GREEN WALLS OR GREEN PRETEXTS? EXAMINING THE WTO COMPATIBILITY OF THE EU CARBON BORDER ADJUSTMENT MECHANISM

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ABSTRACT

The European Union's Carbon Border Adjustment Mechanism (hereinafter referred to as "CBAM"), established by Regulation (EU) 2023/956, imposes a carbon price on certain imports equivalent to the cost borne by European producers under the EU Emissions Trading System. Proponents characterise the measure as a necessary instrument for preventing carbon leakage and preserving the integrity of unilateral climate policy. Critics, particularly from developing economies, contend that the CBAM is a sophisticated form of disguised protectionism dressed in the language of environmental responsibility. This article examines the WTO compatibility of the CBAM through three analytical lenses: the Most-Favoured-Nation and National Treatment obligations under the General Agreement on Tariffs and Trade 1994; the environmental exceptions available under Article XX of the GATT; and the prohibition on export subsidies under the Agreement on Subsidies and Countervailing Measures. The article argues that while the CBAM is defensible as a border tax adjustment and enjoys a plausible route to justification under Article XX(b) and (g), the mechanism's differential treatment of exporting nations introduces a structurally significant vulnerability under the chapeau of Article XX. The asymmetric treatment of developing countries, combined with the opacity of the equivalence determination process, risks transforming a legitimate environmental instrument into unjustifiable discrimination.

I. INTRODUCTION

The Carbon Border Adjustment Mechanism was entered into force on 17 May 2023 and marked a pivotal moment in the intersection of trade law and climate governance.[1] The mechanism forms a central pillar of the European Union's Fit for 55 legislative package, which seeks to reduce net greenhouse gas emissions by at least fifty-five per cent by 2030 relative to 1990 levels.[2] At the heart of the CBAM lies a straightforward concern: the EU Emissions Trading System (EU ETS) imposes significant carbon costs on European producers and without a border correction, competing imports from countries with less stringent climate regulation would undercut European industry, incentivise relocation of production and ultimately undermine the environmental integrity of the EU's climate ambitions.[3] This problem is known as carbon leakage.[4]

The CBAM addresses carbon leakage by requiring importers to surrender certificates corresponding to the embedded carbon emissions of designated goods, priced equivalently to the EU ETS allowance price.[5] The sectors presently subject to the CBAM include cement, iron and steel, aluminium, fertilisers, electricity and hydrogen. From the European perspective, the measure is not a tariff but a correction: it levels the playing field between European and foreign producers, ensuring that both face an equivalent carbon price.[6]

Yet the international trading community has not accepted this framing uncritically. India, Brazil, South Africa and a coalition of developing nations have argued that the CBAM constitutes a discriminatory measure that violates the General Agreement on Tariffs and Trade 1994 (GATT) and conflicts with the principle of common but differentiated responsibilities under international climate law.[7] These concerns go beyond academic disputation. The prospect of WTO litigation is real and the systemic implications for the architecture of trade-

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[1] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130/52 (CBAM Regulation).
[2] European Commission, 'Fit for 55: delivering the EU's 2030 Climate Target on the Way to Climate Neutrality' COM (2021) 550.
[3] Directive 2003/87/EC of the European Parliament and of the Council as amended by Directive (EU) 2023/959 [2023] OJ L 130/134 (EU ETS Directive).
[4] Mustafa Babiker, 'Climate Change Policy, Market Structure and Carbon Leakage' (2005) 65 Journal of International Economics 421, 422.
[5] CBAM Regulation (n 1) recitals 3-6.
[6] Joost Pauwelyn, 'Carbon Leakage Measures and Border Tax Adjustments under WTO Law' in Thomas Cottier, Olga Nartova and Sadeq Bigdeli (eds), International Trade Regulation and the Mitigation of Climate Change (CUP 2009) 34, 38.
[7] General Agreement on Tariffs and Trade 1994 (GATT 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

and-environment linkage are profound.[8]

This article undertakes a rigorous examination of the WTO compatibility of the CBAM. **Part II** analyses whether the CBAM constitutes a border tax adjustment consistent with GATT Articles I and III. **Part III** examines the availability of Article XX exceptions, with particular focus on the chapeau's requirement of non-arbitrary and non-discriminatory application. **Part IV** considers the subsidy dimension under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). **Part V** offers a critical synthesis and proposes interpretive pathways for reconciling climate ambition with multilateral trade obligations.[9]

II. THE CBAM AS A BORDER TAX ADJUSTMENT: ARTICLES I AND III OF THE GATT

A. Structure and operational logic of the CBAM

The CBAM operates by requiring authorised declarants to surrender CBAM certificates in proportion to the embedded carbon emissions of imported goods.[10] The price of each certificate is calculated on the basis of the weekly average auction price of EU ETS allowances, expressed in euros per tonne of carbon dioxide equivalent.[11] Importers who can demonstrate that a carbon price has been paid in the country of origin may deduct that amount from their certificate obligation.[12] Following a transitional reporting period that concluded in December 2025, full financial obligations apply from 2026.[13]

From a structural standpoint, the CBAM most closely resembles a border tax adjustment (BTA): a fiscal measure that extends the incidence of a domestic tax to imported products, ensuring that imports do not benefit from a competitive advantage arising from the absence of the same domestic tax. The legal permissibility of BTAs under GATT law is well established, though the precise conditions under which a BTA is valid have generated significant jurisprudential complexity.

B. The likeness inquiry under Article III

Article III:2 of the GATT prohibits the imposition of internal taxes on imported products in

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[8] Agreement on Subsidies and Countervailing Measures (SCM Agreement), Marrakesh Agreement Establishing World Trade Organization, Annex 1A, 1869 UNTS 14.

[9] Robert Howse and Antonia Eliason, 'Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues' in Thomas Cottier, Olga Nartova and Sadeq Bigdeli (eds), International Trade Regulation and the Mitigation of Climate Change (CUP 2009) 48, 55.

[10] CBAM Regulation (n 1) art 2(1).

[11] ibid art 3(1).

[12] ibid art 4.

[13] ibid art 6.

excess of those applied to like domestic products. The threshold question is whether imported CBAM goods are like their domestically produced counterparts. The Appellate Body in EC, Asbestos held that likeness must be assessed through four criteria: physical properties, end-uses, consumer preferences and habits and tariff classification.[14] The criteria are neither exhaustive nor hierarchically ranked.[15]

Steel produced in India and steel produced in Germany may be physically identical, serve identical end-uses and attract the same tariff classification. The CBAM, however, applies a differential charge based on production-related carbon emissions rather than the physical characteristics of the product itself. This raises a question of considerable doctrinal significance: can production and process methods (PPMs) generate non-likeness in the GATT sense?[16]

The GATT panel in US - Gasoline indicated that the origin of a product, including its production methods, could not render otherwise like products unlike for the purpose of Article III:4.[17] The Appellate Body, while not definitively resolving the PPM question, suggested that the analysis should focus on the competitive relationship between products in the marketplace rather than their production histories.[18] Under this standard, high-carbon and low-carbon steel compete directly in the same market and satisfy the same consumer demand, suggesting they are like products for Article III purposes.[19]

The WTO Working Party on Border Tax Adjustments in 1970 confirmed that taxes on products could be adjusted at the border, but taxes on production processes generally could not.[20] The CBAM, which calibrates the charge to the carbon intensity of the production process, creates an interpretive tension: the obligation to pay flows from the importation of a product, but the quantum is determined by how the product was made.[21]

A persuasive resolution is found by characterising embedded carbon as a de facto input into

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[14] Appellate Body Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001.
[15] Appellate Body Report, Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, ¶137.
[16] CBAM Regulation (n 1) art 7.
[17] Panel Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R, adopted 20 May 1996 ¶ 6.10.
[18] Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, ¶ 18.
[19] Panel Report, European Communities - Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, ¶ 7.2514.
[20] Working Party Report on Border Tax Adjustments, L/3464, adopted 2 December 1970 (BISD 18S/97) (BTA Report).
[21] ibid ¶ 14.

production. The Appellate Body in Japan - Alcohol confirmed that Article III requires an examination of the competitive conditions and market relationships between products.[22] If a domestic tax is designed to equalise conditions of competition between domestic and foreign goods, the measure falls within the permissive scope of Article III rather than the prohibitory scope of Article II on tariffs.[23] This argument is bolstered by the BTA framework: a charge calibrated to carbon emissions embedded in a product is functionally analogous to the VAT adjustment mechanism applied to input taxes, which the GATT working party expressly permitted.[24]

C. Most-Favoured-Nation consistency under Article I

Article I of the GATT mandates that any advantage granted to the product of any country be accorded immediately and unconditionally to the like product of all other contracting parties. The CBAM creates differential treatment in two principal ways. First, countries linked to the EU ETS or possessing equivalent carbon pricing mechanisms receive a full deduction of carbon costs already paid, effectively reducing their CBAM obligation to zero.[25] Second, Least Developed Countries (LDCs) are exempted entirely subject to a de minimis import share threshold.[26]

These differentiations prima facie engage Article I. The Appellate Body in Philippines - Distilled Spirits confirmed that any advantage conferred on the product of one member state must be extended unconditionally to the like product of every other member state, regardless of whether the differential treatment was motivated by legitimate policy objectives.[27]

The European Union's defence rests on two propositions. First, the advantages accorded to ETS-linked countries are not unconditional in the sense that they are available to any country that installs an equivalent carbon pricing scheme, rather than being tied to national origin per se.[28] Second, the LDC exemption may be defended under the Enabling Clause, which creates a permanent exception to MFN for measures favouring developing countries.[29] Neither

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[22] Appellate Body Report, Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 page 16.
[23] CBAM Regulation (n 1) art 9.
[24] Panel Report, Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, adopted 19 May 2005, ¶ 7.299.
[25] Appellate Body Report, Philippines - Taxes on Distilled Spirits, WT/DS396/AB/R, WT/DS403/AB/R, adopted 20 January 2012, ¶ 220.
[26] Pauwelyn (n 6) 55-60.
[27] Jorge Viñuales, 'Cartography and Genesis of the Rio Principles on Sustainable Development' in Jorge Viñuales (ed), The Rio Declaration on Environment and Development: A Commentary (OUP 2015) 3, 18.
[28] EC - Asbestos (n 14) ¶ 120.
[29] Panel Report, India - Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/R, adopted 14

argument is watertight. The equivalence determination rests on a unilateral assessment by the European Commission and the Enabling Clause requires that differential treatment be responsive to the development needs of developing countries, not simply applied on the basis of a climate-policy condition that the EU alone defines.[30]

III. ARTICLE XX EXCEPTIONS: ENVIRONMENTAL JUSTIFICATION AND ITS LIMITS

A. The applicable paragraphs: Article XX(b) and XX(g)

Even if the CBAM is found to violate Articles I or III, it may be justified under the general exceptions in Article XX. The two most directly relevant paragraphs are Article XX(b), which covers measures necessary to protect human, animal or plant life or health and Article XX(g), which covers measures relating to the conservation of exhaustible natural resources.[31] Climate stabilisation fits naturally within Article XX(g), given that the atmosphere is an exhaustible natural resource whose absorptive capacity for greenhouse gases is finite. The Appellate Body in US - Shrimp confirmed that the list of exhaustible natural resources is not closed and must be read in an evolutionary manner, in light of contemporary concerns of the community of nations as reflected in multilateral environmental agreements.[32]

For Article XX(b), the CBAM must be necessary to protect life and health. The necessity test requires a weighing and balancing of factors including the contribution of the measure to its objective, the importance of the value protected and the trade-restrictive impact of the measure.[33] Reducing carbon leakage makes an objective contribution to climate stabilisation, which in turn protects human life and health from the effects of climate change. The contribution is indirect but genuine: if the CBAM prevents one unit of production from migrating to a less regulated jurisdiction, it prevents the associated emissions and their contribution to climate-related harm.[34]

For Article XX(g), the measure must relate to conservation and must be applied in conjunction with restrictions on domestic production or consumption. The EU ETS, which forms the

October 2016, para 7.294.

[30] CBAM Regulation (n 1) recital 49.

[31] Appellate Body Report, European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, adopted 20 April 2004, ¶ 153.

[32] Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November , ¶ 121.

[33] Appellate Body Report, Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 December 2007, ¶ 150.

[34] US - Shrimp (n 36) ¶¶ 166-168.

domestic anchor of the CBAM, clearly constitutes a domestic restriction on emissions. The CBAM extends that restriction to imported products, making the overall scheme one that applies in conjunction with domestic restrictions in the sense required by XX(g).[35]

B. The chapeau: the decisive battleground

Provisional justification under any paragraph of Article XX is necessary but not sufficient. A measure must also satisfy the chapeau of Article XX, which requires that it not be applied in a manner constituting arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.[36]

The Appellate Body in US - Shrimp provided the most detailed exposition of the chapeau's requirements. It held that the chapeau is concerned with the manner of application of a measure, not with the measure itself and that discrimination is unjustifiable when it cannot be explained by reference to the policy goal that provided the provisional justification.[37] The Appellate Body also held that the chapeau requires the regulating country to engage in good-faith negotiations with affected countries before applying the measure and to allow for flexibility in how affected countries may achieve the common objective.[38]

Applying this standard to the CBAM reveals a structural vulnerability. The CBAM grants a full exemption to countries with ETS-equivalent carbon pricing, as determined unilaterally by the European Commission.[39] A country that has adopted an alternative but potentially equally effective climate strategy, such as command-and-control regulations, renewable energy mandates, or carbon taxes on final consumption rather than production, receives no credit under the CBAM.[40] This rigidity closely parallels the inflexibility that led the Appellate Body in US - Shrimp to condemn the original US measure as unjustifiable discrimination: the US required exporting nations to adopt the same sea turtle protection programme used domestically, without accommodating different but equally effective methods of achieving the same conservation goal.[41]

The CBAM's recognition of only price-based carbon mechanisms, to the exclusion of

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[35] Korea - Beef (n 15) ¶ 166.
[36] Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005, ¶ 306.
[37] CBAM Regulation (n 1) recitals 7–10.
[38] Brazil - Retreaded Tyres (n 43) ¶ 156.
[39] India - Solar Cells (n 29) ¶ 7.397.
[40] US - Shrimp (n 36) ¶ 153.
[41] Joost Pauwelyn, 'U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law' (Nicholas Institute Working Paper NI WP 07-02, 2007) 12-15.

regulatory alternatives that may achieve equivalent emission reductions, risks falling into the same trap. A developing country that has reduced the carbon intensity of its steel sector through industrial modernisation grants or through sector-specific emissions regulations is not credited under the CBAM as currently designed.[42] The discrimination between ETS-equivalent and non-ETS countries does not track the underlying policy objective of preventing carbon leakage: what matters for climate purposes is whether embedded emissions are lower, not whether the mechanism that produced the lower emissions takes a particular form.[43]

C. Arbitrariness and the developing country dimension

The Appellate Body in US - Gambling confirmed that the chapeau prohibits discrimination that is capricious or unpredictable, as well as discrimination that cannot be rationalised by reference to the policy concern at issue.[44] The CBAM's equivalence determination process is presently insufficiently transparent. The Commission publishes a list of recognised equivalent schemes under Article 2(11) of the CBAM Regulation, but the criteria for inclusion, the evidentiary standards applied and the review procedures are not specified with sufficient particularity in the legislative text.[45] A WTO panel might regard this opacity as evidence of arbitrary determination, particularly if the list of recognised schemes tracks geopolitical relationships rather than objective criteria for climate equivalence.[46]

The tension is sharpened by the context of the principle of common but differentiated responsibilities (CBDR), which is a foundational norm of international climate law codified in the UNFCCC and reaffirmed in the Paris Agreement.[47] While CBDR is not formally binding on WTO adjudicators, the Appellate Body has accepted that WTO law must be read in light of contemporary international law, including multilateral environmental agreements.[48] A measure that imposes on developing countries the costs of a climate transition that was historically driven by the industrialisation of developed economies may be regarded as applying the same conditions where conditions do not in fact prevail, thereby triggering the chapeau's prohibition.[49]

[42] SCM Agreement (n 8) art 1.1(a)(1)(ii).
[43] ibid art 1.1(b).
[44] ibid art 2.
[45] Panel Report, United States - Tax Treatment for 'Foreign Sales Corporations', WT/DS108/R, adopted 20 March 2000, ¶ 7.94.
[46] SCM Agreement (n 8) Annex I, item (e).
[47] United Nations Framework Convention on Climate Change (UNFCCC), opened for signature 9 May 1992, 1771 UNTS 107, art 3(1).
[48] Paris Agreement, opened for signature 22 April 2016, UNTS Registration No I-54113, art 2(2).
[49] Howse and Eliason (n 9) 72.

The CBAM Regulation's transitional exemption for LDCs and its deduction mechanism for countries with recognised carbon pricing address these concerns only partially.[50] A country that is neither an LDC nor party to an ETS-equivalent scheme but that has pursued climate action through alternative domestic policy instruments finds itself in a structurally disadvantaged position that may not survive chapeau scrutiny.[51]

IV. THE SCM AGREEMENT DIMENSION: FREE ALLOWANCES AS ACTIONABLE SUBSIDIES

A. Free allocation under the EU ETS as a potential subsidy

A dimension of the CBAM's WTO exposure that has received insufficient attention concerns the interaction between the CBAM and the free allocation of EU ETS allowances. During the transitional period and beyond, European producers in certain sectors continue to receive a proportion of their ETS allowances free of charge rather than purchasing them at auction.[52] The CBAM Regulation provides that free allocations will be phased out progressively as the CBAM is phased in, reaching zero by 2034.[53]

The free allocation of allowances may constitute a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement, which covers government revenue that is otherwise due but foregone.[54] The EU government notionally owns the carbon emission rights within the ETS and derives revenue from their auction. When allowances are freely allocated, revenue that would otherwise accrue to the government is foregone. The benefit element of the SCM Agreement definition is satisfied where the recipient is placed in a better position than it would be without the financial contribution.[55] European producers who receive free allowances avoid costs that their competitors must absorb, conferring a measurable benefit.[56]

The specificity requirement of the SCM Agreement demands that the subsidy be limited to particular enterprises or industries.[57] Free allocation under the EU ETS is sector-specific: it applies to energy-intensive industries including steel, cement and aluminium and is not

[50] CBAM Regulation (n 1) art 2(9).
[51] SCM Agreement (n 8) Annex II.
[52] Kateryna Holzer, Carbon-Related Border Adjustment and WTO Law (Edward Elgar 2014) 145-152.
[53] Appellate Body Report, Canada - Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, ¶ 78.
[54] ibid art 2.
[55] Panel Report, United States - Tax Treatment for 'Foreign Sales Corporations', WT/DS108/R, adopted 20 March
2000, para 7.94
[56] SCM Agreement (n 8) Annex I, item (e).
[57] Howse and Eliason (n 9) 72.

extended to the broader economy. A panel in US - FSC confirmed that sector-specific tax relief satisfies the specificity threshold.[58] The overlap between ETS free allocation sectors and CBAM sectors creates a structural irony: the same industries whose imported products are subject to CBAM carbon charges benefit, on the domestic side, from a partial subsidy in the form of free allowances.[59]

B. The export subsidy question

A separate though related concern is whether the CBAM creates an implicit export subsidy. Where European goods are exported, no CBAM certificate obligation arises. The EU ETS cost is borne by domestic producers in respect of their emissions, but the CBAM levy does not apply to exports. If free allocations remain in place while exported goods carry no carbon cost relative to their foreign competitors, one could argue that the net effect is a cost advantage enjoyed by European exporters.[60]

Annexes I and II of the SCM Agreement create a complex framework governing the permissibility of adjusting taxes and charges at the border. Annex I permits the remission of indirect taxes on exported goods and Annex II permits the relief of prior-stage cumulative indirect taxes on inputs consumed in the production process.[61] The question of whether the carbon charge embedded in ETS-covered production constitutes a prior-stage indirect tax on an input consumed in production is not resolved in existing jurisprudence and the answer would determine whether the CBAM's export architecture escapes the export subsidy prohibition.[62]

Holzer argues that the ETS cost qualifies as an indirect tax on an input and that the absence of a corresponding charge on exports represents a permissible BTA under Annex II rather than a prohibited export subsidy.[63] This reading is defensible but contested. The Appellate Body in Canada - Autos confirmed that the SCM Agreement must be interpreted strictly and that measures that extend beyond the traditional parameters of permissible border adjustment risk falling within the export subsidy prohibition.[64]

[58] SCM Agreement (n 8) Annex II.

[59] Kateryna Holzer, Carbon-Related Border Agreement and WTO Law (Edward Elgar) 145-152.

[60] Appellate Body Report, Canada - Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, ¶ 78.

[61] 6'Gabriel Weimann and Bettina Moll, 'The EU Carbon Border Adjustment Mechanism in International Trade Law' (2022) 25 Journal of International Economic Law 665, 678.

[62] CBAM Regulation (n 1) art 35(7).

[63] 63 United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development' UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1, Goal 13.

[64] US - Shrimp (n 36) ¶ 129.

V. CRITICAL SYNTHESIS: PATHWAYS TOWARD WTO COMPATIBILITY

A. The balance of legal risk

The foregoing analysis reveals that the CBAM occupies an uncertain but not entirely hostile legal position under WTO law. As a border tax adjustment, it has a defensible structural logic under GATT Articles I and III, particularly if embedded carbon is characterised as a product-related input rather than a pure production process method.[65] The justification under Article XX(b) and (g) is plausible and the EU ETS's domestic restriction on emissions provides the foundation required by XX(g).[66] The SCM Agreement concerns, while real, admit of interpretive responses grounded in the annexes to the agreement.[67]

The most significant legal risk attaches to the chapeau of Article XX. The jurisprudential standard established in US - Shrimp and subsequently applied in US - Tuna II, Brazil - Retreaded Tyres and US - Gambling requires measures to accommodate the situation of affected countries in a flexible and good-faith manner and to abstain from discrimination that cannot be grounded in the policy objective.[68] The CBAM's current design fails to credit equivalent outcomes achieved through regulatory means other than carbon pricing and the equivalence determination process lacks the transparency and objective criteria required to escape the chapeau's condemnation of arbitrary determination.[69]

B. Recommendations for reform

Four reforms would materially strengthen the CBAM's WTO compatibility. First, the equivalence determination criteria should be articulated in objective and verifiable terms in the legislative text, rather than delegated to unilateral Commission assessment. The criteria should measure the outcome of foreign climate regulation, namely the embedded carbon intensity of production, rather than the particular form of regulatory instrument employed.[70] This reform would respond to the chapeau's prohibition on arbitrary determination by grounding the differential treatment in a transparent and policy-consistent methodology.[71]

Second, the EU should pursue multilateral negotiations with major trading partners before the

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[65] Gabriel Weimann and Bettina Moll, 'The EU Carbon Border Adjustment Mechanism in International Trade Law' (2022) 25 Journal of International Economic Law 665, 678.
[66] CBAM Regulation (n 1) art 35(7).
[67] United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development' UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1, Goal 13.
[68] US - Shrimp (n 36) ¶ 129.
[69] Brazil - Retreaded Tyres (n 43) ¶ 178.
[70] CBAM Regulation (n 1) art 2(11).
[71] EC - Tariff Preferences (n 31) ¶183.

full financial phase of the CBAM generates significant legal disputes.[72] US - Shrimp made clear that good-faith engagement is a procedural dimension of chapeau compliance. Bilateral and plurilateral negotiations that offer affected countries technical assistance and transition pathways would serve both climate and legal objectives.[73]

Third, the deduction mechanism under Article 9 of the CBAM Regulation should be extended beyond carbon price equivalents to encompass verified equivalent emission reductions achieved through regulatory means. A country that mandates verified best-available-technology standards for its steel sector, resulting in embedded emissions below the EU average, should receive a corresponding credit regardless of whether those reductions were achieved through a carbon price or a performance standard. [74]

Fourth, the EU should ensure that the phase-out of free ETS allocations proceeds in strict proportion to the phase-in of CBAM obligations, so that no residual domestic advantage remains for covered sectors that could be characterised as a de facto export subsidy. This reform addresses the SCM Agreement exposure while reinforcing the internal coherence of the CBAM as an instrument of environmental correction rather than industrial protection. [75]

C. The systemic stakes

The CBAM raises questions that transcend the European Union's climate policy. It represents the first systematic attempt by a major trading power to extend the reach of unilateral carbon pricing to the global trading system. The legal precedent set by the CBAM will shape the conditions under which other economies can design analogous measures and the norms established by any WTO dispute will determine whether trade law can accommodate unilateral climate action or will drive it toward the less accountable space outside the multilateral trading system. [76]

The relationship between WTO law and international climate law is not inherently antagonistic. The GATT's general exceptions were drafted with sufficient flexibility to accommodate genuine environmental objectives, as the Appellate Body has consistently affirmed in its evolutionary jurisprudence. However, that flexibility has limits. Measures that claim

[72] Appellate Body Report, United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 16 May 2012, ¶ 321.
[73] CBAM Regulation (n 1) recital 52. The EU acknowledges an obligation to engage with third countries and facilitate their transition to low-carbon production methods.
[74] ibid arts 2(4), 2(9).
[75] Sungjoon Cho and Cynthia Lichtenstein, 'Not Merely Rhetoric: The Real Clout of International Trade Law' (2012) 42 Georgetown Journal of International Law 299, 318.
[76] WTO Dispute Settlement Understanding, arts 3.7, 21.5 (DSU).

environmental justification while reproducing the asymmetric economic relationships that trade law was designed to prevent will not survive the scrutiny that WTO adjudicators have shown themselves willing to apply. [77]

VI. CONCLUSION

The EU Carbon Border Adjustment Mechanism is neither purely a green wall nor purely a green pretext. It is a genuinely novel instrument designed to address a genuine market distortion, situated at the intersection of trade law's deepest tensions: the tension between national regulatory autonomy and the multilateral trading order; between the imperative of climate action and the obligation of non-discrimination; and between the interests of developed economies that led industrialisation and developing economies that bear disproportionate costs of the resulting climate emergency.

This article has demonstrated that the CBAM's core architecture is defensible under WTO law as a border tax adjustment and can be provisionally justified under Article XX(b) and (g) of the GATT. However, the mechanism's most significant legal vulnerability lies in its application under the chapeau of Article XX. The unilateral equivalence determination, the failure to credit non-price regulatory equivalents and the opacity of the assessment process combine to create a risk of unjustifiable discrimination that existing jurisprudence has consistently condemned.

The EU has both a legal interest and a moral obligation to address these deficiencies. A CBAM that survives WTO scrutiny must demonstrate that its differential treatment of exporting nations is grounded in objective, transparent and policy-consistent criteria that genuinely track the climate objective rather than the administrative convenience of the European Commission. A CBAM that fails this standard will not merely lose a trade dispute; it will set a damaging precedent that delegitimises the broader project of integrating climate ambition with multilateral trade discipline, at precisely the moment when that integration is most urgently needed.

[77] Holzer (n 59) 198-203.