
THE EU'S CARBON BORDER ADJUSTMENT MECHANISM (CBAM) AND THE EROSION OF MULTILATERAL TRADE PRINCIPLES: A LEGAL ANALYSIS OF WTO COMPATIBILITY AND DEVELOPMENTAL EQUITY

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ABSTRACT

The European Union's Carbon Border Adjustment Mechanism (CBAM), operational during its transitional phase until 2025, represents a seminal clash between multilateral trade law and unilateral climate ambition. CBAM aims to prevent 'carbon leakage' by imposing a carbon levy on imports equivalent to the EU's domestic Emissions Trading System (ETS) price. This article analyses the mechanism's compatibility with the foundational principles of the General Agreement on Tariffs and Trade 1994 (GATT). The article argues that CBAM is *prima facie* inconsistent with GATT Article III (National Treatment) due to the temporary, yet significant, structural advantage provided to domestic EU producers through the gradual phase-out of free ETS allowances. Furthermore, even if the EU successfully asserts a defence under GATT Article XX (environmental exceptions), the mechanism's systemic failure to incorporate Special and Differential Treatment (SDT) for developing countries means it is unlikely to satisfy the stringent non-discrimination requirements of the Article XX *chapeau*. CBAM thus risks setting a precedent for 'green protectionism', undermining developmental equity, and exacerbating the trend of weaponizing trade tools for domestic policy objectives.

Keywords: CBAM, WTO, GATT Article III, GATT Article XX, Carbon Leakage, Developmental Equity, Green Protectionism.

I. Introduction: The New Climate-Trade Nexus and the CBAM Controversy

The global economic order is increasingly defined by an accelerating collision between urgent environmental imperatives and the established principles of trade liberalisation. The European Union's Carbon Border Adjustment Mechanism (CBAM) stands as the most significant and contentious exemplar of this nexus, representing the EU's attempt to leverage trade policy to achieve ambitious domestic climate objectives. Operational in its transitional phase until December 2025, CBAM is designed to prevent 'carbon leakage' by imposing a charge on carbon-intensive imports equivalent to the price domestic EU producers pay for carbon under the Emissions Trading System (ETS).¹ The introduction of CBAM forces a critical legal and policy examination of whether environmental necessity can supersede, or at least redefine, the foundational non-discrimination tenets of the World Trade Organization (WTO) system.

The central thesis advanced here is that the structural design of CBAM renders it *prima facie* inconsistent with key provisions of the General Agreement on Tariffs and Trade 1994 (GATT), particularly Article III (National Treatment), owing to inconsistencies related to the EU ETS free allowance phase-out. Furthermore, even if the EU successfully establishes its defence under the environmental exception of GATT Article XX, the mechanism's systemic failure to account for the developmental equity and capacity of the Global South means the measure is unlikely to satisfy the stringent non-discrimination requirements embedded in the Article XX *chapeau*.

The complexity and urgency of this legal challenge were highlighted on May 19, 2025, when Russia formally filed a complaint against the CBAM package before the WTO Dispute Settlement System.² Russia's legal claims explicitly target the transitional reporting obligations, the methodology used to calculate embedded emissions, the reliance on default values and critically, the gradual phase-out of free allowances under the EU ETS.³ Although the EU has deemed the complaint "unfounded,"⁴ this challenge compels the EU to articulate a

¹ Peter Lunenborg & Vahini Naidu, *How the EU's Carbon Border Adjustment Mechanism Discriminates Against Foreign Producers*, S. Centre Pol'y Brief No. 124, at 2 (2024); R. A. F. M. Vrolijk & J. M. A. W. C. M. A. S. L. A. E. M. E. R. M. A. S. C. L. F. N. T., *Potential Conflicts Between the European CBAM and the WTO Rules*, Norton Rose Fulbright (2022).

² Antoine Oger & Pierre Leturcq, *The EU CBAM's Reform and Remaining Implementation Challenges for Low- and Middle-Income Countries*, Inst. for Eur. Envtl. Pol'y 1, 2 (2025); Jacob Kopnick, *Russia Challenges EU's CBAM Scheme at WTO*, Commc'ns Daily (May 21, 2025).

³ Squire Patton Boggs, *Russia Brings WTO Claims Against CBAM and Other Countries Express Serious Concerns* (July 2025).

⁴ Oger & Leturcq, *The EU CBAM's Reform*, at 2.

formal legal defence under the GATT framework.

The profound significance of the Russia dispute extends beyond bilateral economic rivalry. While Russia's primary motivation is to counter economic retaliation given the high carbon intensity of its key exports, its legal claims are strategically directed at the fundamental *systemic design flaws* of CBAM, specifically aiming to demonstrate an inconsistency with GATT Article III. If a WTO panel accepts the Article III claim, the measure is definitively deemed WTO-inconsistent, preventing the need to rely on the difficult and highly contested Article XX defence. This outcome directly benefits low and middle-income countries (LMICs) who face the same disproportionate cost burden but lack the legal capacity or political leverage to initiate such a dispute, positioning Russia as a strategic first mover challenging the core legal structure of the mechanism.

II. CBAM's Prima Facie Inconsistency with GATT 1994

The assessment of CBAM's WTO compatibility must begin with an analysis of its consistency with the fundamental GATT principles of non-discrimination. The most compelling argument for *prima facie* inconsistency lies in the violation of GATT Article III, which mandates that imported products be accorded treatment "no less favourable" than that accorded to "like products" of national origin.

A. The Structural Conflict: EU ETS Free Allowances

The core legal conflict arises from the concurrent operation and gradual phase-out of the EU ETS free allowance system, which is scheduled to occur over a nine-year period (2026 - 2034).

⁵ During this lengthy transition, domestic EU producers in CBAM-covered sectors retain a diminishing, yet significant, level of free allowances, which functions as a financial offset, thereby reducing their effective carbon cost. This financial benefit is explicitly *not* extended to imported products, which must surrender CBAM Certificates equivalent to the full carbon price upon entry into the EU market. ⁶

This structural asymmetry results in clear *de facto* differential treatment, undermining the National Treatment guarantee under both Article III:2 (internal taxation) and Article III:4 (internal regulation). The South Centre confirms this disparity, observing that CBAM systematically discriminates against foreign producers across multiple parameters, including

⁵ Vrolijk & T., *Potential Conflicts Between the European CBAM and the WTO Rules*, Norton Rose Fulbright (2022).

⁶ Lunenburg & Naidu, *How the EU's*, at 2.

the continued free allocation of allowances to EU firms, regulatory exemptions enjoyed domestically but not mirrored in CBAM, and disparate verification standards.⁷ Russia's formal complaint specifically references the *gradual phase-out* of free allowances, asserting that this provision nullifies or impairs the benefits guaranteed to WTO members under GATT 1994.⁸

The success of a GATT Article III claim hinges on defining the "like product" and the competitive conditions it faces. Although the imported product (e.g., steel) and the domestically produced product are physically identical, the legal discrimination arises from the *regulatory costs imposed* and the *financial benefits granted* within the competitive environment. Since EU domestic firms temporarily receive a critical financial offset that foreign competitors are denied, competitive inequality is established, confirming a *prima facie* inconsistency with Article III, regardless of the environmental intent.

B. Methodological and Procedural Discrimination

Beyond the free allowance issue, procedural requirements impose further burdens that suggest discrimination. Critics, including Russia, have challenged the EU's use of default emissions values and unilateral calculation methods.⁹ These methods allegedly fail to adequately recognize or credit the domestic Measurement, Reporting, and Verification (MRV) systems of third countries.¹⁰

The unilateral reliance on default values places an immediate and relatively heavier administrative and financial cost burden on foreign producers, particularly those from LMICs.

¹¹ This lack of procedural equity raises concerns regarding Article III:4 consistency, as it affects the conditions of internal sale, and potentially Article I (MFN), if the methodologies inherently favour trade partners with more integrated reporting systems over others.

The complex array of legal challenges facing CBAM can be summarised below:

⁷ Lunenborg & Naidu, *How the EU's*, at 3.

⁸ Kopnick, *Russia Challenges*.

⁹ Squire Patton Boggs, *Russia Brings WTO Claims*.

¹⁰ Julia de Cendra, *Learning from CBAM's Transitional Impacts on Trade*, Ctr. for Eur. Reform Pol'y Brief (2024).

¹¹ K. A. L. N. Zwart, *Legal Issues of the European Carbon Border Adjustment Mechanism*, Cato Inst. Briefing Paper 1, 3 (2022).

Table 1: CBAM Legal Challenges and WTO Inconsistencies

CBAM Component Challenged	GATT 1994 Article Allegedly Violated	Nature of Legal Claim/Discrimination	Primary Supporting Evidence/Source
Gradual Phase-out of EU ETS Free Allowances (2026–2034)	Article III:2 (Internal Taxation) & III:4 (Regulation)	<i>De facto</i> discrimination: Imported goods face a full CBAM charge while competing EU like products temporarily benefit from subsidized allowances.	Kopnick, <i>Russia Challenges</i> ; Lunenborg & Naidu, <i>How the EU's</i> , at 3.
Reliance on Default Emission Values/EU Methodology	Article III:4 & Article I (MFN)	Procedural discrimination and administrative burden: Failure to adequately recognize or credit third-country MRV systems and mitigation efforts.	Squire Patton Boggs, <i>Russia Brings WTO Claims</i> ; de Cendra, <i>Learning from</i> .
Failure to Formalize SDT/LDC Exemptions	Article XX <i>Chapeau</i>	Unjustifiable discrimination: Disproportionate economic costs imposed on developing countries (LMICs) without corresponding compensatory measures or procedural flexibility.	Kang et al., <i>The WTO</i> , at 7303; Zwart, <i>Legal Issues</i> , at 3.

III. The Conditional Salvation: GATT Article XX and the Chapeau Challenge

If CBAM is found to be *prima facie* inconsistent with the non-discrimination clauses, the EU must rely entirely on the general exceptions provided under GATT Article XX. The EU will

likely invoke Article XX(g), which allows measures “relating to the conservation of exhaustible natural resources” (the atmosphere/climate), a goal deemed highly plausible in contemporary WTO law. Alternatively, the EU could argue the measure is necessary to protect human health under Article XX(b).¹²

The EU faces a critical legal hurdle regarding its policy intent. Critics argue that if the EU defines the CBAM’s objective predominantly as preventing ‘carbon leakage,’ it risks undermining its environmental defence, as this objective may be characterised as primarily economic or protectionist, rather than a genuine public policy objective related to conservation.¹³ To successfully assert the exception, the measure must be demonstrably “primarily aimed at” the conservation goal.

The most difficult challenge for CBAM remains the *chapeau* of Article XX. This introductory paragraph prohibits the application of exceptions in a manner that constitutes “arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” This demands both substantive consistency and procedural equity. The jurisprudence on Article XX, particularly from cases like *US – Shrimp/Turtle*, mandates that measures must be administered fairly, demonstrating good faith and minimizing adverse impact on trading partners.

The current design appears vulnerable to *chapeau* failure on two major fronts. First, Russia's complaint highlights that CBAM fails to properly account for alternative mitigation efforts undertaken by third countries.⁹ The mechanism's hybrid structure is criticised for privileging countries that adopt an EU-style carbon pricing mechanism over those that implement different national decarbonization policies.¹⁴ Second, the critical absence of structurally integrated Special and Differential Treatment (SDT) severely compromises the legal justification.

The failure to offer procedural flexibility for national reporting or alternative climate standards, coupled with the imposition of unilateral calculation methodologies,¹⁵ suggests a lack of procedural good faith and consultation. This failure to engage in cooperative design, especially with LMICs facing disproportionate economic impact,¹⁶ increases the likelihood of a WTO

¹² Ctr. for Eur. Reform & Trade, *CBAM Issues and Options Paper*, ERCST 4, 7 (2021); R. A. F. M. Vrolijk & J. M. A. W. C. M. A. S. L. A. E. M. E. R. M. A. S. C. L. F. N. T., *Potential Conflicts Between the European CBAM and the WTO Rules*, Norton Rose Fulbright (2022).

¹³ Julia de Cendra, *Exempting Least Developed Countries from Border Carbon Adjustments: Simple Economically but Complex Legally*, World Trade Rev. (2021).

¹⁴ Squire Patton Boggs, *Russia Brings WTO Claims*.

¹⁵ Squire Patton Boggs, *Russia Brings WTO Claims*; de Cendra, *Learning from*.

¹⁶ Squire Patton Boggs, *Russia Brings WTO Claims*.

panel interpreting CBAM as an “externalisation of climate efforts”¹ that results in “unjustifiable discrimination.”

Table 2: CBAM's Article XX Defense Strategy and Vulnerabilities

Defense Element	Article XX Requirement	CBAM Compliance Status	Key Vulnerability/Risk of Failure
Public Policy Objective	Paragraph (g): Conservation of Exhaustible Natural Resources (Atmosphere)	High Plausibility	Risk of being deemed an economic measure (“preventing carbon leakage”) rather than a <i>bona fide</i> environmental measure, challenging the P/P linkage. ^{17 18}
Relation to Objective	Measures "relating to" conservation	Conditional	Must demonstrate the measure is not just <i>intended</i> to prevent leakage but is <i>necessary</i> for the conservation goal and least restrictive of trade. ¹⁹
Application (Chapeau)	Must not constitute arbitrary or unjustifiable discrimination	Low Compliance Risk	The systemic failure to integrate SDT for LMICs/DCs and the reliance on unilateral methodologies constitute

¹⁷ Ctr. for Eur. Reform & Trade, *CBAM Issues and Options Paper*, ERCST 4, 7 (2021); R. A. F. M. Vrolijk & J. M. A. W. C. M. A. S. L. A. E. M. E. R. M. A. S. C. L. F. N. T., *Potential Conflicts Between the European CBAM and the WTO Rules*, Norton Rose Fulbright (2022).

¹⁸ Julia de Cendra, *Exempting Least Developed Countries from Border Carbon Adjustments: Simple Economically but Complex Legally*, World Trade Rev. (2021).

¹⁹ Peter Lunenborg & Vahini Naidu, *How the EU's Carbon Border Adjustment Mechanism Discriminates Against Foreign Producers*, S. Centre Pol'y Brief No. 124, at 2 (2024); R. A. F. M. Vrolijk & J. M. A. W. C. M. A. S. L. A. E. M. E. R. M. A. S. C. L. F. N. T., *Potential Conflicts Between the European CBAM and the WTO Rules*, Norton Rose Fulbright (2022).

			process discrimination and lack of good faith consultation. ²⁰
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IV. The Developmental Cost: CBAM and Global South Equity

The systemic risk of CBAM lies in its disproportionate impact on the Global South, challenging the very principle of development equity within the multilateral framework.²¹ CBAM imposes a “relatively heavier cost on producers with more carbon-intensive processes, which tend to be in developing countries”.²²

While the WTO system acknowledges that countries at different stages of development require distinct rules (SDT),²³ the CBAM framework largely disregards this differentiation. The structural necessity of special consideration for developing countries is essential given the substantial economic impact of CBAM.²⁴ Developing nations need clarity on what constitutes a valid rebate for third countries, particularly those using domestic carbon pricing or receiving transition support.²⁵ The lack of explicit legal provisions within CBAM to operationalize effective differentiation beyond potential LDC exemptions²⁶ creates a legal vacuum.

By applying a uniform carbon standard based on the EU’s domestic price, CBAM implicitly rejects the principle of differential responsibilities and capabilities in the climate-trade realm. If CBAM is upheld without implementing meaningful SDT, it sets a dangerous precedent, implying that developed economies can unilaterally impose their preferred environmental standards extraterritorially. This imposition, which fails to account for national development capacity constraints, effectively destabilizes decades of WTO developmental policy. Scholarly proposals suggest that future regimes must adopt a framework of “differentiated

²⁰ Donghyun Kang et al., *The WTO and the Carbon Border Adjustment Mechanism: Issues and Options*, 14 *Energies* 7303, 7303 (2021).

²¹ Donghyun Kang et al., *The WTO and the Carbon Border Adjustment Mechanism: Issues and Options*, 14 *Energies* 7303, 7303 (2021).

²² K. A. L. N. Zwart, *Legal Issues of the European Carbon Border Adjustment Mechanism*, Cato Inst. Briefing Paper 1, 3 (2022).

²³ Abhijit Das et al., *Rethinking Special and Differential Treatment in the WTO*, Inst. for Int’l Trade at Adelaide Pol’y Brief No. 25, at 1, 3 (2024).

²⁴ Donghyun Kang et al., *The WTO and the Carbon Border Adjustment Mechanism: Issues and Options*, 14 *Energies* 7303, 7303 (2021).

²⁵ F. E. P. S., *Impact of CBAM*, FEPS Pol’y Brief 4 (2024).

²⁶ Lunenburg & Naidu, *How the EU’s*, at 2.

differentiation,” introducing issue-specific criteria based on sector-specific capacity and competitiveness, ensuring climate action is genuinely collaborative rather than punitive.²⁷

V. Broader Implications: Weaponisation and Regulatory Arbitrage

The legal pressures surrounding CBAM align with the broader trend of “weaponizing trade measures” for non-commercial objectives.²⁸ While CBAM is environmentally focused, its unilateral nature and extraterritorial reach contribute to the instability caused by expansive definitions of national security and the rise of unilateral trade sanctions.²⁹ CBAM demonstrates that “green protectionism”³⁰ can be as disruptive to the multilateral trading system as technology controls employed for security reasons.

This pursuit of high-priority domestic goals often results in regulatory arbitrage; the exploitation of ambiguities within WTO escape clauses. The legal ambiguity surrounding CBAM under Article XX finds a notable parallel in the contemporary crisis concerning the invocation of GATT Article XXI (National Security). Recent landmark WTO rulings in *Russia – Traffic in Transit*³¹ and *US – Steel and Aluminum*³² established that Article XXI is not purely self-judging; a Member’s action is subject to objective review of the circumstances. The WTO has moved to constrain the discretion available to invoking Members, requiring an assessment of whether the measure relates to an “emergency in international relations”.³³

This established constraint on unilateralism in the security context informs the CBAM debate. If the EU fails the environmental exception test (Article XX) due to procedural failures in the *chapeau* (i.e., lack of good faith), states may be tempted to use the Article XXI security exception, arguing that climate change impacts constitute an “essential security interest”.³⁴ This systematic choice of the path of least resistance: unilateral action over multilateral consensus, threatens to transform the WTO framework into a set of voluntary guidelines,

²⁷ Abhijit Das et al., *Rethinking Special and Differential Treatment in the WTO*, Inst. for Int’l Trade at Adelaide Pol’y Brief No. 25, at 1, 3 (2024).

²⁸ Guang Ma & Hong Wu, *Weaponization of Trade Measures and Countermeasures*, 59 J. World Trade 641, 642 (2025).

²⁹ Guang Ma & Hong Wu, *Weaponization of Trade Measures and Countermeasures*, 59 J. World Trade 641, 642 (2025).

³⁰ Lunenborg & Naidu, *How the EU’s*, at 2.

³¹ Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 7.15 (adopted Apr. 26, 2019).

³² Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/R, 7.16 (adopted Dec. 9, 2022).

³³ Klint W. Alexander, *The 2022 U.S. Steel/Aluminum Tariff Ruling: A Legal Reckoning for the United States and the WTO over the National Security Exception in International Law*, 72 Am. U. L. Rev. 1137, 1150 (2023).

³⁴ Alexander, *2022 U.S. Steel/Aluminum*, at 1150.

routinely undermined by aggressive invocations of escape clauses.³⁵

VI. Conclusions and Recommendations

The current design and proposed implementation of the EU's Carbon Border Adjustment Mechanism risk judicial defeat. The structural non-compliance with the National Treatment principle, driven by the differential treatment of domestic producers through the EU ETS free allowance phase-out,³⁶ constitutes a fundamental *prima facie* violation of GATT. This structural flaw, compounded by the mechanism's failure to adequately integrate Special and Differential Treatment for developing nations, suggests the measure is likely to constitute "unjustifiable discrimination" under the stringent requirements of the GATT Article XX *chapeau*.³⁷

To safeguard the multilateral trading system and establish CBAM as a legitimate tool for climate-trade integration, the EU must move beyond unilateral policy imposition and embrace genuine multilateral interoperability. This requires proactively engaging with trading partners to recognize equivalent foreign carbon pricing mechanisms, levies, and alternative mandatory mitigation schemes.³⁸ Such recognition would mitigate the structural discrimination inherent in the current regime and address the economic concerns raised by highly impacted countries.

For the future of global trade governance, climate-trade agreements must formally integrate nuanced standards of "differentiated differentiation".³⁹ This approach requires applying standards that account for the relative development level and economic complexity of the exporting country, making climate action collaborative rather than punitive. Failure to implement such equitable mechanisms confirms the suspicion that CBAM is green protectionism.⁴⁰ The outcome of the Russia dispute and subsequent legal scrutiny will determine whether CBAM serves as a precedent for coercive unilateralism or as a catalyst for collaboratively negotiated global carbon standards.

³⁵ Ma & Wu, *Weaponization*, at 646.

³⁶ Lunenborg & Naidu, *How the EU's*, at 2

³⁷ Donghyun Kang et al., *The WTO and the Carbon Border Adjustment Mechanism: Issues and Options*, 14 *Energies* 7303, 7303 (2021).

³⁸ F. E. P. S., *Impact of CBAM*, FEPS Pol'y Brief 4 (2024).

³⁹ Abhijit Das et al., *Rethinking Special and Differential Treatment in the WTO*, Inst. for Int'l Trade at Adelaide Pol'y Brief No. 25, at 1, 3 (2024).

⁴⁰ Lunenborg & Naidu, *How the EU's*, at 2.