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# (Re)framing Responsibility? Assessing the Division of Burdens Under the EU Carbon Border Adjustment Mechanism

COLLECTION:
MANAGING RESPONSIBILITIES FOR CLIMATE CHANGE RISKS

ARTICLE

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## ABSTRACT

As part of its highly anticipated Fit for 55 Package, in July 2021 the European Commission introduced a proposed regulation establishing a carbon border adjustment mechanism (CBAM). The CBAM places a price on carbon embedded in imports from certain energy-intensive sectors, and is intended to combat the risk of carbon leakage arising from the gap between EU climate ambitions and those of trading partners. In the words of Commission President von der Leyen, 'carbon must have its price – because nature cannot pay the price anymore'. This raises the question, however, of who should pay it instead. From the EU's perspective, the proposed CBAM reflects the EU's 'responsibility to continue playing a leading role in global climate action' through reducing its *global* GHG footprint in line with the Paris Agreement. However, several newly industrialised countries have attacked the proposal as discriminatory and contrary to the principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC).

Against this backdrop, this article assesses how the EU's framing of responsibility fits within the applicable public international law framework. First the article examines how the EU's faming of 'responsibility' fits within the law of state jurisdiction, which conditions regulators' competence to place burdens on actors beyond their territory. It then turns to the division of responsibilities under the UN climate agreements, with a particular focus on opportunities for incorporating a more equitable differentiation of burdens in line with CBDRRC. Such differentiation would only be feasible for regulators if it could pass the obstacles posed by the law of the World Trade Organisation (WTO). Unpacking the challenges and opportunities, it is argued that these hurdles need not be insurmountable, though much would depend on the willingness of both the EU and the WTO dispute settlement body to accommodate competing trade and environmental interests.

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## 1. INTRODUCTION

As part of its highly anticipated Fit for 55 Package, in July 2021 the European Commission introduced a proposed regulation establishing a carbon border adjustment mechanism (CBAM).[1] The CBAM places a price on carbon embedded in imports from certain energy-intensive sectors, and is intended to combat the risk of carbon leakage arising from the gap between EU climate ambitions and those of trading partners. In the words of Commission President von der Leyen, 'carbon must have its price – because nature cannot pay the price anymore'.[2] This raises the question, however, of *who* should pay it instead.

From the EU's perspective, the proposed CBAM reflects the EU's 'responsibility to continue playing a leading role in global climate action' through reducing its '*global* GHG footprint'.[3] Yet while EU consumers will ultimately pay a higher price for products, the measure is also projected to reduce exports in energy-intensive goods from developing and least developed countries (LDCs).[4] Through targeting carbon leakage, the CBAM namely moves burdens up the supply chain to producers abroad. The price on carbon creates an advantage for states with greener and more technologically advanced production processes, and states which impose their own carbon tax.[5] Among developing states, the measure is expected to have the greatest effects on Brazil, India and South Africa, which have the highest level of energy-intensive exports to the EU.[6] Mozambique has been identified as the most exposed LDC, being one of the top 10 exporters of aluminium to the EU.[7] As noted by the European Commission itself, even though LDCs account for a 'minimal' proportion of EU external trade, exports may nonetheless 'provide important foreign exchange earnings', constituting 'a significant share' of *their* Gross National Income.[8] With a broader scope under consideration in inter-institutional negotiations, these effects could become even more far-reaching.[9]

Representatives of several newly industrialised countries have expressed 'grave concern' about such a 'unilateral carbon border adjustment', which imposes costs on emissions from installations beyond the EU.[10] In support of their arguments, these states refer to international law norms, criticising the measure as 'discriminatory' and against the principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC).[11]

The abovementioned perspectives reflect very different views on states' 'responsibility' to respond to climate change, relying on a number of public international law norms. Importantly, these references are not to the body of secondary rules in international law governing the consequences of a breach of an obligation.[12] Rather, they concern the question of how burdens are to be divided when interpreting *rights* and *obligations* to mitigate climate change. This article will assess how the EU's framing of responsibility fits within the public international law framework. In doing so, it relies on Caney's definition of 'mitigation burdens', as the opportunity

1 Commission (EU), 'Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism' (Communication) COM(2021) 564 final, 14 July 2021 (CBAM Proposal).

2 ibid 2.

3 Amendments adopted by the European Parliament to the CBAM Proposal, P9_TA(2022)0248, 22 June 2022 (EP CBAM Amendments), art 7a (emphasis added).

4 UNCTAD, 'A European Border Adjustment Mechanism: Implications for Developing Countries' (14 July 2021) <https://unctad.org/system/files/official-document/osginf2021d2_en.pdf>, 7, accessed 1 October 2021, ('2021 UNCTAD Report').

5 ibid 12.

6 ibid 9.

7 Impact Assessment Report accompanying the CBAM Proposal (n 1), SWD(2021) 643 final, 14 July 2021, 66 (Impact Assessment CBAM Proposal).

8 ibid 30.

9 See for the latest legislative developments: <www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-carbon-border-adjustment-mechanism> accessed 20 August 2022.

10 'Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change hosted by India on 8th April 2021' (Government of South Africa Website) <www.gov.za/nr/speeches/joint-statement-issued-conclusion-30th-basic-ministerial-meeting-climate-change-hosted> accessed 18 October 2021

11 ibid para 19.

12 'Draft articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10.

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costs of not engaging in activities contributing to climate change, such as the reduction in revenue from reduced exports or the acquisition and use of greener technologies.[13]

Section 2 starts by briefly sketching the EU's framing of responsibility under the CBAM, and unpacking the measure's basic operation. The subsequent sections then analyse key tensions – and possible design solutions – under three legal fields of particular relevance to the targeting of foreign embedded emissions by the proposed CBAM. The first is the law of state jurisdiction, which governs the competence of states to regulate conduct and events.[14] As will be seen in Section 3, there remains lively discussion on the legal implications of unilateral trade measures whose operation is dependent on 'extraterritorial' conduct and circumstances. This article takes the view that the – largely customary – law of state jurisdiction is applicable to the EU as a supranational organisation and subject of international law.[15] Functionally speaking, the EU is exercising uniquely far-reaching regulatory competences that were subject to jurisdictional conditions before their attribution to the EU by the member states. Under EU law, it is also well recognised that the EU is bound by international custom. Indeed, as will be discussed, in the *Air Transport Association of America (ATAA)* case, the Court of Justice of the EU (CJEU) assessed the jurisdictional basis of an EU climate protective measure, the Emissions Trading Scheme (ETS).[16]

Central to the division of climate burdens are the United Nations (UN) climate change agreements – the Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCCC).[17] Both of these treaties are binding on the EU, which has notably taken on a joint commitment of 55% emission reductions by 2030, compared to pre-industrial levels.[18] The key burden-sharing norms under these treaties are equity and CBDRRC. These are widely seen as two 'intertwined' and even 'coterminous' norms that, in the context of climate change, must be 'understood in relation to each other'.[19] As such, Carlarne and Colavecchio suggest that CBDRRC may be construed as a reflection of equity, which seeks to 'fairly distribute the burden of addressing climate change with the goal of improving conditions for all of mankind'.[20] Section 4 considers these norms under the Paris Agreement, and analyses how they may inform an improved design of the CBAM.

With its focus on imported products, the CBAM must further respect the law of the World Trade Organisation (WTO), in particular the General Agreement on Tariffs and Trade (GATT).[21] The GATT rules place a great emphasis on non-discrimination, and also offer a relatively accessible avenue for dispute settlement. This creates a design dilemma for the EU should it wish to incorporate differential treatment.[22] Indeed, it has been noted that, in its present state, WTO law is on a 'collision course' with the UNFCCC.[23] Section 5 therefore briefly examines the core GATT rules, considering whether and how there may be room for differentiation in line with CBDRRC.

13 S Caney, 'Cosmopolitan Justice, Climate Change and Responsibility' (2005) 18 Leiden Journal of International Law 751–2.

14 See further e.g. R Jennings and A Watts, *Oppenheim's International Law* (9th edn, OUP, 2008) 456.

15 See in favour of this view, A Reinisch, 'Sources of international organizations' law: why custom and general principles are crucial' in J d'Aspremont and S, Besson (eds) *The Oxford Handbook of the Sources of International Law* (OUP 2017) 1021.

16 See on the applicability of international law, in particular custom, Case C-366/1 *Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change* [2011] ECR I-0000 (*ATAA* case), paras 101 and 123.

17 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Paris Agreement (adopted 15 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740. See art 18(4) Paris Agreement, referring specifically to a 'regional economic integration organization'. See under EU law e.g., *ATAA* case (n 16), para 123.

18 Submission by Germany and the European Commission on behalf of the European Union and its Member States (17 December 2020), <www4.unfccc.int> accessed 20 October 2021.

19 See further CP Carlarne & JD Colavecchio, 'Balancing Equity And Effectiveness: The Paris Agreement & The Future Of International Climate Change Law' (2019) 27 New York University Environmental Law Journal, 108, 125.

20 ibid 117.

21 General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (GATT).

22 European Parliament, 'Towards a WTO-compatible EU carbon border adjustment mechanism (2020/2043(INI))' (Report) A9-0019/2021, 15 February 2021 (EP Report on WTO Compatibility).

23 J Bacchus, 'A Call for a WTO Climate Waiver' (Yale Center for Environmental Law and Policy) <https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_Bacchus.pdf>.

## 2. THE PROPOSED EU CBAM: 'RESPONSIBILITY' FOR CONSUMPTION-DRIVEN EMISSIONS

Responding to the 'profound climate crisis', in late 2019 the EU released the European Green Deal, setting the goal to become climate neutral by 2050.[24] To put it on track, the 2030 Climate Target Plan set a mid-term goal of 55% emission reductions by 2030, compared to 1990 levels. The 2021 Fit for 55 Package intends to deliver on this, containing a robust array of measures including the CBAM as an 'essential element of the EU toolbox' to achieve climate neutrality by 2050 'in line with the Paris Agreement'.[25] The analysis in this article is primarily based on the initial Commission CBAM proposal of July 2021. Where possible, it seeks to incorporate later legislative developments available at the time of writing, in particular the amendments in the first reading of the European Parliament of June 2022.

In terms of rationale, the CBAM straddles two elements of the global emissions dynamic. Firstly, it seeks to address the large 27% portion of emissions from fuel combustion which are related to internationally traded goods.[26] According to the European Parliament, while domestic greenhouse gas (GHG) emissions have been 'substantially reduced', those embedded in imports continue to increase. This undermines efforts to reduce the EU's 'global carbon footprint'. Conceived of in this way, the global carbon footprint includes emissions triggered by *domestic consumption*, but generated beyond the EU.

Secondly, the CBAM seeks to enhance the efficacy of the EU's *internal* measure – the Emissions Trading Scheme (ETS). The ETS attaches a cost to emissions from installations in certain carbon-intensive sectors through a cap and trade scheme.[27] Operators must surrender allowances per tonne of carbon dioxide equivalent emissions, the price of which is determined by supply and demand (articles 2 and 3(a) ETS Directive). The proposed CBAM is designed as a 'mirror' to the ETS in order to prevent carbon from 'leaking' out of the EU to countries where less domestic mitigation action is being taken.[28] Less stringent carbon regulation means lower costs of production, creating a competitive advantage for 'dirtier' products. Carbon-intensive imports will then be cheaper and likely to be consumed in higher quantities. Currently the EU manages the risk of carbon leakage through granting free allowances for vulnerable sectors.[29] However, such free allocation 'weakens the price signal', reducing the necessary incentive for operators to invest further in GHG-reduction measures.[30] In order to achieve its more ambitious target, the EU therefore intends to remove free allowances, which it foresees will increase the 'divergence' with trading partners' climate action.

The CBAM will then address the risk of carbon leakage by subjecting imported and domestic products to nominally equivalent carbon pricing. After a transition period starting in 2023, implementation is expected to begin around 2027. The price of CBAM certificates is coupled with the ETS, using the average price of auctioned ETS allowances for each calendar week.[31] Where importers have already paid a price on carbon in the country of origin, they may claim a reduction in the number of CBAM certificates they are required to surrender.[32] This incentivizes other states to impose their own carbon pricing, providing a basis for the formation of a 'climate club' 'to promote the implementation of ambitious climate policies'.[33]

24 Commission (EC), 'The European Green Deal' (Communication) COM(2019) 640 final, 11 December 2019, 4.

25 CBAM Proposal (n 1), Explanatory Memorandum 0.

26 EP CBAM Amendments (n 3), rec 7a.

27 Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (2003) OJ L 275 (ETS Directive).

28 CBAM Proposal (n 1) arts 4 and 6 and rec 17.

29 ibid, Explanatory Memorandum 1.

30 ibid rec 10.

31 ibid art 21.

32 ibid art 9.

33 General Approach of the Council of the EU to the CBAM Proposal, 2021/0214(COD), 15 March 2022 (Council General Approach), art 54a.

The CBAM would apply to third-country goods or 'processed products from those goods', upon importation into the EU customs territory.[34] In its General Approach of March 2022, the Council of the EU proposed the inclusion of a minimum threshold for consignments of below 150 euros.[35] According to the 2021 Commission proposal, the GHGs covered will match those of the ETS, namely carbon dioxide, nitrous oxide and perfluorocarbons (Annex I). After considering various selection criteria, the Commission proposal envisages that the CBAM would cover the iron and steel, cement, fertilisers, electricity and aluminium sectors. The proposal itself notes that these are sectors of importance for various developing countries exporting to the EU. For example, in 2019, Tunisia and Vietnam were both in the top 10 exporters of cement to the EU, while Mozambique, China and India were among the main exporters of aluminium.[36] The 2022 European Parliament amendment proposes an expansion of the scope to include plastics, hydrogen, and organic materials.[37]

Authorised declarants must surrender one CBAM certificate for each tonne of emissions 'embedded' in goods.[38] The Commission proposal defines embedded emissions as 'direct emissions released during the production of goods', calculated according to specific methods. Direct emissions are those over which 'the producer has direct control'.[39] The European Parliament's amendment proposes the inclusion of 'indirect emissions' from the production of electricity consumed during the production processes of goods.[40] Controversially, where actual embedded emissions cannot be calculated, default values will apply. These are deliberately set at a high level, corresponding to the worst performing 10% of EU installations.[41]

The Commission's proposed CBAM contains no blanket exemptions for LDCs, as this was perceived to 'encourage LDCs to increase their level of emission and run counter to the overarching objective of the CBAM'.[42] As any exemptions would be only temporary, it was suggested that they would 'prove counterproductive' for LDCs' own interests, resulting in higher adaptation costs in the longer term. Interestingly, however, to 'ensure' that the CBAM 'helps to meet the Union's climate objectives and international commitments, including the Paris Agreement', the European Parliament adopted an amendment to provide financial support to LDCs. While the CBAM revenues enter the EU budget as general income, the amount of financing of LDCs' efforts to decarbonise their manufacturing industries must at least match that of the revenues generated by the sale of CBAM certificates.[43] The amendment further notes that this is not to be regulated within the CBAM, but rather provided through 'international climate finance and the relevant geographic programmes'.[44]

## 3. REGULATING 'EXTRATERRITORIAL' EMISSIONS UNDER THE LAW OF STATE JURISDICTION

With its focus on foreign embedded emissions, the EU CBAM directly seeks to regulate conduct and circumstances abroad. This raises questions of state jurisdiction, which is both grounded in and limited by the principle of sovereign equality. In the relatively new field of climate change, there is very little binding authority on how to apply the classic rules of state jurisdiction.[45] The

34 CBAM Proposal (n 1) art 2(1).

35 Council General Approach (n 33) art 2a.

36 Impact Assessment CBAM Proposal (n 7) 100–101.

37 EP CBAM Amendments (n 3) Annex I.

38 CBAM Proposal art 13 (16), (18).

39 ibid art 13 (16), (20).

40 EP CBAM Amendments (n 3) art 3.

41 CBAM Proposal (n 1) art 7 and Annex III (4.1).

42 ibid, Explanatory Memorandum 30.

43 EP CBAM Amendments (n 3) art 24a.

44 ibid rec 55.

45 See for a foundational analysis in the literature: FA Mann, 'The Doctrine of Jurisdiction in International Law' 111 Collected Courses of The Hague Academy of International Law (1964) 9, 30. For an exploration in the emerging context of climate change see, NL Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law* (Hart Publishing/Bloomsbury, 2021).

present section therefore unpacks the legal debates, and evaluates how the EU's framing of responsibility fits within the existing framework.

At the outset it must be noted that there is no overarching treaty codifying the law of state jurisdiction. Rather, the key norms are customary in nature, having arisen primarily in the fields of criminal and economic law.[46] For its part, WTO law does not appear to contain clear territorial limitations on unilateral climate-protective measures with an extraterritorial element. The WTO Appellate Body explicitly declined to answer this question in the well-known *US-Shrimp* and *EC-Seals* cases, leaving scholars to continue the debate.[47]

Turning to customary law as a *lex generalis*, three types of jurisdiction are generally distinguished. The first is a state's 'enforcement jurisdiction' 'to ensure compliance with its laws'.[48] Secondly, 'adjudicative jurisdiction' refers to state competence to subject cases to be tried and determined by its courts. Finally, 'prescriptive jurisdiction' concerns the competence to 'adopt legislation governing persons, property and conduct'.[49]

Enforcement jurisdiction is clearly very intrusive, and is therefore in principle restricted to a state's territory. By comparison, prescriptive jurisdiction interferes less with other states' sovereignty and, in addition to territory, is supported by a number of 'extraterritorial' bases. Of particular relevance here is the effects-doctrine, which grants jurisdiction over foreign conduct causing direct and substantial effects within a state's territory.[50] In addition, the protective principle provides a basis for jurisdiction over foreign conduct that threatens vital state interests. States may also exercise jurisdiction over foreign conduct either undertaken by or affecting their nationals. Lastly, the universality principle grants jurisdiction over conduct violating fundamental values of the international community, in the absence of an individual connection with the regulating state. This has traditionally been recognized in relation to particularly grave crimes.[51] Taken together or individually, these principles serve as indicators with which a state must be able demonstrate a 'substantial connection' to the regulated subject matter as a requirement of customary international law.[52]

Unilateral trade measures occupy a debated position within the jurisdictional analysis. On one approach, supported for example by Nollkaemper, market access requirements like the CBAM are 'a prerogative of sovereign states, and as such lawful'.[53] Such measures apply only to goods *voluntarily* seeking entry to EU territory, whereby it is argued that jurisdiction can be based squarely on the territoriality principle.[54] The correct characterisation of measures which condition the manner in which a product is produced ('production process measures' (PPMs)), is also a longstanding discussion in world trade law. Taking a similar position, leading

46 See for an authoritative overview of state practice, *Restatement of the Law Fourth – The Foreign Relations Law of the United States* (American Law Institute Publishers, 2018) (US Fourth Restatement).

47 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report (6 November 1998) WT/DS58/AB/R (*US-Shrimp*); *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Appellate Body Report (22 May 2014) WT/DS400/AB/R, WT/DS401/AB/R (*EC-Seals*). See for discussion in the literature e.g. B Cooreman, 'Addressing Environmental Concerns through Trade? A Case for Extraterritoriality' (2015) 65 ICLQ 229; 9; and NL Dobson, 'The EU's Conditioning of the "Extraterritorial" Carbon-Footprint: A Call for an Integrated Approach in Trade Law Discourse' (2018) 27 RECIEL 76, discussing the literature more extensively.

48 ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, Annex E: Extraterritorial Jurisdiction (ILC Report on Extraterritorial Jurisdiction) 518.

49 ibid.

50 ibid 522.

51 S Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10 Chicago Journal of International Law 503, 505.

52 M Kamminga, 'Extraterritoriality' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2011) para 10.

53 A Nollkaemper, 'Rethinking States' Rights to Promote Extra-Territorial Environmental Values' in F Weiss, E Denters and P de Waart (eds), *International Economic Law with a Human Face* (Kluwer Law International 1998) 188.

54 See e.g. EU Petersmann, 'International Trade Law and International Environmental Law' (1993) 27 Journal of World Trade 69.

commentators Howse and Regan for example, argue that process-based measures are not extraterritorial as they 'do not directly regulate any behaviour occurring outside the border'.[55]

Support for this view can further be found in the well-known *ATAA* case mentioned in Section 1. While this is an EU law case, it remains particularly pertinent as one of the only instances where the international law of state jurisdiction has been applied to an (EU) unilateral climate-protection measure. At issue was the legality of the EU Aviation Directive (2008/101), which extended the scope of the ETS to include emissions from the whole duration of international flights to and from the European Economic Area.[56] The CJEU directly considered 'if and in so far as Directive 2008/101 is intended to apply the allowance trading scheme to those parts of flights which take place outside the airspace of the Member States … whether that directive is valid in the light of the principles of customary international law'.[57] The customary principles considered were exclusive state sovereignty over airspace, the freedom to fly over the high seas and 'the principle that no State may validly purport to subject any part of the high seas to its sovereignty'.[58] According to the CJEU, the extension of the ETS 'does not infringe upon the principle of territoriality or sovereignty of third states … since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union'.[59]

Turning to the CBAM, the Commission proposal is formally addressed to authorized 'declarants', defined as persons 'lodging a customs declaration'.[60] On an annual basis, authorized declarants must submit a 'CBAM declaration' containing the total quantity of imported goods, embedded emissions, and CBAM certificates to be surrendered.[61] In textual terms, the obligations in the CBAM concern activities occurring within the EU's territory. Following the approach above, it could be argued that the EU may base its jurisdiction on the territoriality principle.

This author, however, supports an alternative view that focuses on the material functioning rather than the formal wording of the regulation. To assess whether there is an interference in the sovereign regulatory space of other states, one must look at the subject matter upon which a measure's operation is dependent.[62] This approach aligns better with jurisdictional theory. As noted by Ryngaert and Ringbom, while territorial presence provides a basis for enforcement jurisdiction, it is not automatically sufficient to support *prescriptive* jurisdiction.[63]

The operation of the CBAM is dependent on the scope of 'embedded emissions' for which certificates must be surrendered. Accepting the European Parliament's amendment, 'embedded emissions' include both direct emissions released during goods production, as well as indirect emissions released during the production of electricity consumed.[64] Calculation is based on what are known as 'attributed emissions' which are 'the part of the installation's direct emissions … that are caused by the production process resulting in goods'. From these definitions it is clear that the de facto subject matter of the proposed CBAM extends to production processes of goods and electricity in installations beyond the EU. While certificates must only be surrendered within the EU, compliance with the CBAM requirements is dependent on prior foreign conduct and payment for foreign emissions. This illustrates a clear extraterritorial element within the CBAM.

55 R Howse and D Regan 'The Product/Process Distinction — An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2011) 11 EJIL 249.

56 Parliament and Council (EC) Directive 2008/101 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (2008) OJ L 8/3 (Aviation Directive).

57 *ATAA* case (n 16) para 112.

58 ibid para 103.

59 ibid paras 124–5.

60 Commission CBAM Proposal art 3(13).

61 ibid art 6(2).

62 Dobson (2018) (n 47) 79; L Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction – The Case of Trade Measures for the Protection of Human Rights' (2002) 36 Journal of World Trade 378.

63 C Ryngaert and H Ringbom, 'Introduction: Port State Jurisdiction: Challenges and Potential' (2016) 31 International Journal of Marine and Coastal Law 379.

64 EP CBAM Amendments (n 3) art 3(16).

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Such an 'extraterritorial element' need not immediately constitute jurisdictional overreach. Rather, it signals that the EU must demonstrate an independent basis of prescriptive jurisdiction. There are good reasons for this, as such trade measures exert very real pressure on foreign producers dependent on exports into the EU market. While, formally speaking, producers could choose not to export into the EU, the projected economic impacts generate strong incentives to comply in exchange for market access. Indeed, this incentive is recognised and instrumentalised by the EU as, without it, the measure would not motivate other economies to 'do their part'.

The question is then whether, under customary international law, the EU may claim the requisite 'substantial connection' to the activities of foreign installations. It is argued here that the answer is yes, but not necessarily on the basis of EU responsibility for its global carbon footprint. The territoriality principle provides certain indirect support, as the embedded emissions regulated are only those 'attributed' to goods imported *into* the EU. As the regulated activities themselves remain beyond EU territory, additional jurisdictional support is needed. Such support may be provided by the effects doctrine, given that GHG emissions are recognised by established climate science to cause substantial harmful effects, including within EU territory.[65] Indeed, the harm caused arguably poses a threat to 'vital state interests' under the protective principle, as it threatens the EU's territorial integrity and even national security.[66] This is clearly illustrated by the severe floods in Western Europe in July 2021, the increased likelihood of which has been attributed to climate change.[67] Turning finally to the universality principle, state practice to date has been limited to the context of grave crimes.[68] That being said, the rationale of this principle lends itself to a broader interpretation of 'fundamental values of humanity' which would plausibly encompass a stable climate. This is supported by the recognition of climate change as a 'common concern of humankind' in the near-universal UN climate treaties.[69] Framed in this way, the EU could arguably better rely on universality rather than territoriality to buttress a jurisdictional claim on the normative basis of 'responsibility' for consumption-driven emissions.

As this author has argued elsewhere, when exercising unilateral jurisdiction regulators should seek to reduce a measure's interference with the regulatory space of other sovereign states.[70] One means of operationalising such 'considerate design' is to seek alignment with affected states' existing policies. This can be done through incorporating flexibility and recognition of equivalent or similar standards. One could argue that the CBAM's recognition of taxation in the state of origin at least shows some consideration for other states' policies. This is, however, unlikely to help LDCs when they do not wish to compromise economic growth in favour of carbon taxes. Indeed, the tax rebates would put LDCs at a further disadvantage compared to developed countries with equivalent tax schemes.[71] The CBAM's equivalence approach has further been criticised for its lack of recognition for emissions *regulation* in other forms than taxes. Such regulatory measures entail implicit costs which, if not taken into account, will result in de facto double taxation.[72] While not without challenges, it has been suggested that the EU

65 *Sixth Assessment Report of the Intergovernmental Panel on Climate Change – Climate Change 2021: The Physical Science Basis* (IPCC website, 2021) <https://www.ipcc.ch/assessment-report/ar6/> accessed 21 October 2021.

66 ILC Report on Extraterritorial Jurisdiction (n 48) 522.

67 See further, 'Heavy rainfall which led to severe flooding in Western Europe made more likely by climate change' (World Weather Attribution Scientific Consortium, 23 August 2021) <https://www.worldweatherattribution.org/heavy-rainfall-which-led-to-severe-flooding-in-western-europe-made-more-likely-by-climate-change/> accessed 20 October 2021. During work on this cooperative special issue, similar concerns arose in Australia, see: 'Australia flood, boosted by climate change, making history in Sydney', *The Washington Post* (6 July 2022) <https://www.washingtonpost.com/climate-environment/2022/07/05/australia-flooding-sydney-record-rainfall/> accessed 20 August 22.

68 ILC Report on Extraterritorial Jurisdiction (n 48) 522.

69 See relatedly, T Cottier others, 'The Principle of Common Concern and Climate Change' (2014) 52 Archiv des Völkerrechts 293.

70 Dobson (2021) (n 45) 209.

71 S Lowe, 'The EU's carbon border adjustment mechanism: How to make it work for developing countries' (Policy Brief, Centre for European Reform, 22 April 2021) 6.

72 M Jarsulic, 'What the European Union's Proposed Trade Tax on Carbon Means for the United States' (Center for American Progress, 16 August 2021) <hwww.americanprogress.org/issues/economy/reports/2021/08/16/502650/european-unions-proposed-trade-tax-carbon-means-united-states/>, accessed 10 October 2021.

'should go the extra mile to account for regulation', and 'acknowledge different approaches to climate action'.[73]

Another essential component of 'considerate design' is the incorporation equity. Given the open nature of this norm, Section 4 will now focus more narrowly on equity in the context of climate protection measures under the UN climate agreements.

## 4. THE DIVISION OF BURDENS UNDER THE UNITED NATIONS CLIMATE AGREEMENTS

At the outset, the notion of EU responsibility for its global carbon footprint differs from the accounting rules under the UN climate change agreements. The latter employ a territorial system boundary, based on where emissions are *produced* rather than consumed.[74] Specifically, article 13(7)a of the Paris Agreement and the Paris Rulebook reference the 2006 IPCC Guidelines for National Greenhouse Gas Inventories, which provide that national inventories 'should include greenhouse gas emissions and removals taking place within national territory and offshore areas over which the country has jurisdiction'.[75] This system boundary is also incorporated in the reporting requirements for Annex I countries under the UNFCCC.[76] It further sits comfortably with the general rule that states only have enforcement jurisdiction over acts within their territory.

As noted by Scott, the IPCC Guidelines do not pose a binding limitation on the geographical scope of EU prescriptive measures. In her view, however, the system boundary should be seen as 'the only internationally agreed methodology for apportioning *responsibility* for GHG emissions between states'.[77] A measure like the proposed CBAM, which targets emissions abroad, then raises tensions. Scott points out that the EU is in fact 'entering a jurisdictional space that ought, from the perspective of the IPCC system boundary guidelines, to be occupied by a different state'.[78]

In the absence of territorial limitations, the division of responsibilities under the UN climate agreements hinges on the norms of equity and CBDRRC. According to article 2(2), the implementation of the Paris Agreement as a whole must 'reflect' these norms, although they not are defined under the treaties. It goes beyond the constraints of this article to fully engage in the rich scholarly debate on the content of equity and CBDRRC. This section will limit itself to a small selection, sketching out the core criteria, and the extent to which these norms support and challenge the design of the CBAM.

### 4.1 CBDRRC AND EQUITY UNDER THE UN CLIMATE AGREEMENTS

A first key question for this interpretative exercise is whether the CBDRRC principle, as a reflection of equity, forms an independent legal obligation.[79] In this regard, Scott and Rajamani convincingly argue that even if not binding, CBDRRC 'is a fundamental part of the conceptual apparatus of the climate change regime, such that it forms the basis for the interpretation of existing obligations and the elaboration of future international legal obligations within

73 E Cornago and S Lowe, 'Avoiding the pitfalls of an EU carbon border adjustment mechanism' (Centre for European Reform, 5 July 2021) <https://www.cer.eu/insights/avoiding-pitfalls-eu-carbon-border-adjustment-mechanism> accessed 20 October 2021. Though this would admittedly be a complex undertaking in practice.

74 J Scott, 'The Geographical Scope of the EU's Climate Responsibilities' (2015) 17 Cambridge Yearbook of European Legal Studies 92, 100.

75 Katowice Texts, Decision 18/CMA.1 'Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement', FCCC/PA/CMA/2018/3/Add.2, Annex, Chapter II, para 17; '2006 IPCC Guidelines for National Greenhouse Gas Inventories', Volume 1: General Guidance and Reporting, Chapter 8, para 8.2.1.

76 Decision 24/CP.19 'Revision of the UNFCCC reporting guidelines on annual inventories for Parties included in Annex I to the Convention' (2014) FCCC/CP/2013/10/Add.3.

77 Scott (n 74) 102 (emphasis added).

78 ibid 97, 110.

79 See further e.g. BM Romera and H van Asselt, 'The International Regulation of Aviation Emissions: Putting Differential Treatment into Practice' (2015) Journal of Environmental Law 271; E Hey, 'Common but Differentiated Responsibilities' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2011) para 18.

the regime in question'.[80] Relatedly, Hey suggests that CBDRRC should be characterised as a principle rather than a rule, 'given that it cannot apply in an all or nothing fashion'.[81] This author ascribes to the aforementioned views, considering equity and CBDRRC as principles that 'guide' the interpretation of states' mitigation obligations under the UN climate agreements.[82] These principles are themselves also binding obligations; however, by nature, they do not dictate a single concrete outcome or conduct requirement. Arguably, their application may be extended to private operators based outside the EU, whose activities are interwoven with their home state's level of development.

Focusing here on the core elements, a first aspect of CBDRRC is that responsibility is 'common' to all states. This is manifested in the Paris Agreement's shared goal of 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels' (article 2(1)). In addition, article 4(2) and (3) require that all parties take on ambitious and successive NDCs. It remains unclear, however, whether these provisions entail a binding collective obligation for states to stabilise emissions.[83]

This then leads to the controversial issue of *differentiating* burdens. Under CBDRRC, the core criteria for differentiation are states' historical contribution to climate change, and their capability to respond in the present and future.[84] Developed states typically have greater historical emissions that cumulatively led to the climate change risks we experience today.[85] In this regard, commentators have noted a possible corrective element, whereby states which have historically contributed more to climate change should compensate those with smaller contributions, in particular in the global south.[86] Developed states also have sufficient capability to shoulder a heavier mitigation burden. At the same time, certain developing states and more recently developed states which have contributed less in the past are currently some of the greatest gross emitters. Thus according to a 2020 Report of the Netherlands Environmental Assessment Agency, the six main emitters in 2018 were China, Japan, US, the EU, India, and the Russian Federation.[87] As a matter of practical necessity, all large emitters must engage in mitigation activities to prevent 'dangerous' anthropogenic climate change. Questions also remain as to the meaning of the phrase 'in the light of different national circumstances', which was added to CBDRRC references in the Paris Agreement. Voigt and Ferreira suggest that this 'qualifier' widens the parameters of differentiation, which, in addition to past and present contributions, could include population size, human capacity and opportunity costs.[88]

The application of these open-textured criteria in the UN climate agreements themselves has been subject to hard-fought negotiations between states. Originally, responsibility was divided based on a static distinction between 'developed' countries listed in Annex I of the UNFCCC and developing 'non-Annex I' countries. Thus under the Kyoto Protocol, only Annex I countries under the UNFCCC had binding mitigation targets.[89] Yet the bifurcated approach proved a stumbling block in further negotiations. To overcome this, the Paris Agreement now takes a more nuanced bottom-up approach, allowing parties to determine their own NDCs. While reference is made to 'developed' and 'developing' countries, these categories are not

80 J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23 European Journal of International Law 469, 477.

81 Hey (n 79) para 18.

82 See further, D Shapovalova, 'In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities' in B Mayer and A Zahar (eds), *Debating Climate Law* (CUP 2021) 63.

83 See further e.g. J Peel, 'Climate Change' in A Nollkaemper and I Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (CUP 2017) 1009, 1024.

84 See further, H Winkler and L Rajamani, 'CBDR&RC in a Regime Applicable to All' (2014) 14 Climate Policy 106.

85 ibid, noting the acknowledgement of this by parties in the UNFCCC Cancun Agreements.

86 See e.g. Carlarne & Colavecchio (n 19) 117.

87 JGJ Olivier and JAHW Peters 'Trends in Global C02 and Total Greenhouse Gas Emissions' (Report, PBL Netherlands Environmental Assessment Agency, 2019) 27.

88 C Voigt and F Ferreira, 'Differentiation in the Paris Agreement' (2016) 6 Climate Law 66.

89 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) UN Doc FCCC/CP/1997/7/Add.1, 10 December 1997.

defined, leaving the contours of the CBDRRC principle more flexible than before.[90] As regards NDC ambition, article 4(4) provides that '[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts.' Article 4(5) requires that financial, technological and capacity building support' be provided to developing states to implement the provision's mitigation objectives.

LDCs and Small Island Developing States (SIDS) must bear the lightest burdens. According to article 4(6) they 'may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances'. The definition of these categories would seem less contentious, with the European Parliament having adopted the widely-accepted categorisation of LDCs by the UN Economic and Social Council.[91] Similarly, the UN also recognises a defined list of SIDS, which includes non-UN members.[92]

As noted by Maljean-Dubois, 'NDCs are by definition respectful of national sovereignty' and are key to the treaty's success.[93] Through unilaterally regulating foreign emissions, the EU is imposing burdens on producers in states that, under the self-differentiation approach, had opted not to do so in the same way. While this does not appear precluded under the UN climate agreements, it is then essential that the CBAM itself incorporates differentiation in line with CBDRRC. The following section will now evaluate this issue further.

### 4.2 CBDRRC AND THE CBAM

Given the absence of 'objective or evidence based criteria' in the Paris Agreement, complex questions remain for the operationalisation of CBDRRC under the CBAM.[94] For the EU, it is the 'common' element of CBDRRC that appears most dominant in its position. As such, the European Parliament's proposed amendment notes the EU's 'responsibility to continue playing a leading role', 'in cooperation with *all of the world's other economies*, as it is only through actions by all Parties that it will be possible to achieve the objectives set out in the Paris Agreement'.[95] There is certainly a truth to this argument, as the widest possible participation is essential to bridge the emissions gap. The EU's position further reflects the wording of article 4(4) of the Paris Agreement that developing countries 'take the lead' by setting 'economy-wide absolute emission reduction targets'. Through preventing carbon leakage, the CBAM would enable the EU to effectively achieve its climate neutrality objective.

When it comes to differentiation, however, the CBAM appears to be lacking. One of the most obvious opportunities to differentiate burdens under the CBAM is to carve out an exemption for developing countries, in particular LDCs.[96] However, as mentioned in Section 2, the CBAM currently contains no blanket exemption for developing countries, as this is considered to undermine its carbon leakage objective. The Council of the EU's General Approach does alleviate some burdens by providing a threshold exemption for consignments of goods worth less than 150 euros. This may indirectly benefit LDCs with a very low volume of trade with the EU.

Somewhat more promisingly, the European Parliament has proposed that financial support be provided to LDCs corresponding to the value of CBAM certificates surrendered. Importantly, this is for 'mitigation and adaptation' in LDCs, '*including* their efforts towards the de-carbonisation

90 See, Voigt and Ferreira (n 88) 65; S Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?' (2016) 25 Review of European, Comparative and International Law 153–4.

91 EP CBAM Amendments (n 3) art 3(28)a. See further, UNCDP, 'LDC Identification Criteria & Indicators' (United Nations Website, 2021) <https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html> accessed 20 October 2021.

92 UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, 'List of SIDS' <https://www.un.org/ohrlls/content/list-sids> accessed 20 October 2021.

93 Maljean-Dubois (n 90) 155.

94 ibid.

95 EP CBAM Amendments (n 3) rec 7a (emphasis added).

96 See e.g. Mehling et al, 'How to Design Border Carbon Adjustments that Work for the Climate' (Brief, Climate Strategies, October 2017) 3, available at: <https://climatestrategies.org/wp-content/uploads/2017/11/CS_WP2-Brief_FINAL-1.pdf>.

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and transformation of their manufacturing industries'.[97] To an extent, this may ameliorate criticism of the initial Commission proposal that rather than being 'recycled to the public' revenue generated by the measure, it 'should be used to further its environmental objective and benefit developing countries affected by it'.[98] It bears noting, however, that the support provided is not specifically targeted at improving the functioning of the installations concerned, but rather at mitigation and adaptation more broadly. This may well do little to reduce the technological advantage of developed country producers. In addition, should the financial support count as 'climate finance', it could be perceived by developing countries as forcing them to pay for their own support.[99]

Overall, while capacity building is certainly laudable, it is questionable whether this provides sufficient alleviation of mitigation burdens for developing countries. The argument that LDCs experience a relatively small impact of the EU CBAM is made from the EU's own perspective, doing little to assuage the fact that a tax may have 'very meaningful' effects on small exporters in LDCs.[100]

Furthermore, developing countries and LDCs are not exempt from the complex monitoring and verification requirements to prove actual embedded emissions. While there is an interim period to prepare for implementation, declarants must already provide quarterly reports on emissions from the start of 2023, or face a penalty. In practice, the calculation and reporting of direct emissions will require a certain infrastructure and pose considerable compliance burdens on operators higher up the supply chain.

In addition, where the CBAM does allow the use of default emissions, the 2022 Parliament amendment stresses that these are 'under no circumstances' intended to *benefit* exporters for the 'failure to provide reliable data' on actual emissions.[101] According to Annex III, default values are to be 'set at average emission intensity of the 10% worst performing installations in each exporting country'. For all covered goods other than electricity, the default values must be 'increased by a mark-up' to be determined later. According to Annex III, where declarants 'can demonstrate, on the basis of reliable data, that alternative region specific adaptation of default values are lower than the default values defined by the Commission the former can be used'. Here, however, the burden of proof still indirectly falls on operators with very limited capacity to challenge the EU's default values. The requirement of actual data may then be 'unduly punitive' for smaller operators in developing countries, which lack the capacity to meet the monitoring, reporting and verification requirements.[102]

Much will come down to the implementing measures further specifying the monitoring, reporting and verification requirements. The CBAM Impact Assessment aims for 'robust' procedures, which could rely on 'major elements of existing EU ETS mechanisms', including the ETS Monitoring and Reporting Regulation.[103] It is to be hoped that simplified procedures are incorporated for developing countries. Inspiration may, for example, be drawn from the EU's Small Emitters Tool (SET), which allows for non-punitive estimated emission values for aircraft operators with annual emissions below a certain threshold.[104] Alternatively, the EU could support verification costs; Gay, for example, suggests that the EU could fund third-party verification.[105] Such support could also be extended to monitoring and reporting requirements.

97 EP CBAM Amendments (n 3) art 24a (emphasis added).

98 Mehling et al (n 96).

99 I am indebted to the anonymous reviewer of this article for this argument.

100 D Gay, 'Smooth transition for graduating LDCs under the EU Carbon Border Adjustment Mechanism' (United Nations Website, 4 May 2021) <https://www.un.org/ldcportal/smooth-transition-for-graduating-ldcs-under-the-eu-carbon-border-adjustment-mechanism/> accessed 20 October 2021.

101 EP CBAM Amendments (n 3) Annex III, point 4.1.

102 A Clark, 'The Fit for 55 package: A diplomatic tightrope' (European Council on Foreign Relations, 19 July 2021) <https://ecfr.eu/article/the-fit-for-55-package-a-diplomatic-tightrope/> accessed 10 October 2021.

103 Impact Assessment CBAM Proposal (n 7) 19.

104 Commission Regulation (EU) No 606/2010 of 9 July 2010 on the approval of a simplified tool developed by the European organisation for air safety navigation (Eurocontrol) to estimate the fuel consumption of certain small emitting aircraft operators [2010] OJ L 175, 25.

105 Gay (n 100).

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## 5. DIFFERENTIATION AND NON-DISCRIMINATION: CONSTRAINTS UNDER WTO LAW

As a member of the WTO, the EU is bound by the applicable rules in the WTO agreements. Of particular relevance here is the GATT, regulating measures affecting trade in products. Alignment with WTO law has been a primary design parameter for the EU, as illustrated by the 2021 European Parliament Report 'Towards a WTO-compatible EU carbon border adjustment mechanism'.[106] Prioritising equal trading opportunities, the GATT contains several non-discrimination requirements that at first sight appear to pose an obstacle to differential treatment of trading partners. This section will therefore focus on the extent to which the suggested incorporation of CBDRRC under the CBAM may – or may not – be restricted by GATT rules.

Under WTO law, the CBAM can be characterised as a 'border carbon adjustment measure' (BCA). To date, a BCA has yet to be submitted to dispute settlement, leaving many legal uncertainties. While legal discourse generally agrees that the GATT poses several obstacles, there are diverging perspectives on which rules apply to the CBAM, and where the tensions may lie.

As a first parameter, the GATT prohibits charges on imports in excess of states' tariff schedules (article II:1(b) GATT), as well as absolute quantitative restrictions (article XI GATT). It does not, however, definitively preclude *internal* fiscal measures or regulations, which extend the application of a domestic measure to 'like' imported products, even when this is formally applied at the border (article III:2 and III:4 GATT respectively).[107] According to article II:2(a) GATT, 'a charge equivalent to an internal tax' is permitted if applied in accordance with article III:2 GATT.

For the CBAM, a first contentious issue is whether BCAs applying a charge to 'unincorporated carbon' are adjustable at the border under article III GATT.[108] According to the authoritative interpretation by the GATT Working Party on Border Tax Adjustments, article III GATT applies 'directly or indirectly' to *products*.[109] Unincorporated carbon pertains to elements of the carbon footprint that leave no physical trace in the final product characteristics.[110] To date, it remains undecided whether unincorporated carbon from the production process that is separately attributed to goods applies directly or indirectly to 'products'.[111]

A second question is whether the CBAM qualifies as 'internal'. For this, the 'obligation to pay' a tax or charge must 'accrue due to an internal event, such as the distribution, sale, use or transportation of the imported product'.[112] It has been suggested that, as the requirement to surrender CBAM certificates formally accrues due to importation, the measure may not actually constitute an 'internal measure'.[113] The EU, however, may convincingly argue that this is an overly formalistic view, as importation is simply a prerequisite for the distribution and sale of the energy-intensive products on the common market. Interestingly, Venzke and Vidigas argue

106 EP Report on WTO Compatibility (n 22). See further on the legitimising role of the WTO Agreement, I. Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Hart Publishing 2019) 213.

107 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report (12 March 2001) WT/DS135/AB/R.

108 See further, MA Mehling et al, 'Designing Border Carbon Adjustments for Enhanced Climate Action' (2019) *113* American Journal of International Law 458.

109 Mehling et al (2019) (n 108) 458, referring to, Border Tax Adjustments: Report of the Working Party (2 December 1970) BISD 18S/97 para 14.

110 See further e.g. D Regan, 'How to Think about PPMs (and Climate Change)' in T Cottier, O Nartova and SZ Bigdeli (eds), *International trade regulation and the mitigation of climate change: World Trade Forum* (CUP 2009) 97.

111 J Pauwelyn and D Kleimann, 'Trade Related Aspects of a Carbon Border Adjustment Mechanism. A Legal Assessment' (Briefing, European Parliament Directorate-General for External Policies, April 2020) PE 603.502, 8.

112 *China – Measures Affecting Imports of Automobile Parts*, Appellate Body Report (12 January 2009) WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R [139], [162]; and GATT *Note ad Article III*.

113 J Bacchus, 'Legal Issues with the European Carbon Border Adjustment Mechanism', (CATO Institute, 9 August 2021) <https://www.cato.org/briefing-paper/legal-issues-european-carbon-border-adjustment-mechanism>, accessed 1 October 2021.

that the objective of avoiding being an 'emissions *consumer*' may support a characterisation as internal.[114]

Thirdly, there remains uncertainty on whether the CBAM is considered a fiscal measure or rather an 'internal regulation' under article III:4 GATT.[115] Defining 'tax', Dhar and Das helpfully rely on the OECD definition of 'compulsory, unrequited payments to general government'.[116] This would appear to cover the CBAM, which obliges authorized declarants to purchase certificates, with revenue generated going to the EU general budget. In this sense, the CBAM differs from the EU ETS where, as noted by Bartels, operators 'gain a tradable property right', the price of which is 'based on supply and demand according to free market forces'.[117] Under the CBAM, authorized declarants do not participate in this market, they are simply obliged to pay the average weekly auction price of domestic emission allowances.[118]

That being said, as noted by Venzke and Vidigal, the proposal also contains certain 'non-fiscal aspects', including the mechanisms for collection and penalties.[119] These aspects may have to be assessed as 'regulations' under article III:4 GATT. Indeed, the authors also suggest that, as the non-fiscal aspects impose a very different mechanism from the ETS, they may not qualify as internal measures covered by article III:4 GATT, captured rather by the prohibition of quantitative restrictions in article XI:1 GATT.

Assuming the CBAM does qualify as an internal measure, it must then pass the relevant equal treatment hurdles. The first is the 'national treatment' requirement that imported goods are not subject to taxes or charges 'in excess of' those applied to like domestic products (article III:2 GATT).[120] Regulations must grant 'treatment no less favourable' for imports compared to like domestic products (article III:4 GATT). In addition, the 'most-favoured nation' (MFN) rule in article I GATT requires that 'like' products originating from one WTO member are 'accorded the same advantage' as those from all other members.

The precise standard of treatment differs per provision. Generally speaking, the EU seeks to demonstrate equal treatment through its assurances that its CBAM will 'mirror' the sector scope and pricing of the domestic ETS, including as regards free-allocation.[121] It has, however, been argued that the *administrative* burdens may discriminate against developing countries, an issue discussed in Section 4.2 above.[122] In addition, the deduction of CBAM charges for goods already subject to a domestic tax may raise issues under the MFN principle. This is because the deduction is only available for foreign fiscal measures, and not for other regulations which, as discussed in Section 3 above, may equally seek to stimulate cleaner production.[123]

It is worth mentioning that the current interpretation of 'like' products poses a more general hurdle to differentiation based on unincorporated carbon. Essentially, likeness is a 'determination about the nature and extent of a competitive relationship between and among products'.[124] Its assessment is based on goods' physical characteristics, end use and international tariff

114 I Venzke and G Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' (Amsterdam Law School Legal Studies Research Paper No. 2022-02, 10 January 2022 (Draft)) 11 (emphasis added).

115 See further, Mehling et al (2019) (n 108) 459.

116 B Dhar and K Das, 'The European Union's Proposed Carbon Equalization System: Can it be WTO Compatible?' (Discussion Paper 156, Research and Information System for Developing Countries, September 2009) 10.

117 L Bartels, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations' (Issue Paper No 6, International Centre for Trade and Sustainable Development, 2012) 8–9.

118 The EU explicitly rejected the option of extending the ETS, as this would set a cap on total imports, violating the GATT prohibition of quantitative restrictions. See, CBAM Proposal (n 1) rec 19.

119 Venzke and Vidigal (n 114) 12.

120 See also article III:2 second sentence on 'directly competitive or substitutable products', discussed further in Mehling et al (2019) (n 108) 462.

121 CBAM Proposal (n 1) rec 17.

122 R Berahab, 'Is the EU's Carbon Border Adjustment Mechanism a Threat for Developing Countries?'(Policy Center for the New South, 13 January 2022) <www.policycenter.ma/opinion/eus-carbon-border-adjustment-mechanism-threat-developing-countries> accessed 25 August 2022.

123 Venzke and Vidigal (n 114); Cornago and Lowe (n 73).

124 *EC-Asbestos* (n 107) para 99.

classification as well as consumer preferences.[125] While consumer preferences for cleaner goods could theoretically make the difference, it is difficult to find a uniform willingness to pay for lifecycle emissions across the whole EU market.[126] As such, physically identical goods with different carbon footprints may be considered 'like' under the GATT.

Importantly for the present analysis, the non-discrimination requirements also pose an obstacle to differentiation among exporting countries based on CBDRRC. Should the EU wish to lower compliance burdens for developing countries, it would namely be conferring on them an 'advantage' not accorded to other trading partners, in violation of article I GATT.

Here, commentators have suggested that there may be a role for the special and differential treatment (S&D) provisions, found throughout WTO law. Firstly, the EU might seek to negotiate an expansion of the 'enabling clause' to include the CBAM.[127] The 'enabling clause' facilitates an exemption to article I GATT, allowing developed countries to grant 'products originating in developing countries' preferential tariff treatment, 'in accordance with the Generalized System of Preferences' (GSP).[128] Under its GSP and GSP+ schemes, the EU already grants preferential market access to countries classified by the World Bank as lower-income.[129] LDCs are granted even more far-reaching access under the 'Everything but Arms' agreement.[130] Should the EU grant preferential access under CBAM, Lowe convincingly suggests it could then maintain its distinction between LDCs and lower middle-income countries, granting only partial exemptions for the latter group until a state's relative value of EU imports exceeds a certain threshold.[131] This would balance carbon leakage prevention against respect for developing country interests. Alternatively, in line with the Council of the EU's General Approach, the CBAM could incorporate an origin-neutral de minimis threshold for goods from countries with very low trade volumes.[132]

WTO law also recognises a multitude of S&D provisions regarding flexibility on implementation. For example, article 12(4) of the Technical Barriers to Trade (TBT) Agreement provides that 'developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs'. In addition, article 12(7) TBT requires that Members 'provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members'. These provisions appear to support technical assistance and the tailoring of monitoring and reporting requirements according to development. Importantly, neither these, nor the enabling clause, allow for escape from the national treatment requirement. Given the obstacles discussed above, it remains likely that the CBAM constitutes a prima facie GATT violation.

There are, however, persuasive arguments to be made that the incorporation of CBDRRC may be accommodated under the general exemptions of article XX GATT. Of particular relevance are sub paragraph (b) on measures 'necessary for the protection of human, animal or plant life or health', and (g) on measures 'related to the conservation of exhaustible resources'. As argued in detail in the literature, it is highly plausible that the CBAM, with its clear climate protection aim, may be provisionally justified.[133] To prove 'necessity', the EU has to show that the CBAM

125 ibid para 101.

126 Mehling et al (2019) (n 108) 461. Transparency may be enhanced through a labelling system. Labels are regulated separately under the Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120.

127 C Brandi and S Dröge, 'The EU's Carbon Border Adjustment – proceed with caution' (Deutsches Institut für Entwicklungspolitik, 14 July 2021) <https://blogs.die-gdi.de/2021/07/14/the-eus-carbon-border-adjustment-proceed-with-caution/>, accessed 21 October 2021; Lowe (n 71) 9.

128 Decision of 28 November 1979 (L/4903) ('enabling clause'), art 2.

129 Regulation (EU) 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L303, ('GSP Regulation'), art 4(1)a.

130 ibid art 17.

131 Lowe (n 71) 11.

132 Brandi and Dröge (n 127).

133 See further Pauwelyn and Kleimann (n 111) 10–11; Mehling et al (2019) (n 108) 464–470.

is 'apt' to make a 'material contribution' to reducing carbon leakage, and demonstrate a 'genuine relationship of ends and means'.[134] While critics point to limited evidence of carbon leakage to date, the CBAM targets the *risk* of carbon leakage, understandably projected to rise when the EU removes free allocation under the ETS.[135] There must further be no less trade-restrictive alternative that would allow the EU to achieve the same level of climate protection.[136] Commentators have argued that the CBAM is likely to pass this requirement, given the Appellate Body's requirement that an alternative measure generate the same 'synergies' within a Member's 'comprehensive policy'.[137]

Comprising a 'two-tiered' test, it is the chapeau (introductory clause) of article XX GATT that poses the greatest hurdles – and opportunities.[138] The chapeau requires that measures are not *applied* so as to constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. To avoid constituting 'arbitrary or unjustifiable discrimination', a measure must have a rationale that explains how its discriminatory effects relate to its claimed objective.[139]

Interestingly, Pauwelyn and Kleimann suggest that for LDCs at least, the 'same' conditions do not apply, therefore 'there is arguably no discrimination in the first place'.[140] Alternatively, exempting LDCs could be permitted on the environmental ground that LDCs have a far lower historical contribution to climate change.[141] Framed in this way, differentiation would then be supported by an environmental rationale that is sufficiently 'related' to the CBAM's overarching climate protection objective. It is questionable, however, whether this argument would be accepted and extended to developing states as well, particularly given the emphasis placed on current emissions.

Overall, the 'unidimensional' chapeau test presents a challenge for the CBAM's differentiation in line with CBDRRC, as relaxing standards would *undermine* efforts to reduce carbon leakage.[142] Seeking solutions, Venzke and Vidigas point to a small window left open in the *EC-Seals* case, concerning an EU ban on seals and seal products to protect the public moral of animal welfare.[143] The ban exempted seal products from hunts from Inuit communities, despite the fact that such hunts also result in seal suffering. There, the Appellate Body held that the rational relationship approach was 'not the sole test for arbitrary and justifiable discrimination' and that 'depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to that overall assessment'.[144] Nevertheless, the AB still found that the Inuit communities exception violated the chapeau, given that the vaguely formulated criteria and broad discretion allowed seal products from 'commercial hunts' to potentially enter the market.[145] In this author's view, the focus on safeguards and preclusion of any commercial gain does not reflect a balancing of the competing interests. One lesson that can be learned is the importance of clear standards and curtailed discretion in the design of measures pursuing 'countervailing' objectives such as CBDRRC.[146]

134 *Brazil – Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report (17 December 2007) WT/DS332/AB/R, para 210.

135 Berahab (n 122).

136 *EC – Asbestos* (n 107) para 165.

137 Venzke and Vidigal (n 114) 21.

138 *US-Shrimp* (n 47) para 118.

139 *Brazil – Retreaded Tyres* (n 134) paras 225 and 232.

140 Pauwelyn & Kleimann (n 111) 11.

141 ibid.

142 Venzke and Vidigal (n 114) 23.

143 *EC – Seals* (n 47) para 5.320.

144 ibid para 5.321.

145 ibid para 5.328.

146 Venzke and Vidigal (n 114) 24.

A further case that has convincingly been suggested to accommodate the incorporation of CBDRRC is *US-Shrimp*.[147] The case concerned a US ban on imports from countries not requiring the use of turtle-friendly fishing nets. This measure was found to be problematically coercive and lacking in flexibility.[148] In a key passage, the WTO AB held that:

> discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.[149]

This finding aligns with the requirement of CBDRRC that measures are sufficiently flexible to take into account conditions in developing countries. Its wording appears to be reflected in Indonesia's position in a (yet undecided) WTO dispute regarding the EU's indirect land-use change criteria under the revised Renewable Energy Directive.[150] Contesting the EU's phasing-out of palm oil, Indonesia argued the EU had 'prepared and adopted these measures without taking into account circumstances specific to the developing countries'.[151] On this view, the consideration of developing country conditions is construed as an *obligation* supported by the GATT.

Finally, falling back on the rules of treaty interpretation, both the WTO agreements and general international law indicate that article XX GATT should be read consistently with other applicable rules, in particular here, the Paris Agreement.[152] Specifically, article 3.2 of the Dispute Settlement Understanding mandates interpretation 'in accordance with customary rules of interpretation of public international law'. In *EC – Biotech* it was confirmed that this includes article 31(3) of the Vienna Convention on the Law of Treaties, which allows for the use of 'any relevant rules of international law applicable in the relations between the parties'.[153] As noted by Davidson Ladly, 'a panel would have to consider the principle of CBDR as a relevant international legal obligation', particularly where both parties to the dispute are also 'unequivocally' bound by the UNFCCC, and (now) the Paris Agreement.[154] Also of relevance is the preamble to the Agreement Establishing the WTO itself. The very first recital provides that parties seek 'both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[155] Indeed, in *US-Shrimp*, the Appellate Body referred both to this recital and other multilateral environmental agreements, proving its willingness to recognise developments in international environmental law.[156]

Accepting these arguments, the EU should not hide behind WTO law to excuse itself from differentiating burdens for developing countries.

## 6. CONCLUSION

The proposed EU CBAM demonstrates an assertive and far-reaching framing of the EU's responsibility to respond to climate change. Its focus on the EU's 'global GHG footprint'

147 J Pauwelyn, 'U.S. federal climate policy and competitiveness concerns: The limits and options of international trade law' (Working paper 07–02, Nicholas Institute for Environmental Policy Solutions, Duke University 2007) 39; S Davidson Ladly, 'Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities' (2012) 12 International Environmental Agreements 78–9.

148 *US-Shrimp* (n 47) para 161.

149 ibid para 163.

150 *European Union – Certain Measures Concerning Palm Oil And Oil Palm Crop-Based Biofuels – Request for the Establishment of a Panel Indonesia* (24 March 2020) WT/DS593/9.

151 ibid 5–6.

152 See further on how the AB has previously dealt with environmental law under article XX GATT, NL Dobson, 'Article XX GATT as Guardian of the Environment', in P Delimatsis and L Reins (eds) *Elgar Encyclopedia of Environmental Law, Trade and Environmental Law* (Edward Elgar 2021).

153 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report (29 November 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R paras 7.67–7.68. Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 31.

154 Davidson Ladly (n 147) 79.

155 Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3, 154, rec 1.

156 *US-Shrimp* (n 47) para 130.

targets the EU's consumption-driven contribution to the substantial portion of emissions from internationally traded goods. Yet this framing is not without controversy, as it moves burdens up the supply chain to developing and least developed countries.

This paper has investigated how the EU's framing of responsibility fits within the fragmented public international law landscape. From a jurisdictional perspective, the targeting of foreign embedded emissions raises issues of extraterritoriality, as it interferes in the regulatory space of other sovereign states. The demonstration of a valid jurisdictional basis for climate-protective measures remains a matter of continuing legal uncertainty. As explored in Section 3, the greatest support can arguably be found in the effects and protective principles that focus on climate harm *within* the EU's territory. In this sense, the rationale of responsibility for foreign, consumption-driven emissions is not the most intuitive fit with the classic prescriptive principles. That being said, the universality principle's focus on 'fundamental interests of the international community', may in theory at least, support jurisdictional assertions based on more normative grounds.

Greater issues arise under the UN climate agreements, which stress the centrality of equity and CBDRRC. As discussed in Section 4, on the one hand, the EU's pressure for 'actions by all parties' finds support in the 'common' element of CBDRRC. The notion of EU leadership is also reflected in the wording of article 4(4) of the Paris Agreement that developed countries 'take the lead' in mitigation efforts. On the other hand, the EU's targeting of foreign embedded emissions opposes the UNFCCC's production-based territorial system boundary, and undermines the freedom accorded by the self-differentiation approach under the Paris Agreement. It is then particularly problematic that the CBAM incorporates very little differentiation between trading partners. The European Parliament's amendment to provide financial assistance to developing countries at least equal to the CBAM revenues is then to be welcomed. Still, it is questionable whether this general aid will be sufficient, especially without any relaxation of the heavy administrative requirements and fiscal burdens placed on suppliers themselves.

Should the EU decide to incorporate differentiated burdens, it is likely to face obstacles under the equal treatment requirements of world trade law. This field has heavily influenced the EU, which makes particular sense given the relative accessibility of the WTO dispute settlement procedures, and possibility of countermeasures. Still, as argued in Section 5, while explorative in nature, there are persuasive grounds for accepting differentiation based on CBDRRC under the GATT. Both the special and differential treatment provisions, as well as case law on the general exemptions, offer openings that could be further utilized by a dedicated regulator. As a self-appointed climate leader, the EU is well-placed to forge such practice, taking its responsibility in a fairer manner.

## COMPETING INTERESTS

The author has no competing interests to declare.

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