Proposal for a Multilateral Border Carbon Adjustment Scheme That Is Consistent With WTO Law

by Brian Chang

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As the world considers how to respond to the Donald Trump Administration's decision to withdraw from the Paris Agreement,[1] it may wish to consider as one possible policy response the adoption of border carbon adjustment (BCA) schemes that are compatible with international trade law. The European Union and China have already indicated that they will work together to strengthen the implementation of the Paris Agreement,[2] and the "G-19" (G-20 minus the United States) have declared that the Paris Agreement is irreversible and reaffirmed their commitment to it.[3] World leaders (again minus the U.S.) appear to have had early success in coordinating a unified response thus far. However, they may encounter difficulty working within a near-universal framework based on consensus, such as the United Nations Framework Convention on Climate Change (UNFCCC) framework, which gives every country a veto.

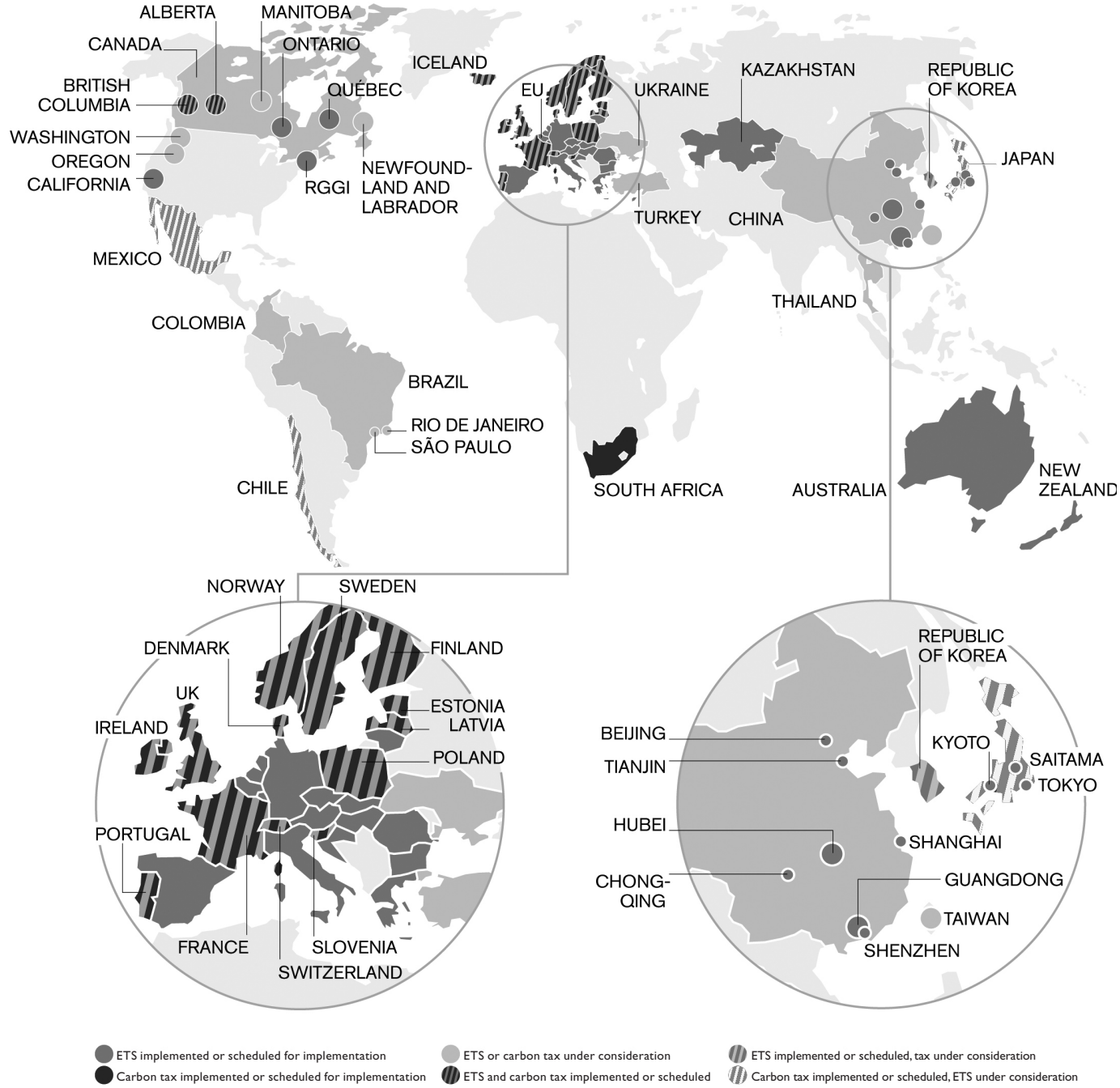
In particular, world policymakers will wish to consider adopting policy responses that avoid a "domino effect" by disincentivizing further withdrawals from the Paris Agreement and that incentivize voluntary participation by U.S. states, cities, and industries. World policymakers will also wish to incentivize the ratcheting up of commitments to reduce carbon emissions in order to make up for the shortfall in emission reduction and international climate funding caused by U.S. withdrawal. They will also have to be aware of the possibility that the United States may attempt to play a spoiler role in U.N. negotiations, and carefully communicate their intentions and plans in order not to provoke the Trump Administration. These weighty considerations, which draw on the work of Luke Kemp,[4] the climate change pundit who arguably deserves an award for the most prescient article title of the year,[5] need to be carefully considered, and it may be that BCAs are not the best, or the only, policy response that should be adopted.

Nevertheless, BCAs will be considered as a response to the U.S. withdrawal, as well as to the creation of carbon markets. About 100 countries, accounting for 58% of global greenhouse gas (GHG) emissions (most notably those of the European Union, Japan, Mexico, and South Korea), have created carbon markets, or are planning (most notably China) or considering plans to adopt carbon pricing initiatives to meet their obligations under the Paris Agreement. At the subnational level, many states and provinces and cities (such as California, Ontario, and Quebec) already participate in carbon pricing initiatives, and more are planning to do so.[6] The map in Figure 1 provides further details on carbon pricing initiatives in other countries.[7]

Two major concerns of countries and subnational entities taking part in or considering such initiatives are: (1) domestic industries losing economic competitiveness; and (2) carbon leakage—that is, a shift in carbon emissions from these countries/places to countries/places with less-stringent GHG mitigation policies or none at all. This latter concern will be amplified due to the Trump Admin-

1. *Adoption of the Paris Agreement*, U.N. Framework Convention on Climate Change [UNFCCC] Conference of the Parties, 21st Sess., Annex, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (2015) [hereinafter *Paris Agreement*].
2. Press Release, European Commission, EU-China Summit: Moving Forward With Our Global Partnership (June 2, 2017), http://europa.eu/rapid/press-release_IP-17-1524_en.htm.
3. G20 Leaders' Declaration: Shaping an Interconnected World (2017), https://www.g20.org/gipfeldokumente/G20-leaders-declaration.pdf.
4. Luke Kemp, *The World Would Be Better Off if Trump Withdraws From the Paris Climate Deal*, Conversation, May 22, 2017, https://theconversation.com/the-world-would-be-better-off-if-trump-withdraws-from-the-paris-climate-deal-78096.
5. Luke Kemp, *US-Proofing the Paris Climate Agreement*, 17 Climate Pol'y 86 (2017).
6. World Bank Group, Ecofys & Vivid Economics, State and Trends of Carbon Pricing 10, 25 (2016), *available at* http://documents.worldbank.org/curated/en/598811476464765822/pdf/109157-REVISED-PUBLIC-wb-report-2016-complete-161214-cc2015-screen.pdf.
7. World Bank Group, *supra* note 6, at 25.

Figure 1. Summary Map of Existing, Emerging, and Potential Regional, National, and Subnational Carbon Pricing Initiatives (Emission Trading Systems and Carbon Tax)



The circles represent subnational jurisdictions: subnational regions are shown in large circles and cities are shown in small circles. The circles are not representative of the size of the carbon pricing initiative.

Note: Carbon pricing initiatives are considered "scheduled for implementation" once they have been formally adopted through legislation and have an official, planned start date. Carbon pricing initiatives are considered "under consideration" if the government has announced its intention to work towards the implementation of a carbon pricing initiative and this has been formally confirmed by official government sources. Jurisdictions that only mention carbon pricing in their INDCs are not included as different interpretations of the INDC text are possible. The carbon pricing initiatives have been classified in ETSs and carbon taxes according to how they operate technically. ETS does not only refer to cap-and-trade systems, but also baseline-and-credit systems such as in British Columbia and baseline-and-offset systems such as in Australia. Carbon pricing has evolved over the years and initiatives do not necessarily follow the two categories in a strict sense. The authors recognize that other classifications are possible.

Initiatives implemented or scheduled for implementation: National ETSs: Australia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Greece, Hungary, Italy, Kazakhstan, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, the Republic of Korea, Romania, Slovakia, and Spain. National carbon taxes: Chile, Japan, Mexico, and South Africa. Both national ETSs and carbon taxes: Denmark, Estonia, Finland, France, Iceland, Ireland, Latvia, Norway, Poland, Portugal, Slovenia, Sweden, Switzerland, and the United Kingdom. Subnational ETSs: Beijing, California, Chongqing, Connecticut, Delaware, Guangdong, Hubei, Kyoto, Maine, Maryland, Massachusetts, New Hampshire, New York, Ontario, Québec, Rhode Island, Saitama, Shanghai, Shenzhen, Tianjin, Tokyo, and Vermont. Both subnational ETSs and carbon taxes: Alberta and British Columbia. **Initiatives under consideration:** National ETS or carbon tax: Brazil, Canada, Chile (ETS), China, Colombia, Japan (ETS), Mexico (ETS), the Republic of Korea (carbon tax), Thailand, Turkey, and Ukraine. Subnational ETS or carbon tax: Manitoba, Newfoundland and Labrador, Oregon, Rio de Janeiro, São Paolo, Taiwan, and Washington State.

Source: World Bank, Ecofys and Vivid Economics. 2016. State and Trends of Carbon Pricing 2016 (October), by World Bank, Washington, D.C.

istration's stated intention to withdraw from Paris and its policies of repealing the Barack Obama Administration's Clean Power Plan,[8] reviving the U.S. coal industry, and cutting research on solar energy,[9] particularly at a time when the Chinese[10] and the rest of the world are going in the opposite direction.

Such concerns could be addressed through the adoption of BCAs, which this Comment defines as measures that aim to ensure that both domestic products and imported products are subject to equivalent carbon pricing measures, and that typically operate by incorporating the domestic price of carbon into imported products. Although variations may attempt to rebate or subsidize products that are being exported to countries with no or less-stringent carbon pricing measures, these variations are not advocated for here.

The thesis of this Comment is that international trade law will permit BCAs on products from the United States, if such schemes are well-designed to avoid the World Trade Organization (WTO) prohibitions on arbitrary or unjustified discrimination and on disguised protectionism. To illustrate this thesis, I propose a multilateral border carbon adjustment (MBCA) scheme that other countries could agree to impose on the United States, which would meet the above objectives of disincentivizing further withdrawals, incentivizing voluntary participation by American actors, continuing the ratcheting up of carbon reduction commitments, and making up the shortfall in international climate funding.

I. Recommendations for BCA Compatibility With International Trade Law

To maximize its compatibility with Article XX of the General Agreement on Tariffs and Trade (GATT), a BCA scheme should comply with the following recommendations:

(1) Be justified on the basis of environmental protection rather than competitiveness concerns.

(2) Be adopted within a multilateral framework, such as Article 6 of the Paris Agreement.

(3) Be adopted alongside ongoing, serious good-faith attempts at negotiating a solution with countries to which the BCA would apply, though such negotiations need not be successful.

(4) Meet the WTO standards for basic fairness and due process, such as publication and the provision of a mechanism for appeals.

(5) Allow industries and subnational entities within non-Paris Agreement countries to avoid BCAs by participating in equivalent carbon pricing schemes.

(6) Take into account the principle of "common but differentiated responsibilities and respective capabilities" (CBDRRC), in order not to constitute an arbitrary restriction on developing countries with little historic responsibility for existing GHGs in the atmosphere and a lower ability to address carbon emissions while pursuing economic development.

(7) Only impose BCAs on imported goods (and do not attempt to subsidize or rebate exported goods).

While these recommendations should suffice to ensure that the Dispute Settlement Body (DSB) of the WTO finds the MBCA to be consistent with international trade law, an additional recommendation that would greatly strengthen the political feasibility of the proposed MBCA is:

(8) Transferring the proceeds of the BCA to a climate change mitigation or adaptation fund.

I argue that these recommendations may be easily met if the MBCA only covers countries that are not signatories to,[11] or have withdrawn from, the Paris Agreement and/or the UNFCCC.[12] This provides a strong incentive for the United States to stay within the Paris Agreement and UNFCCC, so that it has a seat at the negotiating table if/when rules regarding BCA schemes are discussed.

II. Application of International Trade Law to an MBCA Scheme

Generally, BCA schemes fall into one of two varieties depending on a country's domestic carbon pricing policies. If Country A has a carbon tax on domestic goods, it will desire a BCA in the form of an equivalent carbon tax on imported goods. If Country B has an emissions trading scheme under which domestic industries have their carbon emissions capped and are required to hold (and trade for) carbon emissions credits or permits amounting to the amount of carbon they emit, Country B will desire a BCA scheme in the form of a requirement that importers purchase and surrender an amount of emissions credits/permits equivalent to those expended by domestic producers of similar goods.

Article 6 of the Paris Agreement recognizes that some Parties may choose to pursue voluntary cooperation in implementation of their carbon emissions targets, to

8. Press Release, The White House, Presidential Executive Order on Promoting Energy Independence and Economic Growth (Mar. 28, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

9. Lucas Mearian, *Here's What Trump's Budget Means for Renewable Energy*, Computerworld, Mar. 17, 2017, http://www.computerworld.com/article/3182184/sustainable-it/heres-what-trumps-budget-means-for-renewable-energy.html.

10. Bridgette Burkholder, *Five Things You Didn't Know About Energy in China*, NexusMedia, Apr. 6, 2017, https://nexusmedianews.com/five-things-you-didnt-know-about-energy-in-china-video-b86f202169d1.

11. Presently, these countries are Nicaragua and Syria. Note, however, that both of these countries may argue for differentiated treatment under the principle of CBDRRC, as they are developing countries with little responsibility for historic emissions.

12. UNFCCC, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

allow for higher ambition in their mitigation and adaptation actions, and to promote sustainable development and environmental integrity[13]; and it mandates the creation of a mechanism to contribute to GHG emissions mitigation and support of sustainable development.[14] This mechanism is not stated to be the exclusive means through which Parties may pursue voluntary cooperation.

A. *The Proposed MBCA Scheme*

The proposed MBCA scheme could be agreed upon under the mechanism created under Article 6.4 of the Paris Agreement, or as a plurilateral agreement under Article 6.1 between countries that wish to take collective efforts to tackle climate change. It would distinguish between participating countries (who are signatories to the Agreement) and nonparticipating countries (who are not signatories). In its simplest form, such a scheme could (1) exempt from BCA participating countries who have committed to undertake efforts to reduce GHG emissions within the UNFCCC framework (i.e., by submitting carbon emissions targets—intended national determined contributions (INDCs)—within the framework of the Paris Agreement), while (2) permitting participating countries to impose BCA on products from nonparticipating countries that have not committed to undertake efforts to reduce GHG emissions (e.g., by not submitting or withdrawing INDCs), subject to the principle of CBDRRC, and (3) create a rule enabling subnational entities or foreign companies to apply for exemption from the MBCA if they participate in equivalent carbon pricing initiatives.

While ideally participating countries would agree on a common BCA measure, given the diversity in practice of carbon pricing initiatives and the necessity under international trade law of not imposing measures that unduly disadvantage imports against domestic production (e.g., by imposing a carbon tax of $20 per ton of carbon dioxide (CO_2) on imports when domestic carbon trading permits cost $10 per ton of CO_2), they may find it difficult to do so. But they should also (4) commit to imposing BCAs that are designed to ensure equal carbon pricing on their domestic production and imports from nonparticipating countries. This would have the effect of requiring exporters from nonparticipating countries either to comply with the national carbon pricing regimes of all participating countries that they export to, imposing a regulatory burden on them, or to voluntarily participate in equivalent carbon pricing schemes.

The MBCA should be justified on the basis of noneconomic environmental reasons rather than economic competitiveness reasons, in order to comply with international trade law: for example, internalizing the social cost of carbon, reducing carbon leakage, enabling wider and deeper emissions reductions within the regulating countries, incentivizing others[15] to join the Paris Agreement, and ensuring that domestic consumers are not incentivized to buy products from countries that make no attempt to internalize the cost of carbon and do not share the regulating countries' commitment to reducing carbon emissions. These justifications and the structure of the MBCA demonstrate that the primary motivation behind the MBCA would not be concerns to protect the economic competitiveness of domestic industries, but to exclude nonparticipants in the Paris Agreement from a benefit exclusive to participating countries—exemption from BCAs.

Part of the inspiration for this idea must be credited to Nathaniel Keohane, Annie Petsonk, and Alex Hanafi, who have proposed the creation of a "club" of carbon markets that are linked through mutual recognition and trading of carbon emissions units among members, and excludes non-members and noncompliant members from the benefit of being able to trade carbon emissions units.[16] Should such a club be created, its members could agree to make exceptions to their BCA for jurisdictions with comparable climate policies, while applying an MBCA to non-signatories to the Paris Agreement.

The proposed MBCA has been carefully designed to maximize its likelihood of being found consistent with international trade law by the WTO DSB, while being politically feasible in the sense that it does not impose BCAs on countries that are party to the Paris Agreement, and therefore is less likely to be opposed by these countries. While it would be preferable for the MBCA to be adopted by the Article 6.4 mechanism created by the Paris Agreement, as this would lend the MBCA the special legitimacy of being agreed to by all States Parties to the Paris Agreement, it is possible for the MBCA to be adopted under Article 6.1 of the Paris Agreement should non-States Parties pressure States Parties to block consensus within the Article 6.4 mechanism.

B. *Consistency of Proposed MBCA With International Trade Law*

Since the proposed MBCA treats imports from countries that have submitted INDCs differently than imports from countries that have not, it appears to violate Article I of GATT, the most-favored-nation obligation under international trade law.[17] However, the violation can be justified under the general exceptions regime in Article XX as being necessary for the protection of human, animal, or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)).[18] For the

13. *Paris Agreement*, *supra* note 1, art. 6.1.
14. *Paris Agreement*, *supra* note 1, art. 6.4.
15. Joost Pauwelyn, *Carbon Leakage Measures and Border Tax Adjustments Under WTO Law*, *in* Research Handbook on Environment, Health, and the WTO 448, 451-52 (Geert van Calster & Denise Prevost eds., Edward Elgar Pub. 2013).
16. Nathaniel Keohane et al., *Toward a Club of Carbon Markets*, Climatic Change (2015).
17. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
18. Gabrielle Marceau, *The Interface Between the Trade Rules and Climate Change Actions*, *in* Legal Issues on Climate Change and International

WTO DSB to find the proposed MBCA legal under Article XX, it needs to first find that the MBCA falls within one of these two paragraphs, and then that it passes muster under the introductory paragraph to Article XX (also known as the "chapeau"), which prohibits measures that constitute "arbitrary or unjustified discrimination between countries where the same conditions prevail," or a "disguised restriction on international trade," even though they may be justified under one of the specific paragraphs of Article XX.

The rest of this section will demonstrate, through a step-by-step analysis, how the proposed MBCA can be justified under Article XX, and draw out recommendations for the design and justification of the proposed MBCA.

1. Paragraph (g): Relating to the Conservation of Exhaustible Natural Resources

For the proposed MBCA to be justified under paragraph (g), it must meet three conditions. First, the measure must concern the conservation of "exhaustible natural resources." Second, the MBCA must "relate to" the conservation of exhaustible natural resources. Third, the MBCA must be "made effective in conjunction with restrictions on domestic production and consumption."[19] The proposed MBCA should be able to meet these conditions easily.

When determining what constitutes "exhaustible natural resources," the Appellate Body (AB) of the WTO DSB has indicated that it will interpret these words in an evolutionary manner, in light of contemporary international concerns about the protection and conservation of the environment, and the objective of sustainable development included within the Preamble to the Marrakesh Agreement Establishing the WTO.[20] The WTO DSB has previously held that fish stock that were not endangered (dolphin, salmon, and herring), endangered sea turtles, and clean air are "exhaustible natural resources,"[21] and Prof. Joost Pauwelyn argues that it would be a surprise if it did not accept the conservation of the planet's climate as an "exhaustible natural resource," especially given the potential for catastrophic consequences for plant and animal life and humanity if climate change is left unaddressed.[22] In the alternative, Prof. Bradley J. Condon has argued that the WTO DSB may analogize the object of conserving the global climate with the object it accepted in the case of *United States—Standards for Reformulated and Conventional Gasoline*[23] (conserving clean air), or view the issue of GHG emissions in the atmosphere as a clean air issue.[24]

Some might argue that countries should not be allowed to regulate activity (in this case, carbon emissions) that occurs outside their territory or jurisdiction, essentially requiring their import sources to adopt similar conservation policies. This argument parallels the reasoning of the first *Tuna/Dolphin* panel in the *United States—Restrictions on Imports of Tuna* disputes,[25] which prioritized the effectiveness of international trade rules over the conservation objective, and attempted to limit the United States' right to regulate matters within its territory. This panel report was not adopted by the DSB, as the United States rejected this view, meaning that it has little precedential weight.

The better view, which was adopted by the panel in the second *Tuna/Dolphin* case[26] (after hearing new arguments made by the United States) and refined by the AB in its *United States—Import Prohibition of Certain Shrimp and Shrimp Products* report,[27] is that countries may regulate activities outside their territory or jurisdiction and may even do so unilaterally, provided that there is a "sufficient nexus" between the territory or jurisdiction of the regulating country and the object of protection. Although the AB in *U.S.—Shrimp* deliberately left open the question of whether there is a jurisdictional limitation on the reach of conservation policies justified by paragraph (g), there is no need for this question to be addressed when considering BCAs, as the DSB is likely to accept that there is a "sufficient nexus" between measures taken to protect the planet's climate and the territory of the regulating countries, which will be affected by climate change.[28]

For the MBCA to "relate to" the conservation object, the WTO DSB will examine the "relationship between the general structure and design of the measure . . . and the policy goal it purports to serve," and must find a "close and genuine relationship of ends and means."[29] So long as the MBCA is designed to serve environmental conservation goals (i.e., the reduction of carbon emissions, by pricing the cost of carbon into some imports) and not economic protectionist goals, it is likely to pass this test.[30] This is the reason for recommendations (1) and (6).

The MBCA must also be "made effective in conjunction with restrictions on domestic production and consumption," which the AB has held to mean that there must be *even-handedness* (though not necessarily identical treat-

Trade Law 3, 15 (Deok-Young Park ed., Springer 2016) (speculating that "a WTO Member could arguably invoke paragraph (a) measures necessary to protect public morals, as the survival of humans via GHG actions might be argued to be an action of public morals." This appears to be backed by the finding in Appellate Body, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014) [hereinafter *EC—Seal Products*], that the protection of seal welfare was a question of EU public morals that the EU could use to justify restrictions on the sale of seal products, although this Comment does not discuss paragraph (a), and because the MBCA may be justified under paragraphs (b) and (g)).

19. Pauwelyn, *supra* note 15, at 497-500.
20. Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 2001), ¶¶ 129-30 [hereinafter *U.S.—Shrimp*]
21. Pauwelyn, *supra* note 15, at 497-98.
22. *Id. See also* WTO & U.N. Environment Programme, Trade and Climate Change 107 (2009).
23. Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996) [hereinafter *U.S.—Gasoline*].
24. Bradley J. Condon, *Climate Change and Unresolved Issues in WTO Law*, 12 J. Int'l Econ. L. 896, 911-12 (2009).
25. GATT Panel, *United States—Restrictions on Imports of Tuna*, WT/DS21/R (not adopted, circulated Sept. 3, 1991), ¶¶ 5.25-5.27.
26. GATT Panel, *United States—Restrictions on Imports of Tuna*, WT/DS29/R (not adopted, circulated June 16, 1994), ¶¶ 5.15-5.20.
27. *U.S.—Shrimp, supra* note 20, ¶¶ 121, 133.
28. Pauwelyn, *supra* note 15, at 498; Condon, *supra* note 24, at 912; *see also* Marceau, *supra* note 18, at 18.
29. *U.S.—Shrimp, supra* note 20, ¶ 136.
30. Pauwelyn, *supra* note 15, at 498-500; Marceau, *supra* note 18, at 18.

ment) in the imposition of restrictions on imports as there is on domestic goods.[31] Since the purpose of the MBCA is to ensure that domestic goods and imported goods have the same carbon price, this test should not be difficult to meet so long as there are not onerous restrictions placed on imported goods that are not placed on domestic goods.

2. Paragraph (b): Necessary to Protect Human, Animal, or Plant Life or Health

The MBCA is likely to meet the requirements of this paragraph easily. Here, the link between measures taken to prevent or reduce climate change and the protection of human, animal, and plant life and health from extreme weather events, temperature changes, and sea-level rise caused by climate change is obvious. The AB has outlined a test for the necessity of the measure that involves "weighing and balancing" three factors: (1) the importance of the common interest or value protected by the measure; (2) the contribution made by the measure to the achievement of the policy objective; and (3) the trade restrictiveness of the measure, including whether less trade-restrictive and reasonably available alternative measures guarantee the desired level of achievement of the policy objective.[32]

It is likely that the WTO DSB would find the common interest or value protected by the MBCA to be of paramount importance, given the potential devastation to human life and health that can be caused by climate change, and this will make it easy for the DSB to accept the MBCA as necessary.[33] The WTO DSB would also be able to easily rely on the ever-growing body of scientific evidence that climate change is being caused by human activities, to find that the MBCA is apt to make a material contribution to the achievement of the policy objective (by reducing carbon emissions).[34] Because a BCA is considered to have relatively low trade restrictiveness as compared to a total ban on goods, and because the onus is on the complainants (the United States, if it brings a case) to prove that there is a less trade-restrictive alternative reasonably available for achieving the desired aim of the respondents[35] (which will be difficult for the complainants to design and prove), the MBCA is likely to be found to meet the requirements of paragraph (b).

3. The Chapeau

The chapeau prohibits "arbitrary or unjustified discrimination between countries where the same conditions prevail," or a "disguised restriction on international trade," and is extremely difficult to meet (only two cases have passed the requirements of the chapeau).[36] The proposed MBCA has thus been rigorously designed to meet the requirements of the chapeau. While the AB has not set out a clear test for the application of the chapeau, Prof. Gabrielle Marceau's review of the cases suggests that it will take into account the following factors: whether the application of a measure is flexible enough to allow for the specific conditions prevailing in the exporting Member's economy; if there is discrimination, whether that discrimination was foreseen by the Member, or whether it was merely inadvertent or unavoidable; whether "serious, good faith efforts" have been made by the Member to lessen any discriminatory effects; whether similar or comparable opportunities have been provided by the Member, or consideration given, to all exporting Members to negotiate; and whether the application of the measure complies with other WTO standards, such as in relation to basic fairness, due process, and transparency.[37]

The nondiscrimination principle in the chapeau requires that the MBCA consider the local conditions in foreign countries,[38] since discrimination occurs: (1) when countries in which the same conditions prevail are treated differently; and (2) when the measure "does not allow for an inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[39] Arguably, this principle aligns well with the principle of CBDRRC, which calls for developed countries to take the lead in tackling climate change, while recognizing that developing countries may bear little historic responsibility for existing GHGs in the atmosphere and have a lower ability to address carbon emissions while pursuing economic development (as manifested in Article 4 of the Paris Agreement). Hence, this is why recommendation (5) above is that the MBCA take into account the CBDRRC principle.

To avoid arbitrary or unjustified discrimination, the MBCA should not seek to rigidly impose one policy or measure on all countries, but allow for "sufficient flexibility in the application of the measure" for other countries to adopt programs "comparable in effectiveness."[40] While the MBCA cannot require that all other countries "adopt essentially the same policy" and refuse to take into account the "other specific policies and measures that an exporting country may have adopted for the protection and conservation of [the planet's climate],"[41] the AB has stressed that "countries are free to adopt their own policies

31. *U.S.—Gasoline*, *supra* note 23, ¶ 21.
32. Marceau, *supra* note 18, at 16 (quoting Appellate Body, *Korea—Various Measures on Beef*, WT/DS161/AB/R (Jan. 9, 2001), ¶ 136 [hereinafter *Korea—Beef*].
33. *Korea—Beef*, *supra* note 32, ¶ 162.
34. *EC—Seal Products*, *supra* note 18, ¶ 5.213.
35. Marceau, *supra* note 18, at 18.
36. Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Nov. 21, 2001) [hereinafter *U.S.—Shrimp 21.5*], and Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Apr. 5, 2001) [hereinafter *EC—Asbestos*].
37. Marceau, *supra* note 18, at 19-21 (synthesizing *U.S.—Shrimp* and Appellate Body, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC—Tariff Preferences*].
38. *U.S.—Shrimp*, *supra* note 20, ¶ 164.
39. *Id.* ¶ 165.
40. *U.S.—Shrimp 21.5*, *supra* note 36, ¶ 144.
41. *U.S.—Shrimp*, *supra* note 20, ¶¶ 161, 163.

aimed at protecting the environment,"[42] and that importing countries may require exporting countries to maintain specific environmental policies and measures that are comparable in effectiveness in dealing with the policy concern it is invoking.[43]

To strike a balance between recognizing the principles of nondiscrimination and CBDRRC, and give exporting countries sufficient flexibility to adopt their own measures while preserving importing countries' right to regulate to protect the planet's climate, the proposed MBCA would impose BCAs only on countries that have not submitted INDCs under the Paris Agreement. It would allow developing countries that are unable to submit INDCs to apply for exemption from BCAs. This proposal recognizes INDCs as each country's attempt to pursue measures of "comparable effectiveness" in pursuit of the common object of protecting the planet's climate, taking into account their different circumstances, while preserving importers' right to impose regulation on exports from countries that do not adopt any measures to protect the planet's climate.

While the imposition of BCAs only on countries that do not adopt any measures to protect the planet's climate is discriminatory, this can hardly be said to be arbitrary or unjustified. The WTO DSB is likely to find the proposed MBCA to be consistent with its jurisprudence to date, provided that it finds that the proposed MBCA is designed and intended to protect the environment and not to protect the economic competitiveness of domestic industries (which it is likely to do, since imports from countries with INDCs but lower/no carbon prices would not be affected), and provided the proposed MBCA meets its other standards.

Before the proposed MBCA is imposed, there must be "serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements" that address climate change,[44] although those negotiations need not lead to the conclusion of agreements.[45] The AB has found the revised unilateral measures undertaken by the United States examined in its *U.S.—Shrimp 21.5* decision to be justified under the chapeau, as long as the "ongoing, serious good faith efforts to reach a multilateral agreement continue."[46] Since the Paris Agreement is a multilateral agreement that represents the culmination of years of effort to reach consensus on measures to address climate change, it should suffice for the imposition of the proposed MBCA on countries that refuse to submit INDCs or that leave the Paris Agreement, as long as the Parties to the Paris Agreement make ongoing, serious good-faith efforts to negotiate with these countries. This is the reason for recommendation (2).

Finally, the application of the MBCA must comply with other WTO standards, such as "basic fairness and due process"[47] and transparency (recommendation (5)). The carbon pricing rules that would apply to imports should therefore be published beforehand, and sufficient time given for exporters to adjust to the rules. While developing countries were given a 10-year grace period to meet their obligations under the Montreal Protocol,[48] it is likely that a significantly shorter period could be imposed on exporters in developed countries, since they will be able to adjust more quickly to carbon pricing measures.[49]

While I do not go into detail on the practical issues that may arise, the main ones relate to the difficulty of assessing product-specific emissions, and the fluctuations of the carbon price (or allowance price) in the context of an emissions trading scheme.[50] The proposed MBCA would address this by adopting measures to facilitate carbon pricing of imports, such as labeling, or assessing a carbon tax based on using the "best available technology" or "predominant method of production" available to exporters.[51] Crucially, the measures should be transparent, ensure equivalent carbon pricing between imports and domestic products, and allow affected exporters to appeal their carbon price adjustments by submitting their own data.

4. Other Design Considerations That Demonstrate Environmental Protection or Noneconomic Competitiveness Concerns

While the above design considerations should be sufficient for the proposed MBCA to pass muster under Article XX, additional design considerations will improve the chances that the WTO DSB will find that the measure is motivated by concerns to protect the planet's climate, and not economic protectionist sentiment. First, the MBCA should allow industries and subnational entities within non-Paris Agreement countries to avoid BCAs by participating in equivalent carbon pricing schemes (recommendation (5)). Second, BCAs should only be imposed on imported goods, and there should not be attempts to subsidize or provide rebates on exports to countries with no carbon prices, as the intent and likely effect of this is to bolster exports, not to reduce emissions[52] (recommendation (7)).

Finally, if the entire proceeds or a substantial part of the BCA are transferred to a climate change mitigation or adaptation fund[53] (recommendation (8)) that provides

42. *Id.* ¶ 186 (citing *U.S.—Gasoline*, *supra* note 23, at 30).
43. Marceau, *supra* note 18, at 21 (citing *EC—Tariff Preferences*, and offering an interpretation of the two *U.S.—Shrimp* decisions that Article XX may oblige countries to impose lower or no requirements on countries that have their own (comparable in effectiveness) climate legislation).
44. *U.S.—Shrimp*, *supra* note 20, ¶ 168.
45. *U.S.—Shrimp 21.5*, *supra* note 36, ¶ 124.
46. *Id.* ¶ 152.
47. *U.S.—Shrimp*, *supra* note 20, ¶ 181.
48. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, T.I.A.S. 11097, 1522 U.N.T.S. 3.
49. *See* Kateryna Holzer, Carbon-Related Border Adjustment and WTO Law 238 (2014).
50. WTO & U.N. Environment Programme, *supra* note 22, at 101.
51. *Id.* at 101-02.
52. Charles E. McLure Jr., *A Primer on the Legality of Border Adjustments for Carbon Prices: Through a GATT Darkly*, 5 Carbon & Climate L. Rev. 456, 463 (2012).
53. Jennifer Hillman, Climate Advisers et al., Changing Climate for Carbon Taxes: Who's Afraid of the WTO 14 (2013); Maria Panezi, When CO_2 Goes to Geneva: Taxing Carbon Across Borders—

developing country assistance, this would help the MBCA pass Article XX scrutiny, as well as improve its political acceptability to many of the developing countries opposed to BCAs.

C. What This Comment Does Not Discuss in Detail

There are innumerable aspects of international trade law that may apply to measures relating to climate change. Of particular relevance to BCAs are the following trade law issues, which I briefly address, but do not discuss in detail:

(1) Whether BCAs generally violate Article I (the general most-favored nation obligation), Article II (the obligation to abide by agreed import tax schedules), or Article III (the national treatment obligation) of the WTO GATT. In particular, commentators have noted that questions may arise concerning whether imported products made with higher carbon footprint emissions may be considered "like" domestic products made with lower carbon footprints, and whether a BCA constitutes a customs duty or an internal charge restricted under Article II or Article III, respectively.[54] I assume that domestic and imported products with different carbon footprints are nevertheless "like" (because they would have a competitive relationship in the marketplace[55]) and that a BCA may violate one or more of the basic rules of GATT, but argue that these violations would nevertheless be justified under Article XX.

(2) Whether the technical regulations required to sustain a BCA would violate the WTO Technical Barriers to Trade (TBT) Agreement.[56] Such technical regulations could include energy-efficiency benchmark requirements, requirements that steel plants use less carbon-intensive production processes, or carbon-labeling requirements. Notably, Article 2.5 of the TBT Agreement states that technical regulations adopted in accordance with relevant international standards shall be rebuttably presumed not to create an unnecessary obstacle to international trade, as long as those international standards come from an institution whose membership is open to all WTO Members (such as standards adopted within the framework of the UNFCCC and Paris Agreement).[57]

(3) Whether emissions trading schemes constitute trade in goods or services, and, if the latter, whether they are compatible with the WTO GATT.[58]

(4) Whether subsidies given to domestic industries (including free carbon allowances) to encourage GHG mitigation are actionable or prohibited under the WTO Agreement on Subsidies and Countervailing Measures.[59]

III. Conclusion

Professor Joost Pauwelyn concluded his piece on BCAs by stating that "[c]arbon leakage measures and border tax adjustments can . . . be WTO consistent. The devil will be in the details."[60] This Comment concludes in agreement, noting in particular that there will be difficulty in accurately measuring carbon emissions from non-Paris Agreement countries, and in ensuring that there is no carbon leakage when goods and services are exported from subnational entities that are voluntarily participating in carbon market schemes, but are at least partially produced in subnational entities that are not participating in such schemes. Given this, and given the requirement laid out by the WTO AB in its *United States—Shrimp 21.5* decision for "ongoing, serious good faith efforts" to negotiate, the importance of continued diplomacy and multilateralism cannot be understated.

Without Violating WTO Obligations 4-5 (Centre for International Governance Innovation, CIGI Papers No. 83, 2015).

54. *See* Marceau, *supra* note 18, at 8-12; Hillman, *supra* note 53; McLure, *supra* note 52.

55. *EC—Asbestos*, *supra* note 36, ¶ 99; *but cf.* Pauwelyn, *supra* note 15 (arguing that likeness should be determined by comparing two similar products with the same carbon footprint, but not two similar products with different carbon footprints, since national carbon pricing measures distinguish between products with different carbon footprints within the domestic market, and treats them differently).

56. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, 33 I.L.M. 1144.

57. Appellate Body, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012), ¶ 359.

58. Marceau, *supra* note 18, at 32-33.

59. *Id.* at 33-34. For an analysis of climate mitigation subsidies, see Robert Howse, International Institute for Sustainable Development, Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis (2010).

60. Pauwelyn, *supra* note 15, at 506.