

TESS Forum on Trade,
Environment,
& the SDGs

Principles Relevant for Consideration in the Design & Implementation of Trade-related Climate Measures & Policies

TESSD INFORMAL WORKING GROUP MEETINGS

Working Group on Trade-related Climate
Measures

20 September 2023



Policy context

- With the urgent need to tackle the climate crisis, a range of **trade-related climate measures** (TrCMs) are being implemented or considered.
- Differences in approach are generating international **tensions**, which if not managed properly may:
 - affect climate efforts and ambition
 - marginalize vulnerable economies unable to comply with requirements
 - affect the functioning of the multilateral trade system
- Rising calls for international cooperation to ensure such measures are **WTO compatible** and **development friendly** while maintaining their **climate ambition**.
- Growing discussion and debate on rules and principles relevant to trade-related climate measures and what this means for design and implementation.

Purpose of the International Expert Group

- **Who?** A regionally diverse group of 17 eminent **international legal experts** on climate, environment, trade, and public international law, participating in personal capacities.
- **What?** A report on ‘Principles relevant for consideration in the design & implementation of TrCMs’
 - **Identify** a core set of relevant internationally recognized principles of international law;
 - **Provide guidance** on considerations relevant to their design and implementation;
 - **A broad definition** of TRCMs;
 - **Consult** with a number of further legal experts and diversity of governments in process .
- **Why?** Inform debates and policymaking at the **domestic level** on trade-related climate measures.
- Foster **shared understandings** & spur informed **dialogue** around principles to promote **inclusive cooperation** on climate, trade and sustainable development and reduce tensions.
- Inform dialogue on TrCMs in relevant international processes, including discussions at the WTO Committee on Trade and Environment, and in TESSD Working Group on Trade-related Climate Measures, as well as processes relevant to climate cooperation, including the UNFCCC.

Expert group members

Including:

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

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

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

[Professor Dominic Coppens](#) (Belgium), Professor of International Economic Law, Faculty of Law, Maastricht University, the Netherlands

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

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

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

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

[Professor Nilufer Oral](#) (Turkey), Centre of International Law (CIL), National University of Singapore, Singapore

[Professor Jacqueline Peel](#) (Australia), Melbourne Law School, The University of Melbourne, Australia

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

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

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

[Dr. Margaretha Wewerinke-Singh](#) (Netherlands), Amsterdam Law School, University of Amsterdam, the Netherlands

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

[Professor Margaret A. Young](#) (Australia), Melbourne Law School, The University of Melbourne, Australia

Rapporteur: [Elena Cima](#), Lecturer in International Energy and Environmental Law, University of Geneva,
Convenors: [Carolyn Deere Birkbeck](#) and [Christophe Bellmann](#), TESS

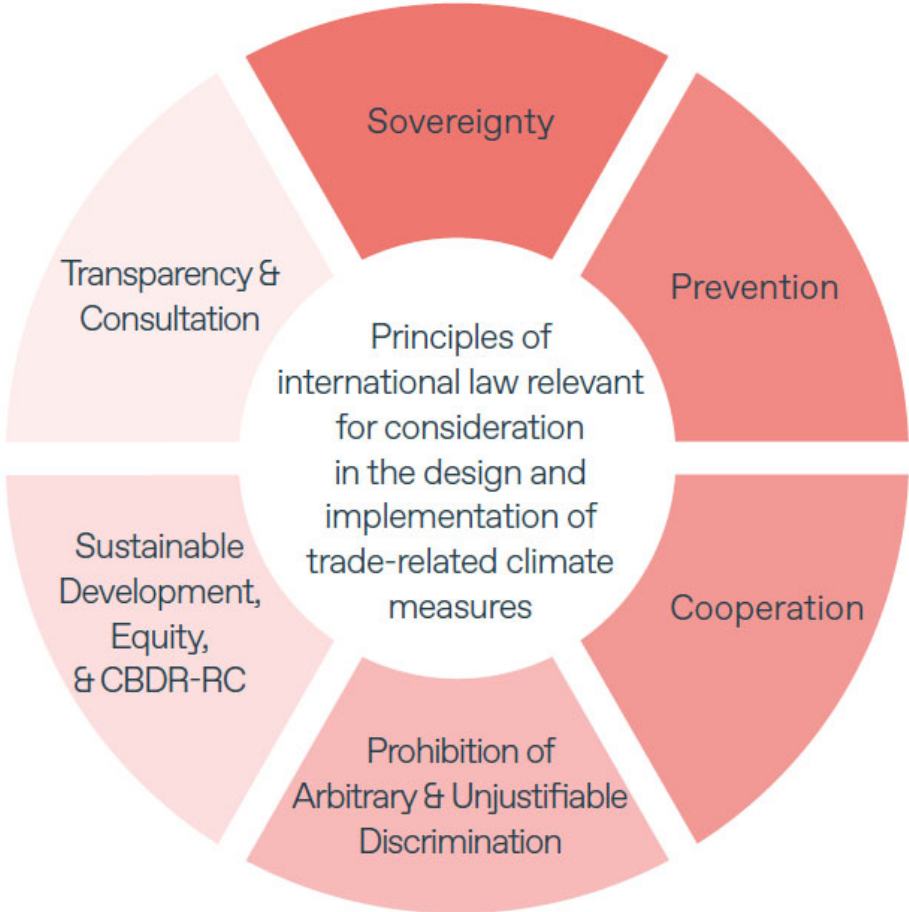
Approach

- Recognition that TrCMs are legal hybrids, responding to international law related to climate and environment and international trade law, along with principles of general international law, human rights law and sustainable development.
- Key part of approach is that the different principles of international law relevant to TrCMs should be understood as **cumulative** and **simultaneously applicable** in a **mutually supportive** and **coherent** manner, giving full effect to all relevant parts of international law, insofar as possible.
- Mandate was to focus on principles - for this we took existing rules as context, BUT this does not imply that all expert group members are satisfied with status quo in trade and climate laws.
- We kept to our specific mandate of reviewing principles, assuming that they will be relevant even to new rules that may emerge, but recognizing that a different composition of experts would be needed to reflect on what reforms and updates of rules & policies are needed.

A few caveats

- A modest reflective posture, rather than a prescriptive approach with the goal of providing insights that:
 - Help foster constructive dialogue and enhanced cooperation on trade-related contributions to the urgent twin imperative of tackling the climate crisis & supporting climate-resilient development.
- A non exhaustive list of principles including those that the Group considered to be particularly relevant and deserving of consideration.
- Presentation in a general manner, acknowledging that each principle may apply differently depending on the specific measure at issue, the particular context, and other relevant factors.
- Does not consider the application of the principles to any particular measures, whether to determine their legality or otherwise.
- Not intended to make any definitive statement as to the legal status of selected principles, including in the context of any particular international law regime.

Principles addressed in the report



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

Sovereignty

- Core principle of international law
- International climate change law:
 - “Principle of sovereignty of States in international cooperation to address climate change” (UNFCCC Preamble).
 - Regulatory autonomy of States with regard to both their emissions reduction targets and the means to pursue them (Paris Agreement).
- WTO law:
 - Right of WTO Members to regulate in the public interest, including for climate action, even if, in so doing, the measures in question restrict trade (E.g., Art. XX(b) & XX(g) GATT and Art. 2.2 TBT).

Prevention

- A customary norm of international law:
 - Limits the “sovereign right” of States to exploit their natural resources.
 - Ensure that “activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.
- Also a duty of due diligence or a requirement for States to do their utmost to protect the environment (e.g. prevent significant harm to the climate system).
- Duty proportional to the degree of risk of harm and vary depending on the level of economic development.

Cooperation

- Principle of international law
- International climate change law:
 - “The global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response” (UNFCCC Preamble)
- WTO law:
 - “... multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature”. (WTO CTE)
 - Lack of a genuine effort to cooperate and/or negotiate a multilateral solution, before having recourse to a unilateral measure, may result in a measure being applied in a manner constituting unjustifiable discrimination (AB Report in *US – Shrimp* (1998))
- Cooperation: advance notice; time for comment & good faith consultations; assistance with compliance

Prohibition of Arbitrary and Unjustifiable Discrimination

- WTO law:
 - Non-discrimination = fundamental principle of WTO law
 - TrCM, which differentiate between products based on their carbon content (i.e., non-product related PPM measures) may be inconsistent with the GATT non-discrimination obligations
 - ... but can be justified under Art. XX GATT, if the TrCM:
 - is necessary to protect the environment (Art. XX(b)) *or* relates to the conservation of exhaustible natural resources & is made effective in conjunction with restrictions on domestic production or consumption (Art. XX(g)); *and*
 - its application does not constitute arbitrary or unjustifiable discrimination or disguised restriction (Art. XX, chapeau)
 - Take into account in design/implementation of a TrCM the conditions in, and relevant measures taken by, trading partners
 - Undertake serious efforts to negotiate solutions with affected trading partners before resorting to a unilateral TrCM
- International climate change law:
 - Measures “should not constitute arbitrary or unjustifiable discrimination” (Art. 3.5 UNFCCC)

Sustainable Development, Equity and Common but Differentiated Responsibilities (CBDR)

- Sustainable development & equity reflected across international law
 - Rio Declaration, UNFCCC
 - Preamble to the WTO Agreement, SDT.
- Protection of environment on basis of equity & common but differentiated responsibility (e.g. Rio Principle 7).
 - UNFCCC: implementation shall be guided by CBDR-RC.
 - Paris Agreement: will be implemented to reflect equity and CBDR-RC in light of national circumstances.
- TrCMs taken to achieve climate objectives & implement UNFCCC & Paris Agreement should be guided by same principles.
- To avoid “arbitrary or unjustifiable” discrimination, the Appellate Body has said that the chapeau of Article XX requires consideration of the “different conditions” that may arise in third countries.

Transparency and Consultation

- Transparency plays a key role in both trade law & international law relating to climate change.
 - Public access to environmental information* public participation (e.g. Rio Principle 10, UNFCCC Article 6)
 - Information on trade measures (e.g. Article X:1 of the GATT 1994) & specific transparency rules in WTO Agreements for different trade measures.
- Both the climate and trade regimes also give expression to the principle of consultation among States:
 - In environmental law: duty of notification and consultation with States potentially affected.
 - In WTO law: consultation expressed in a number of provisions, decision-making procedures and inter-governmental negotiation. Also expressed in the Trade Policy Review Mechanism.

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Thank you!



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