, many developing countries that played only a marginal role in the past have recently increased their emissions. Compare, for example, past and current per capita emissions in the United States, China, and South Korea, shown in figure 1. Using current per capita emissions does not accurately reflect past contributions and tends to unjustifiably disfavour developing countries.

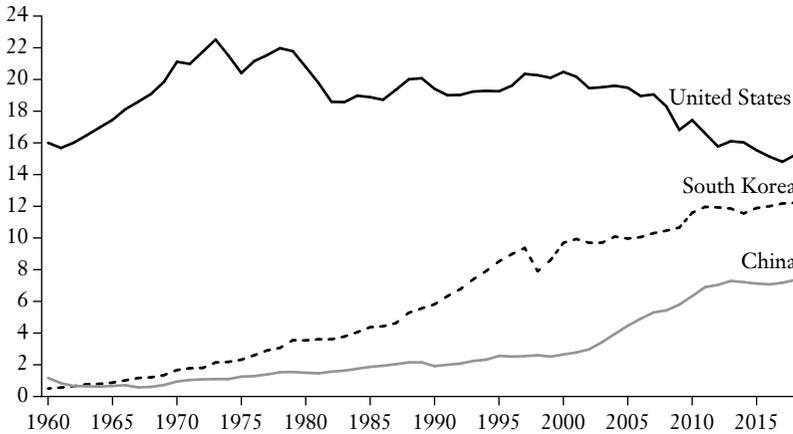
Second, calculating responsibility on the basis of current production instead of consumption puts an unfair burden on developing countries. Although policy makers have justified the use of BCAs as a way to address carbon leakage, most of the world's carbon leakage has been caused, not by differences in carbon policies, but rather by the growing relocation of carbon-intensive production to developing countries. Developed countries have effectively outsourced GHG emissions while steadily increasing their consumption of cheap carbon-intensive imports.¹¹² Emission reductions in the developed world have occurred in the form of leakage to the developing world.¹¹³

111 The national treatment principle prohibits countries from treating domestically produced goods more favourably than foreign-produced goods. A BCA that imposes a higher carbon requirement on foreign countries than that which is applied domestically would directly violate the national treatment principle. As to the general implications of the national treatment principle for BCAs, see the text above at note 27.

112 Eckersley, *supra* note 107, at 371.

113 See, for example, Steven J. Davis and Ken Caldeira, "Consumption-Based Accounting of CO₂ Emissions" (2010) 107:12 *Proceedings of the National Academy of Sciences of the United States of America* 5687-92 (<https://doi.org/10.1073/pnas.0906974107>), pointing out that 22.5 percent of the emissions produced in China are exported to consumers in other countries.

FIGURE 1 Carbon Emissions (Metric Tons per Capita) for the United States, China, and South Korea, 1960-2018



Source: World Bank, “CO₂ Emissions (Metric Tons per Capita)” (2020) World Development Indicators (<https://data.worldbank.org/indicator/EN.ATM.CO2E.PC>).

Considering that today’s developed economies are the main historical contributors to the current state of environmental degradation, a *DA* that considers only per capita income may be less distortionary and may better reflect CBDR’s normative requirement. Under this approach, *DA* would be equal to the ratio of the per capita income of the foreign country (Y_f) to that of the implementing country (Y_i). As in the previous approach, *DA* has an upper limit of 1 because any higher amount would increase the standard BCA and therefore violate the WTO national treatment principle.¹¹⁴ Likewise, for equity and practicality reasons, a minimum threshold may be established so as to exempt countries with significantly low per capita income. This formula can be expressed as follows:

$$DA = \frac{Y_f}{Y_i}, \quad (2)$$

where *DA* equals 1 for all $DA > 1$.

Adjusting BCA for CBDR solely on the basis of per capita income may present problems, but this approach seems to provide the most accurate (and the simplest) approximation to CBDR’s normative requirement.¹¹⁵

114 See *supra* note 111.

115 One such problem is using per capita income as a measure for international inequality. See, for example, Anthony C. Infanti, “International Equity and Human Development,” in Yariv Brauner and Miranda Stewart, eds., *Tax, Law and Development* (Cheltenham, UK: Edward Elgar, 2013), suggesting that the focus of international equity be expanded beyond economic growth

CONCLUSION

Efforts to address anthropogenic climate change require consideration of the inter-related concern of allowing developing countries to meet their development goals. While implementing a BCA mechanism may have the merit of enabling the implementing country to pursue its emission reduction targets and possibly encouraging other countries to adopt more stringent climate policies, it should not do so at the cost of imposing an unbearable burden on developing countries.

This article aims to provide policy makers considering implementation of a BCA with normative and practical guidelines for how to comply with the CBDR principle. It discusses several questions that have previously remained unaddressed in the literature. Its main conclusion is that CBDR requires adopting a BCA that applies differently according to the country of origin (in the case of import duties or allowance purchases) or the destination country (in the case of export rebates)—that is, a differential BCA. Differentiation can be incorporated in different ways. The article provides two alternative design options but submits that the most straightforward and least distortionary measure would consist of applying a rate adjustment that computes the per capita income of the importing or exporting country in relation to the per capita income of the country implementing the BCA.

The article critically analyzes the proposal recently advanced by the European Commission to enact a uniform BCA (which would apply uniformly to all non-EU countries) and argues that this type of mechanism would violate CBDR. The European Commission's proposal to compensate developing countries with technology transfers and financial assistance would not offset the negative economic impacts of a uniform BCA and thus would not remove its illegality. Technical and financial assistance to the developing world constitutes a separate, cumulative obligation of developed economies under the UNFCCC. It would not compensate for the failure to adopt a differential BCA.

As governments worldwide increasingly move toward implementing some form of BCA mechanism, they should not overlook the role of CBDR in international law. Far from being a purely moral issue, differentiating BCAs for developing countries is a legal requirement that is at the core of the UNFCCC. More importantly, given the political and historical relevance of CBDR for achieving a worldwide compact for global emissions reduction, failing to recognize and implement the principle would likely lead to political distrust and stifle international cooperation, thereby hampering rather than promoting the fundamental pursuit of reducing global carbon emissions.

to incorporate other non-economic considerations, such as feminist, social, or strategic ones, and proposing the use of alternative indexes that include non-economic dimensions, such as the human development index (HDI), the inequality-adjusted HDI (IHDI), and the gender inequality index (GII).

