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Least-Developed Countries, Climate Change and Trade

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The least-developed countries are identified in accordance with an assessment that considers income levels, human conditions, and economic vulnerability. The current list is as follows:

> Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Congo (Democratic Republic), Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao (People's Democratic Republic), Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Tanzania (United Republic), Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, Zambia.[1]

These countries are at particular risk from the effects of climate change, from rising sea levels, increases in temperatures, greater frequency of storms, hurricanes, floods and extreme climate events. Agriculture and environments are threatened while populations lack the economic capacity to respond.[2] Within global climate change negotiations, the main areas of concern for least-developed countries are financing and assistance for adaptation. The contribution of trade law and private sector commerce to provide solutions may not be large, but certain trade issues may arise, aimed mainly at ensuring that least-developed countries are not harmed by the climate change measures of other countries.

After outlining briefly the United Nations climate negotiations and the recognition of least-developed countries in the WTO, this paper addresses three issues in trade law: Doha Round negotiations on environmental goods and services, border adjustments and GSP tariff conditionality relating to climate change. It is argued that the separate category of least-developed countries should be appropriately recognized in all three areas, in light of their environmental, social and economic conditions.

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[1] United Nations Conference on Trade and Development, UN Recognition of the Least Developed Countries, available at www.unctad.org (accessed September 19, 2011). Climate change is also especially threatening for the countries on UNCTAD's unofficial list of small island developing nations: Antigua and Barbuda, Bahamas, Barbados, Cape Verde, Comoros, Dominica, Fiji, Grenada, Jamaica, Kiribati, Maldives, Marshall Islands, Micronesia (Federal States), Mauritius, Nauru, Palau, Papua New Guinea, Samoa, Sao Tome and Principe, Seychelles, Solomon Islands, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu, Vanuatu. The countries in both groups are Comoros, Kiribati, Samoa, Sao Tome and Principe, Solomon Islands, Timor-Leste, Tuvalu, and Vanuatu. Some predictions are that Tuvalu may become the first populated island to be swallowed by the ocean, and Kiribati is at risk. See Tiffany T.V. Duong, "When Islands Drown: The Plight of 'Climate Change Refugees' and Recourse to International Human Rights Law" (2009-2010) 31 U. Pa. J. Int'l L. 1239; Angela Williams, "Promoting Justice within the International Legal System: Prospects for Climate Refugees" in B.J. Richardson, Y. Le Bouthillier, H. McLeod-Kilmurray and S. Wood eds Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy (Cheltenham UK, Northampton MA USA: Edward Elgar, 2009) 84.

[2] Ruth Gordon, "Climate Change and the Poorest Nations: Further Reflections on Global Inequality" (2007) 78 U. Colo. L. Rev. 1559 at 1561 ("[T]he consequences may be annihilation, in the case of small island states and the indigenous communities of the North, or a slow death in ecologically vulnerable and technologically lacking low-income nations").

I. United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) was opened for signature in 1992 at the Rio Conference on Environment and Development and entered into force in 1994 with 193 parties.[3] The Convention aims at stabilizing greenhouse gas (GHG) concentrations in the atmosphere in order to prevent dangerous interference with the climate.[4] Article 3 of the Convention includes fundamental guiding principles, including:

> Article 3
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> 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.
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> 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. . . .
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> 4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

In the Convention, all Parties agreed to develop national inventories of GHG emissions, to promote conservation of reservoirs and sinks such as oceans and forests that store or remove greenhouse gases and to cooperate in preparing for adaptation to the impacts of climate change.[5] In accordance with the fundamental principle of common but differentiated responsibilities and respective capabilities (CBDR),[6] the developed country Parties agreed to undertake mitigation policies to limit their GHG emissions, to provide financing to developing country Parties for the full costs of preparing national inventories and to facilitate the transfer of environmentally sound technology to developing country Parties.[7] It was understood that implementation by developing countries would depend on effective implementation of the obligations of financing and transfer of technology by developed countries.[8] Developing countries were not required to adopt

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[3] United Nations Framework Convention on Climate Change, signed at New York 9 May 1992, in force 21 March 1994, 1771 U.N.T.S. 107. There are currently 195 parties (http://unfccc.int).
[4] UNFCCC Article 2
[5] UNFCCC Article 4(1)
[6] UNFCCC, Article 3(1)
[7] UNFCCC Article 4(2)(a)(b), Article 4(3), Article 4(5)
[8] UNFCCC Article 4(7)

mitigation policies to limit GHGs.[9] Special consideration was to be given to particularly vulnerable developing countries, such as small island nations, countries with low-lying coastal areas, countries with vulnerable forests and mountainous ecosystems, and countries prone to natural disasters, drought and desertification.[10] As well, the least developed countries were acknowledged in Article 4(9):

> The Parties shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology.

The emission reduction commitments of developed countries for the period 2008-2012 were set out in the Kyoto Protocol to the Convention, which entered into force in 2005.[11] The Protocol provides for emissions trading and allows a country to acquire emission reduction units from other Parties to help meet its commitments.[12] Parties can agree to implement their commitments jointly.[13] As well, the Protocol establishes the Clean Development Mechanism in which approved projects in developing countries produce Certified Emission Reductions that can count towards the mitigation commitments of developed countries. Developing countries did not accept limits on their emissions in the Kyoto Protocol. Under Article 10 of the Protocol, developing countries agreed to "seek to include" in their national inventories climate change information such as abatements of increases in emissions, enhancement of sinks, capacity building and adaptation measures.[14]

At the meeting in Cancun in 2010, the Conference of the Parties affirmed the movement toward mitigation commitments from certain developing countries that began in the 2009 Copenhagen Agreement. At Copenhagen, participating developed countries agreed to implement emission targets in the post-2012 era, while developing countries would implement mitigation actions as notified to the Secretariat and least-developed countries could undertake actions voluntarily on the basis of support.[15] In the Cancun Agreements, developed countries agreed to submit annual reports on emission reductions. Developing countries are invited to report their actions controlling emissions, supported by enhanced financial, technological and capacity-building

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[9] The Preamble notes that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs."

[10] UNFCCC Article 4(8)

[11] Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted at Kyoto 11 December 1997, in force 16 February 2005.

[12] Kyoto Protocol, Article 17, Article 3(10),(11).

[13] Kyoto Protocol, Article 4; UNFCCC Article 4(2)(a).

[14] Kyoto Protocol, Article 10(b)(ii).

[15] UNFCCC Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, FCCC/CP/2009/11/Add.1, Copenhagen Accord, paras. 4 – 5. The Conference of the Parties took note of the Accord, but did not officially adopt it.

resources.[16] In this effort, least developed countries and small island developing states will receive additional flexibility.[17]

At Cancun, the Conference of the Parties decided that adaptation to climate change should have the same priority as mitigation.[18] The Conference agreed to establish a process to assist least developed countries to formulate and implement national adaptation plans.[19] The Conference also reaffirmed that development and poverty eradication have overriding importance for developing countries and that "the share of global emissions originating in developing countries will grow to meet their social and development needs."[20]

To help least-developed countries adapt to climate change, assistance is provided under the Least Developed Countries Fund, one of the special funds of the UNFCCC held with the Global Environment Facility. The Facility is a joint initiative of UN agencies and a number of development banks.[21] While the Clean Development Mechanism established under the Kyoto Protocol is not targeted specifically at the least-developed countries, there have been a few LDC projects, including a hydroelectricity plant in Uganda and a project for indigenous tree restoration in Ethiopia.[22]

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[16] Report of the Conference of the Parties on its sixteenth session held in Cancun from 29 November to 10 December 2010, FCCC/CP/20110/7/Add.1, Cancun Agreements, paras. 48 – 60.

[17] Cancun Agreements, para. 60. Further, the Cancun Agreements require special consideration for least developed countries in the policies of the Technology Mechanism established at that meeting (Cancun Agreements, para. 121(c)).

[18] Cancun Agreements, para. 2(b)

[19] Cancun Agreements, para. 15.

[20] Cancun Agreements, Preamble to para. 48.

[21] For the UNFCCC Parties, the Facility also operates the Special Climate Change Fund and the Adaptation Fund. The Adaptation Fund operates through an independent board. See Friedrich Soltau, Fairness in International Climate Change Law and Policy (Cambridge University Press 2009) at 118. In the Copenhagen Accord, participating governments agreed to establish a Green Climate Fund for mitigation, adaptation, technology development and transfer and capacity-building (Copenhagen Accord, para. 8). The structure of the Green Climate Fund was set out with equal numbers of developed and developing countries at the Conference of the Parties in Cancun in 2010 (Cancun Agreements, paras. 102-103). See further Richard B. Stewart, Benedict Kingsbury and Bryce Rudyk, ed., Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development (New York University Press, 2009).

[22] Nicholas J. Cicale, "The Clean Development Mechanism: Renewable Energy Infrastructure for China and an Empty Promise for Africa" (2010) 26 Connecticut J. Int'l L 253 at 269-274. Technology supported that may be of particular interest for least-developed countries has included efficient wood fuel stoves and solar cookers (ibid. at 267-269). On the Clean Development Mechanism, see further: Antoine Dechezleprêtre, Matthieu Glachant and Yann Ménière, The Clean Development Mechanism and the International Diffusion of Technologies: An Empirical Study, December 2007, Fondazione Eni Enrico Mattei Note di Lavoro 105.2007, available at www.feem.it: Ved P. Nanda, "Climate Change and Developing Countries: The International Law Perspective" (2009-2010) 16 ILSA J. Int'l & Comp. L. 539; Christina Voigt, "The Deadlock of the Clean Development Mechanism: Caught Between Sustainability, Environmental Integrity and Economic Efficiency" in B.J. Richardson, Y. Le Bouthillier, H. McLeod-Kilmurray and S. Wood eds., Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy (Cheltenham UK, Northampton MA USA: Edward Elgar, 2009) 235; Damilola S. Olawuyi, "Beautifying Africa for the Clean Development Mechanism: Legal and Institutional Issues Considered" in B.J. Richardson, Y. Le Bouthillier, H. McLeod-Kilmurray and S. Wood eds., Ibid., 262.

Throughout, the UNFCCC process has followed the principle of common but differentiated responsibilities and respective capabilities of the Parties. The obligations of developing countries are distinct from those of developed countries, even though there is current debate about the position of economically powerful developing countries and the structure of mitigation commitments after 2012. From the beginning, the least developed countries have been recognized and protected separately, along with the other categories of particularly vulnerable developing countries such as small island nations. There is not necessarily consensus over the grounds for differentiated responsibility, whether it is current emission levels, historic levels,[23] economic capacity or some combination of factors.[24] On any basis, the UNFCCC reflects the view that the least developed and other vulnerable countries are in a separate category. They are the least at fault, but yet the most in danger of harm.

II. World Trade Organization

GATT 1947 contained special provisions allowing flexibility to developing countries to assist sectors of the domestic economy while the country underwent a process of development and industrialization. The basis given was that these economies could "only support low standards of living."[25] Remedying that problem was in keeping with the preamble of GATT in which the contracting parties recognized that "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living. . . ."[26] GATT Article XVIII permits a developing country to re-negotiate a tariff concession[27] or impose import restrictions or other measures, subject to certain requirements. These provisions continue to apply in GATT 1994 in the World Trade Organization.

Part IV was added to GATT in 1965, shortly after the founding conference of the United Nations Conference on Trade and Development (UNCTAD) in 1964. Part IV contains obligations in favour of developing countries that also continue to apply in the WTO. One central addition is in Article XXXVI:8: "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." In an interpretive note, non-reciprocity is defined to mean that in trade negotiations, developing countries are "not expected to make contributions which are inconsistent with their individual development, financial and trade needs, taking into

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[23] Jutta Brunée and Stephen J. Toope, Legitimacy and Legality in International Law: An Interactional Account (Cambridge University Press, 2010) at 191 argue that taking account of historic contributions amounts to responsibility for actions not illegal at the time.

[24] Consensus is lacking in a number of important areas as climate negotiators deal with the upcoming end of the first Kyoto commitment period in 2012 and the need for further emission reductions. Their task is described in the June 2011 edition of the Earth Negotiations Bulletin, a widely consulted source for information on the UNFCCC process, which draws a comparison to Odysseus' challenging voyage home to Ithaca after the Trojan War. (International Institute for Sustainable Development, Earth Negotiations Bulletin, a reporting service for environment and development negotiations, Monday 20 June 2011, vol 12, no 513, pp. 24-25). One question is whether the distinction between developed and developing countries will weaken if both groups are moving toward a "pledge and review" approach on mitigation (Ibid., p.25).

[25] GATT 1947, Article XVIII:1.

[26] GATT 1947, Preamble

[27] See also GATT, Article XXVIII*bis*:3.

consideration past trade developments."[28] The note mentions that this understanding is in accordance with the objectives set forth in GATT Article XXXVI. These objectives include higher standards of living and economic development in the developing countries and more favourable and acceptable conditions of access to world markets for products of export interest to them, in order to ensure that developing countries secure a share in the growth of international trade commensurate with their needs.[29]

The least-developed countries are identified as a separate group entitled to special treatment in the Enabling Clause of 1979, in which tariff preferences and other more favourable treatment for developing countries are given permanent legal status in GATT and the WTO.[30] Preferential treatment would otherwise be contrary to the most-favoured nation obligation of GATT Article I. The Enabling Clause was preceded by a ten-year waiver for preferential tariffs that had been granted earlier in 1971.[31] Preferential tariffs were an early objective promoted by UNCTAD. At UNCTAD II in 1968, the conference unanimously adopted a resolution supporting the establishment of "a mutually acceptable system of generalized non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries."[32] The conference set up a special committee to oversee consultations on this issue, with the aim of having a report in order to seek a GATT waiver.[33] The special committee's report[34] was the basis for the 1971 temporary waiver, which was made permanent in the Enabling Clause.

In addition to identifying the separate category for least developed countries, the Enabling Clause of 1979 also contains the graduation principle, in which developing countries are expected to move away from preferential treatment as their economies improve and they have increased capacity to "make contributions or negotiated concessions or take other mutually agreed action" under GATT.[35] Any concessions and contributions made and obligations assumed are intended to promote the basic objectives of GATT and of Article XXXVI, outlined above.[36]

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[28] Interpretative Note to GATT Article XXXVI:8.

[29] GATT Articles XXXVI:1, XXXVI:4, XXXVI:5, XXXVI.3..

[30] General Agreement on Tariffs and Trade, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, BISD 26S/203 (Enabling Clause), paras. 2(d), 6, 8. See also: WTO Preferential Tariff Treatment for Least-Developed Countries, Decision on Waiver, adopted 15 June 1999, WT/L/304; WTO Preferential Tariff Treatment for Least-Developed Countries, Decision on Extension of Waiver, adopted 27 May 2009, WT/L/759.

[31] General Agreement on Tariffs and Trade, Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24.

[32] UNCTAD, Resolution 21(II), Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries, 26 March 1968, Conference Proceedings p. 38.

[33] Among the background documents at the UNCTAD conference was a report transmitted by the Secretary-General of the Organization for Economic Co-operation and Development (OECD) setting out the views of the major developed countries in the OECD: Report by the Special Group on Trade with Developing Countries of the Organization for Economic for Economic Co-operation and Development, 29 January 1968, TD/56 (OECD report).

[34] UNCTAD, Special Committee on Preferences, Agreed Conclusions, Report to the Trade and Development Board (Agreed Conclusions)(reprinted in Annex D-4 to Appellate Body Report, *EC-Preferences*, WT/DS246/AB/R, adopted 20 April 2004 discussed below). The Trade and Development Board took note of the Special Committee's report on 13 October 1970 (Panel Report, *EC-Preferences*, WT/DS246/R, adopted as modified by the Appellate Body 20 April 2004, para. 7.64, footnote 176 to para. 5.121).

[35] Enabling Clause, para. 7.

[36] Ibid.

The Enabling Clause also repeats the non-reciprocity commitment of GATT Article XXXVI:8, with some additional language to block attempted coercion by developed countries seeking concessions inconsistent with the needs of developing countries.[37] Developed countries are to exercise "the utmost restraint" concerning concessions or contributions from the least developed countries, having regard to their particular development, financial and trade needs and their special economic difficulties.[38]

Special and differential treatment in favour of developing and least developed countries is a regular feature of the agreements making up the World Trade Organization established in the Uruguay Round of negotiations.[39] Some of the provisions of special and differential treatment allow developing countries greater attention or flexibility. There is an obligation of technical assistance to developing countries in the Technical Barriers to Trade Agreement, for example, along with the recognition that developing countries are not expected to use international standards that are inappropriate for their development, financial and trade needs.[40] Some provisions are periods of transition, limits of time that operate as temporary waivers. In the TRIPS Agreement, for example, developing countries had a five-year delay in application of the Agreement, and an additional five years for new areas of patent protection. Least-developed countries had a ten-year delay in application with extensions to be authorized by the TRIPS Council.[41] The evolution of special and differential treatment in the Uruguay Round has been controversial, especially the transition periods which seem to reflect a new theoretical base that does not depend on the needs of developing countries.

The Ministerial Declaration initiating the Doha Round of negotiations in 2001 recognizes that the majority of WTO Members are developing countries and puts development at the heart of the negotiations.[42] In several provisions, special attention is directed to least developed countries.[43] The Ministerial Conference ordered a study of ways of making the existing provisions of special and differential treatment more effective, particularly for least developed countries.[44] The Doha Declaration also called for negotiations on the relationship between trade and environmental agreements, directing the WTO Committee on Trade and Environment to give particular

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[37] Enabling Clause, para. 5.

[38] Enabling Clause, paras. 6, 8.

[39] Charles-Emmanuel Côté, "De Genève à Doha: genèse et évolution du traitement spécial et différencié des pays en développement dans le droit de l'OMC" (2010) 56:1 McGill L.J. 115, who discusses the school of thought among French academics identifying a separate international law of development, based on the Enabling Clause, non-reciprocity, and the New International Economic Order. Côté concludes that school has now faded, after the decision in *EC-Preferences*.

[40] WTO Technical Barriers to Trade Agreement, Article 11, Article 12.4.

[41] WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, Articles 65, 66. For least-developed countries, the general deadline was extended to 2013 (Decision of the Council for TRIPS of 29 November 2005, IP/C/40). The deadline for the recognition of pharmaceutical patents by least-developed countries was extended to 2016 (Decision of the Council for TRIPS of 27 June 2002, IP/C/25).

[42] WTO, Ministerial Declaration, Ministerial Conference, Doha, 14 November 2001, WT/MIN(01)/DEC/1 (Doha Declaration), para. 2.

[43] Doha Declaration, paras. 3, 15, 16, 21, 22, 24, 25, 26, 27, 28, 32, 33, 35 (small economies), 36, 38, 42, 43, 44, 50.

[44] Ministerial Conference, Implementation-Related Issues and Concerns, decision of 14 November 2001, Doha, para. 12.2, 12.1(ii). See WTO Secretariat, A Review of Mandatory Special and Differential Treatment Provisions, 21 December 2001, WT/COMTD/W/77/Rev.1/Add.2.

attention to "the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them."[45]

As with the UNFCCC process, there is some lack of consensus over special and differential treatment given the economic power of certain developing countries. There is less controversy over the separate category for least-developed countries, particularly since membership in the category is determined by the United Nations and is not self-selecting as for developing country status in general.

III. Specific Trade Issues

1. Environmental Goods and Services

The Doha Declaration calls for negotiations on the liberalization of trade in environmental goods and services.[46] In the negotiations, two general approaches have emerged. The first, from the developed countries, calls for a list of goods that would receive greater market access. The second, from developing countries,[47] has been project-based and would concentrate on the use of goods and services for particular environmental applications.[48] In a joint communication in April 2011, China and India called for a renewed emphasis on the development dimension of the negotiations in order to consider transfer of technology, special and differential treatment and a financial mechanism to ensure investment and capacity-building for the production of environmental goods and services.[49]

The list approach has been criticized for including mainly goods of export interest to developed countries such as energy-efficient machinery and vehicles and for covering dual-use goods whose environmental contribution is not assured in all applications. The project approach can be criticized as cumbersome to administer and as presenting the legal question of whether tariff treatment can differ in accordance with the end use of goods.

Argentina and Brazil have proposed linking the project approach to the Clean Development Mechanism.[50] The Canadian customs tariff for many years contained end use tariff items that depended on the actual use of goods after importation, subject to a system of certification and verification. Most of those items were phased out after implementation of the Harmonized

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[45] Doha Declaration, para.32(i).
[46] Doha Declaration, para. 31(iii).
[47] An Alternative Approach for Negotiations under Paragraph 31(iii), Submission by India, 3 June 2005, TN/TE/W/51; Structural Dimensions of the Environmental Project Approach, Submission by India, 4 July 2005, TN/TE/W/54.
[48] Richard G. Tarasofsky, "Heating Up International Trade Law: Challenges and Opportunities Posed by Efforts to Combat Climate Change" (2008) 1 Carbon and Climate Law Review 7 at 12. See further Anuj J. Mathew and Santiago Fernández de Córdoba, "The Green Dilemma about Liberalization of Trade in Environmental Goods" (2009) 42(2) J. World Trade 379.
[49] WTO Negotiations on Environmental Goods and Services: Addressing the Development Dimension for a "Triple-Win" Outcome, Communication from China and India, 15 April 2011, TN/TE/W/79.
[50] The Doha Round and Climate Change, Submission by Argentina, 23 November 2009, TN/TE/W/74; Environmental Goods and Services, Paragraph 31(iii), Communication from Argentina and Brazil, 30 June 2010, TN/TE/W/76.

System in 1988.[51] Administration of project-based distinctions would have to be considered, but there is no legal constraint on using actual end use as a factor in tariff classification. As Argentina noted in 2005, the project approach could be implemented unilaterally by importing countries.[52]

It is important that the interests of least-developed countries receive sufficient attention in the discussion of environmental goods and services, which may be the forerunner of a future Green Round of WTO negotiations.[53] Cuba has proposed combining a list approach with categories of environmental services, such as waste water management and drinking water treatment.[54] Such an initiative could help to identify appropriate technologies with particular potential for least developed countries, including for their import interests.

2. Border Adjustments

If a country imposes a carbon tax on domestic goods to reflect the amount of carbon produced during their manufacture, the question of the treatment of imports will arise. Domestic manufacturers will resist having to compete with imports that were not subject to such a tax in their country of origin. The argument will be that some border adjustment is necessary in order to keep such producers from relocating.

GATT Article II:2 provides that certain fees and charges at the border are permissible and do not constitute a breach of tariff bindings or MFN obligations. Article II:2(a) covers charges equivalent to taxes on like domestic products in accordance with Article III:2. This would seem to support border adjustments. That conclusion, however, is subject to three major objections concerning climate change adjustments, two over the interpretation of GATT provisions as applied to all imports and one relating to the relationship between the WTO and climate change treaties that applies with particular force to imports from developing countries.

One issue relating to the GATT provisions alone has to do with what is actually taxed. If the tax is a simple tax on goods of a particular description, then there may be no issue to resolve. If the tax varies with the amount of carbon produced, however, then it is, in effect, a tax on the output of energy consumption elsewhere, something that is no longer present as a physical component of the goods. GATT Article II:2(a) in both English and Spanish permits border charges equivalent to domestic taxes on "an article from which the imported product has been

[51] See Maureen Irish "Interpretation and Naming: The Harmonized System in Canadian Customs Tariff Law" (1993) XXXI Canadian Yearbook of International Law 89 for a discussion of this history, as well as the argument that attention to use is an inherent part of the naming and classification of goods.

[52] Integrated Proposal on Environmental Goods for Development, Submission by Argentina, 14 October 2005, TN/TE/W/62, para. 7.

[53] Gary Clyde Hufbauer and Jisun Kim, "Climate Change and Trade: Searching for ways to avoid a train wreck" Centre for Trade and Economic Integration, paper prepared for the conference on Climate Change, Trade and Competitiveness: Issues for the WTO held on 16-18 June 2010, at 21.

[54] Communication from Cuba, paragraph 31(iii), 9 July 2008, TN/TE/W/73. The full list of categories noted by Cuba is "waste water management and water resources (drinking water treatment); environmental monitoring and analysis; renewable energy; management of solid and hazardous waste and recycling systems; air pollution control; and soil conservation or protection."

manufactured or produced in whole or in part."[55] This description could include an input that is no longer physically present in the imported goods, although the term "article" is awkward. The same provision in French is expressed as "une marchandise qui a été incorporée dans l'article importé," which appears to require something that has been physically incorporated into imported goods.[56] In all versions, there is some question whether the language covers an extraterritorial tax on energy consumption in the country of production.[57]

The second issue of GATT interpretation arises when the domestic measure is not a tax, but a cap-and-trade system with emission permits that can be bought and sold. If importers must buy emission permits equivalent to the ones required for like domestic products, then this is not precisely a tax adjustment at the border. The domestic measure would most likely be a regulation subject to the national treatment standard of Article III:4. The difficulty is that Article II:2(a) permits border adjustments for taxes that are subject to Article III:2, but is silent on border adjustments for regulations that are subject to Article III:4. There is no real question that Article III:4 would apply domestically, but there may be a problem if the system is made effective at the border.

The third major objection to climate change border adjustments deals with the position of the WTO treaties as part of public international law and, more particularly, the functioning of WTO provisions in harmony with the provisions of the UNFCCC. In accordance with Article 3(2) of the WTO Dispute Settlement Understanding, Panels and the Appellate Body are to interpret the provisions of the WTO agreements following the customary rules of public international law. It is widely accepted that the customary rules are set out in the Vienna Convention on the Law of Treaties, which stipulates in Article 31(3)(c) that interpretation is to take into account " any relevant rules of international law applicable in the relations between the parties." The question, then, is whether border adjustments can be imposed on exports from developing countries that have not accepted a mitigation obligation under a climate treaty. If an importing country imposes an adjustment, has it contravened the principle of common but differentiated responsibilities and respective capabilities of Article 3(1) of the Framework Convention? If GATT Article II:2(a) is read in harmony with Article 3(1), does the mention of charges imposed consistently with the national treatment principle of GATT Article III refer to the circumstances of production only of the domestic goods or does it also refer to the actual circumstances of production of the imported goods?

One argument against reading the two treaties in harmony relates to the mandate of WTO Panels and the Appellate Body. In accordance with the Dispute Settlement Understanding, Panels and the Appellate Body are to deal with complaints under WTO law[58] and their rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."[59] The reply is that

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[55] In Spanish: "una mercancía que haya servido, en todo o en parte, para fabricar el producto importado."

[56] See Patrick Low, Gabrielle Marceau and Julia Reinaud, "The interface between the trade and climate change regimes: Scoping the issue" Centre for Trade and Economic Integration, paper prepared for the conference on Climate Change, Trade and Competitiveness: Issues for the WTO held on 16-18 June 2010, at 8 – 10.

[57] See Paul-Erik Veel, "Carbon Tariffs and the WTO: An Evaluation of Feasible Policies" (2009) 12(3) Journal of International Economic Law 749 at 771-775. If border adjustment is not permitted, then the importing country may claim justification under GATT Article XX(g), a question not addressed in this paper.

[58] WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 7(1), 7(2), 11.

[59] Ibid., Articles 3(2), 19(2).

those rights and obligations cannot be understood until they are properly interpreted and the customary rules of interpretation require that the Framework Convention be taken into account.[60] In this view, failure to consider the Framework Convention would risk adding to or diminishing those rights and obligations.

Another argument against using non-WTO treaties before the Panels and Appellate Body was mentioned by the Panel in *EC-Biotech*[61] which stated that non-WTO treaties could be considered only if all WTO members were party to both. This interpretation is not widely-supported, as it is highly restrictive,[62] and would mean that Article 31(3)(c) would have no application for most multilateral treaties.[63]

Climate change border tax adjustments have been criticized as difficult to calculate, divisive and legally risky.[64] If adjustments are used against imports from developing countries, the principle of common but differentiated responsibilities will be at issue. Whatever the conclusion on the effect of that principle for developing countries in general, the position of the least-developed countries would require separate consideration.[65] Goods of export interest for least-developed countries should not be subjected to climate-related border adjustments.

3. GSP Tariff Preferences

Some commentators have argued that GSP tariff preferences could be used as incentives to encourage developing countries to take climate change measures. The idea is that developed countries could provide tariff reductions or duty-free imports so long as the developing country takes certain action related to climate change. Tracey Epps and Andrew Green suggest this course of action while noting that multilateral routes are better.[66] This would be a carrot, a positive inducement, rather than a stick as with border adjustments.

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[60] Panagiotis Delimatis, "The Fragmentation of International Trade Law" (2011) 45(1) J. World Trade 87; Julia O'Brien, "The Equity of Levelling the Playing Field in the Climate Change Context" (2009) 43(5) J. World Trade 1093; 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) J. World Trade 653.

[61] Panel Report, *European Communities – Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, para. 7.70.

[62] Benn McGrady, "Fragmentation of International Law or 'Systemic Integration' of Treaty Regimes: *EC- Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties" (2008) 42(4) J World Trade 589.

[63] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martii Koskenniemi, United Nations Doc. A/CN.4/L.682, 13 April 2006, para. 450. See the Report at paragraphs 424 to 450 for full analysis of other WTO authority that has referred to non-WTO treaties.

[64] Tracey Epps and Andrew Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (Cheltenham UK & Northampton, MA, USA: Edward Elgar, 2010) (Epps and Green) at 251, 263.

[65] Marrakesh Agreement Establishing the World Trade Organization, Preamble, second paragraph.

[66] Epps and Green at 8, 57, 178-187.

Those who support this argument rely on the WTO Appellate Body decision in *EC-Preferences*,[67] on a complaint filed by India against the European Community. India contested the WTO-conformity of a special arrangement within the EC's preferential tariff at the time that granted additional preferences to developing country GSP beneficiaries who were dealing with the problem of illicit drug production in their territories. The Drug Arrangement was available to twelve listed developing countries. India argued that the EC could not differentiate in this way among its GSP beneficiaries, and give additional preferences to the chosen twelve.

The Panel and Appellate Body agreed with India in the result, but for different reasons. Relying on the previous history in UNCTAD and the 1971 GATT waiver, the Panel found that the Enabling Clause permitted no differentiation among developing countries except for a priori limitations that reflected competitiveness concerns.[68] The Appellate Body also found against the Drug Arrangement, but was of the view that some differentiation was permitted in response to the differing development, financial and trade needs of particular developing countries. India focused its argument on the non-discrimination requirement in the footnote to paragraph 2(a) of the Enabling Clause which refers to the 1971 waiver authorizing "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries." The Appellate Body interpreted discrimination within the context of paragraph 3(c) of the Clause which mentions development, financial and trade needs that can vary from country to country. In the view of the Appellate Body, non-discrimination requires similar treatment for similarly-situated countries. The EC had the burden to show that it offered the additional preference to all similarly-situated beneficiaries of its GSP tariff.[69] As the Drug Arrangement contained no criteria for membership and no grounds or procedure for the withdrawal of the privilege, the EC had not demonstrate that it provided non-discriminatory treatment.

In its decision, the Appellate Body made additional comments on non-discrimination that were not applied to the Drug Arrangement at issue in the dispute. The Appellate Body noted that under paragraph 3(b) of the Enabling Clause developed countries that offer preferential tariffs must "respond positively" to the development, financial and trade needs. The Appellate Body stated that the need cannot be based on unilateral assertion by either the granting country or the beneficiary country, but must be an objective standard, such as a standard with broad-based recognition in a multilateral instrument.[70] As well, there must be a sufficient nexus between the preference and the likelihood of alleviating the need.[71] As the Drug Arrangement did not meet the requirement of non-discrimination, the Appellate Body did not address the question of whether it constituted a positive response pursuant to paragraph 3(b).

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[67] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WT/DS246/AB/R, adopted 20 April 2004; Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WT/DS246/R, adopted as modified by the Appellate Body, 20 April 2004.

[68] Panel Report, paras. 7.109 - 7.113. The a priori limitations were measures such as import ceilings and safeguards to shield producers in the developed countries. The Panel included graduation mechanisms among the current a priori limitations. (para. 7.111, fn 332). The Appellate Body was careful to state that it made no determination on the permissibility of a priori limitations (Appellate Body Report, fn 355).

[69] Before the Appellate Body, India did not argue that all developing countries had to receive the same preferential treatment. Rather, the focus of the dispute according to India was on differentiation among countries that the EC had already chosen as beneficiaries of its preferential tariff (Appellate Body Report, paras. 46, 128).

[70] Appellate Body Report, para. 163.

[71] Appellate Body Report, para. 164.

Michael McKenzie argues that it is open to developed countries to impose GSP conditions requiring actions to mitigate or adapt to climate change, such as spending a certain percentage of GDP on climate change issues or ratifying certain climate conventions.[72] He considers that climate change impedes development and that tariff preferences will produce economic benefits that will permit the developing country to take the measures. As evidence of a broad-based understanding that responding to climate change is a development need, some have pointed to the recognition in paragraph 2 of the Copenhagen Accord that "a low-emission development strategy is indispensable to sustainable development."[73] It is questionable, however, whether this paragraph reflects the required consensus to support such conditionality, particularly when the full sentence in paragraph 2 of the Copenhagen Accord is as follows:

> We should cooperate in achieving the peaking of global and national emissions as soon as possible, recognizing that the time frame for peaking will be longer in developing countries and bearing in mind that social and economic development and poverty eradication are the first and overriding priorities of developing countries and that a low-emission development strategy is indispensable to sustainable development.

The paragraph differs significantly from conditional GSP, as it supports cooperation rather than coercion and gives priority to the policy choices of developing countries. The last few words of the paragraph are not a sufficient justification to subject developing country exports to whatever climate change conditions a granting country chooses to impose.

It should not be assumed that it is easy to meet the Appellate Body's requirements for conditionality in *EC-Preferences*. Tracey Epps and Andrew Green question the effectiveness of climate change conditions in meeting an asserted development need. If industry moves out of a developing country after it ratifies a climate change convention, then the country's economy is harmed and there may well be no overall reduction in greenhouse gases.[74] In commenting generally on the EU's revised GSP+ system after 2005, Lorand Bartels suggests that unless a preference relates to a particular product that is relevant to the need, it is difficult to rely on the theory that a preference generates extra revenue in the developing country that can cover the cost of fulfilling the condition. At the very least, there is a question of sequencing, since the condition is met first before the preferential trade occurs,[75] and the link to alleviating a development need

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[72] Michael McKenzie, "Climate Change and the Generalized System of Preferences" (2008) 11(3) JIEL 679 at 688-689.

[73] Epps and Green at 184 (semble). As well, the Copenhagen Accord was strongly criticized because it was negotiated by only a small group of countries. The Conference of the Parties took note of the Accord, but failed to adopt it. See Jutta Brunée and Stephen J. Toope, Legitimacy and Legality in International Law: An Interactional Account (Cambridge University Press, 2010) at 205.

[74] Epps and Green at 186

[75] Lorand Bartels, "The WTO Legality of the EU's GSP+ Arrangement" (2007) 10(4) Journal of International Economic Law 869 at 880-882. See further "The Appellate Body's GSP Decision," internet roundtable, (2004) 3:2 World Trade Review 239 at 244-245 (Lorand Bartels).

is contestable and tenuous. Joost Pauwelyn is surely right that the *EC-Preferences* reasoning gives the Appellate Body significant discretion and that the Enabling Clause now has teeth.[76]

Most developing countries are already party to the UNFCCC and the Kyoto Protocol, in any case. In theory, a condition could relate to remaining a party or to joining a future agreement, if such conditions were found to constitute positive actions meeting the Appellate Body requirements. A problem may arise from a potential lack of consistency between the United States and the European Union, the two sources of conditional GSP tariffs. If their lists of preferred climate change treaties are incompatible in the future, a developing country could be forced to choose between them.[77]

GSP tariffs are subject to the other requirements of the Enabling Clause that were not analyzed by the Appellate Body in the *EC-Preferences* decision. Any preferences must be "designed to facilitate and promote the trade of developing countries" (para. 3(a)) and would also be subject to the basic objectives of GATT Article XXXVI (para. 7, 1st sentence). In the case of the least-developed countries, paragraphs 6 and 8 prohibit coercion concerning any concessions or contributions from them, in light of their special economic difficulties and development, financial and trade needs.

In *EC-Preferences*, India did not present argument on the requirement that preferences be "non-reciprocal."[78] Lorand Bartels has argued that non-reciprocity in GATT terminology refers only to the absence of concessions from developing countries involving market access barriers.[79] That position is certainly consistent with the wording of GATT Article XXXVI:8 and is not inconsistent with paragraph 5 of the Enabling Clause. It is not clear, however, that such a limited interpretation is the only meaning of reciprocity that applies to the description of the Generalized System of Preferences.[80] In the past, UNCTAD has criticized GSP conditionality as "incompatible with the principle of non-reciprocity".[81] When the WTO now covers intellectual

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[76] "The Appellate Body's GSP Decision," internet roundtable, (2004) 3:2 World Trade Review 239 at 255-256 (Joost Pauwelyn). He mentions particularly the obligation in the AB's reasoning not to discriminate among beneficiaries that have similar development, financial and trade needs. (p 255)..

[77] Dr. Umut Turksen, "The WTO Law and the EC's GSP+ Arrangement" (2009) 43(5) J. World Trade 927 at 960 noting that the US and EU currently have incompatible positions on the Cartagena Protocol on Biosafety.

[78] Enabling Clause, note 3. See Panel Report para. 4.241.

[79] Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program" (2003) 6(2) JIEL 507 at 526-530.

[80] Enabling Clause, para. 2(a), note 3. For a wider use of non-reciprocity that might tie together the interpretation of non-discrimination in the introductory paragraph of GATT Article XX and the principle of common but differentiated responsibility and respective capabilities, see Patrick Low, Gabrielle Marceau and Julia Reinaud, "The interface between the trade and climate change regimes: Scoping the issue" Centre for Trade and Economic Integration, paper prepared for the conference on Climate Change, Trade and Competitiveness: Issues for the WTO held on 16-18 June 2010, at 20-21.

[81] UNCTAD Secretariat, Review and Evaluation of the Generalized System of Preferences, 9 January 1979, TD/232, para.73: "[C]ertain preference-giving countries place conditions on eligibility for preferences which indirectly imply a certain degree of reciprocity or concessions or a certain pattern of behavior. These conditions would therefore seem to be incompatible with the principle of non-reciprocity embodied in the GSP." See also UNCTAD Secretariat, Comprehensive Review of the Generalized System of Preferences, 9 April 1979, TD/B/C.5/63, para. 153. The OECD countries, in their 1968 report that is mentioned in the preamble of Resolution 21 at UNCTAD II, were opposed to attaching conditions to GSP tariffs. Report by the Special Group on Trade with Developing Countries of the Organisation for Economic Co-operation and Development, 29 January 1968, TD/56, para.45: "The Group agreed

property and when many free trade agreements contain chapters or side arrangements on diverse areas such as labour rights and environmental protection, which are common conditions in GSP tariffs, it is difficult to see all of these topics as non-trade related.[82] GSP conditions that required climate change actions from beneficiary countries would not be free of competitive motivations and the fear of footloose industry. Even if a nexus could be established to a development, financial or trade need, clearly something is being asked of the developing country.[83]

In addition to issues in trade law, any climate change GSP conditions would also have to overcome the argument that trade provisions must be read in the context of other public international law. A condition that imposed on a developing country the burden of taking a mitigation action could well be incompatible with the UNFCCC.

For the least-developed-countries, the Enabling Clause creates a position that they did not have under the previous 1971 waiver. Membership in the group of least-developed-countries is not based on self-selection, as for developing countries in the GSP.[84] Rather, the WTO adopts for all its purposes the UN list of least-developed-countries, using language very similar to that of common but differentiated responsibility in the UNFCCC.[85] In general, GSP tariffs have produced disappointing results for least-developed countries,[86] but when rules of origin were simplified in Canada's preferential tariffs, imports increased.[87] The trade of least-developed countries may be harmed by climate-related conditions imposed in GSP tariffs. From the perspective of a least-developed country, a stick and a carrot can look pretty much the same.

IV. Outlook

For least-developed countries, as they face the daunting challenges of adapting to the effects of climate change, the main areas of interest in the UNFCCC process are finance and technology

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on the importance of complementary measures by developing countries to promote trade among themselves, and, in particular, of the establishment of new regional integration arrangements and strengthening of existing integration arrangements between developing countries, and of the creation by the developing countries of a climate for foreign investment that will promote industrialization and permit the developing countries to take advantage of the potential trade advantages created by the special tariff treatment. Again however, they did not believe that the grant of special tariff treatment could or should be made conditional on the adoption of such complementary measures by the developing countries themselves."

[82] Gregory Shaffer and Yvonne Apea, "GSP Programmes and their Historical-Political-Institutional Context" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds.), *Human Rights and International Trade* (Oxford University Press, 2005), 488 at 501.

[83] Shaffer and Apea, ibid., at 490-495.

[84] Agreed Conclusions, para IV.1.

[85] Marrakesh Agreement Establishing the World Trade Organization, Art.XI.2: "The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent constituent with their individual development, financial and trade needs or their administrative and institutional capabilities."

[86] Caf Dowlah, "Trade Preferences and Economic Growth: An Assessment of the U.S. GSP Schemes in the Context of Least Developed Countries" in Yong-Shik Lee, Gary N. Horlick, Won-Mog Choi and Tomer Broude (eds), *Law and Development Perspective on International Trade Law* (Cambridge University Press, 2011) 334-355.

[87] José Anson, Marc Bacchetta and Matthias Helble, "Using Preferences to Promote LDC Exports: A Canadian Success Story?" (2009) 43(2) J. World Trade 285-315.

transfer to assist with adaptation.[88] They are not in a position to make mitigation commitments. The contributions of trade law may be rather narrow, limited chiefly to making sure that they are not harmed by measures taken by other countries to combat climate change. The provisions of the WTO Technical Barriers to Trade Agreement on technical assistance and special and differential treatment may be helpful for some aspects of technology transfer.[89] Perhaps technology could focus particularly on micro trade. The Cancun Agreement mentions the possibility of micro insurance for risk management to address the effects of severe weather.[90] It has been suggested that private micro finance can have a role in delivering funding for climate change adaptation directly to affected people.[91]

In both trade and climate change law, least-developed countries are treated in a separate category, distinct from other developing countries. The category is not self-selecting, as is the case for developing countries in general. Approaches that apply to other developing countries have been abandoned for the least-developed. Time-limited adjustment periods for least-developed countries in the TRIPS agreement, for example, have had to be extended. In both areas, there are ongoing debates over whether some developing countries should take on greater obligations. Whatever the outcome of those debates, they should not be permitted to weaken the boundary line around the category for the least-developed countries. The reasons for expanded mitigation obligations in the climate change context or graduation in the WTO do not apply to the least-developed countries. The basis for differentiation remains strong and dictates special attention to their environmental, economic and social interests, viewed in an integrated manner in accordance with the objective of sustainable development.[92]

[88] UNFCCC Articles 4(2)(a)(b), 4(3), 4(5), 4(7)
[89] WTO Agreement on Technical Barriers to Trade, Articles 11, 12 – see Epps and Green p. 199.
[90] Cancun Agreements, para. 28(b).
[91] Shardul Agrawala and Maëlis Carraro, "Assessing the Role of Microfinance in Fostering Adaptation to Climate Change" 2010, Fondazione Eni Enrico Mattei, Nota di Lavoro 82.2010, available on the website www.feem.it.
[92] UNFCCC, Article 3(4); Marrakesh Agreement Establishing the World Trade Organization, Preamble.