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### Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)

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# Chapter 7

## Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)



Ingo Venzke and Geraldo Vidigal

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**Abstract** The European Commission has proposed a Carbon Border Adjustment Mechanism (CBAM) as part of its European Green Deal (EGD). While the EGD aims to increase prices for carbon emissions for EU producers, CBAM aims at countering competitive disadvantages and at preventing so-called carbon leakage. In the present chapter, we consider CBAM's legality under the EU's international trade obligations and highlight how, in its proposed format, it is bound to undercut the principles of Common but Differentiated Responsibilities (CBDR) and Special and Differential Treatment (SDT). CBAM subjects all imported products, no matter their origin, to the same carbon price. Against the background of competing normative arguments, concerns of practicality, as well as issues of powerplay, we ask whether the European Union's CBAM proposal could legally differentiate between countries, and whether there are legal arguments suggesting that it should do so. We argue that there is indeed scope for differentiation, even if the criteria for this differentiation remain highly contested in theory and practice.

**Keywords** Climate Crisis · Carbon Border Adjustment Mechanism (CBAM) · International Trade Law · Common but Differentiated Responsibilities (CBDR) · Special and Differential Treatment (SDT) · General Exceptions · WTO Law

## 7.1 Introduction

In July 2021, the European Commission proposed a Carbon Border Adjustment Mechanism (CBAM) to complement its European Green Deal (EDG). The CBAM proposal requires importers to pay for so-called 'embedded emissions' in particularly carbon-intensive areas of production—initially, cement, electricity, fertilizers, iron and steel, and aluminium.<sup>1</sup> Whereas producers in the EU pay for emissions under the Emission Trading System (ETS), the idea behind CBAM is to extend that obligation to imported products.<sup>2</sup> The legality of carbon border adjustment measures and their

<sup>1</sup> European Commission (2019) Communication from the Commission—The European Green Deal, 11 December 2019, COM/2019/640 final; European Commission (2021) Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, 14 July 2021, COM/2021/564 final, 2021/0214(COD) ('CBAM proposal'), Annex I.

<sup>2</sup> European Parliament and Council (2003) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32 (ETS Directive).

best design have already been the subject of extensive discussions.<sup>3</sup> The CBAM proposal, however, is the first comprehensive proposal in practice. While CBAM serves to further the EU's climate goals in a way that may in fact comply with the rules of the World Trade Organization (WTO), the categorical, origin-neutral carbon price as well as bureaucratic requirements imposed on all importers are bound to undercut the principles of Common but Differentiated Responsibilities (CBDR) and Special and Differential Treatment (SDT).

First spelled out in the 1992 Rio Declaration, the CBDR principle is core to the international climate change regime.<sup>4</sup> The 2015 Paris Agreement obliges States parties to pursue their 'highest possible ambition' in adopting nationally determined contributions, reflecting States' 'common but differentiated responsibilities and respective capabilities [CBDR-RC], in light of different national circumstances'.<sup>5</sup> As explained in Sect. 7.4.3 below, in the trade regime, the SDT provisions express a similar idea. Since 1965, the General Agreement on Tariffs and Trade (GATT) provides that 'developed contracting parties do not expect reciprocity ... of less-developed contracting parties' in reducing barriers to trade.<sup>6</sup> The 1979 Enabling Clause allowed GATT parties to deviate from its Most-Favoured Nation (MFN) rule and to 'accord differential and more favourable treatment to developing countries' as well as 'special treatment on the least developed among the developing countries'.<sup>7</sup> SDT provisions of various types have been added to the WTO Agreements, permitting or requiring more favourable treatment to, or imposing less stringent obligations upon, developing countries and least-developed countries.<sup>8</sup> The Preamble to the Agreement Establishing the WTO (WTO Agreement) sets out, among the goals of the WTO Members, to pursue 'the objective of sustainable development ... in a manner consistent with their respective needs and concerns at different levels of economic development'.<sup>9</sup>

Although the CBAM proposal briefly refers to the CBDR-RC principle, there are hardly any signs that the EU would differentiate between foreign producers on the basis of the country of origin. As discussed in Sect. 7.3.5 below, all importers

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<sup>3</sup> See, among the vast literature, Howse and Eliason 2009, pp. 48–94; Hillman 2013; Low et al. 2012, p. 485; Larbprasertporn 2014, pp. 145–170; Trachtman 2017, pp. 469–493; Pauwelyn and Kleimann 2020; Pirlot 2021.

<sup>4</sup> UN General Assembly (1992) Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), Annex I. Cf. Sands et al. 2012, p. 233, seeing CBDR to as an expression of equity in international law.

<sup>5</sup> UN General Assembly (2015) Paris Agreement to the United Nations Framework Convention on Climate Change, UN Doc. FCCC/CP/2015/10/Add.1, Article 4(3).

<sup>6</sup> General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 194, entered into force 1 January 1948, as updated in 1994 (GATT), Article XXXVI:8.

<sup>7</sup> Contracting Parties to the GATT (1979) Decision of 28 November 1979: Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903, para 2.

<sup>8</sup> See Hegde and Wouters 2021, pp. 551–571.

<sup>9</sup> Marrakesh Agreement Establishing the World Trade Organization, signed 15 April 1994, in force 1 January 1995, 1867 U.N.T.S. 154.

would have to pay the same price for embedded emissions and comply with the same level of obligations. The only differentiation between countries considered in the CBAM proposal concerns countries that join an EU-led ‘climate club’, either by adhering to the EU’s ETS or by establishing their own scheme and fully linking it to the EU’s ETS.<sup>10</sup> With regard to developing and least-developed countries, the CBAM proposal only notes that the EU ‘should support less developed countries with the necessary technical assistance in order to facilitate their adaptation to the new obligations established by this regulation’.<sup>11</sup> At the moment, even though the Commission remains vague on this point, the EU would at best help other countries to green their production, which would not only help them access the European market at lower entry costs, but also help curb climate change. As such, CBAM falls in line with tendencies, led by developed countries, to concretize CBDR in a way that emphasizes countries’ ‘respective capabilities’ (RC) rather than other factors such as historical emissions.<sup>12</sup>

CBAM’s design is in line with its objective of preventing carbon leakage.<sup>13</sup> The rationale is that ratcheting up carbon prices for domestic producers via the EU’s ETS<sup>14</sup> must not lead to production shifting to countries outside the EU where producers do not have to pay for emissions or have to pay a lower price. With a view to combating the climate crisis, this makes good sense and it might indeed contravene this objective if a ‘carbon discount’ were given for emissions produced in countries that fail to similarly price carbon emissions. However, this seemingly non-discriminatory policy glosses over the different degrees of countries’ contributions to the climate crisis as well as the different relative costs that countries will have to incur in order to preserve well-being under the carbon budget that humanity still has. It is these differences that underlie the argument from developing countries that, in light of past emissions and their contribution to the current economic position of developed countries, origin-neutrality favours formal equality at the expense of substantive equity, and their demand that, instead, developing countries should prospectively be allocated most of the remaining carbon budget.

Not differentiating between countries also side-steps the nagging question of how one might do so. On which basis could a differentiation take place to begin with? For decades, parties to the UN Framework Convention on Climate Change (UNFCCC), have sought to put CBDR into practice. In the lead-up to the 2015 Paris Summit, several proposals suggested allocating roughly a third of the remaining carbon budget to the Global North and two thirds to the Global South.<sup>15</sup> Given

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<sup>10</sup> CBAM proposal, above n 1, Article 2.5.

<sup>11</sup> CBAM proposal, above n 1, preambular para 55.

<sup>12</sup> See Dehm 2021, p. 224, with reference to UNFCCC Secretariat (2008) Decision 1/CP.13 ‘Bali Action Plan’ FCCC/CP/2007/6/Add.1, para 1(a); UNFCCC Secretariat (2010) Decision 2/CP.15 ‘Copenhagen Accord’ FCCC/CP/2009/11/Add.1, para 1. Also see McGee and Steffek 2016, pp. 37–63.

<sup>13</sup> CBAM proposal, above n 1, Article 1(1). See Shoyer et al. 2016, pp. 285–309.

<sup>14</sup> ETS Directive, above n 2.

<sup>15</sup> Cf. Natarajan and Khoday 2021, pp. 132–148.

current distributions of emissions, that would mean truly drastic measures for the North. Complicating matters further, the North/South basis for differentiation just as well as the distinction between developed and developing country has been unravelled by the economic performance of some emerging economies over the last decades. In particular, China, which remains a developing country for the purposes of the trade regime, has nonetheless become the world's largest carbon emitter in absolute terms and, more recently, also per capita.<sup>16</sup> Brazil and India, whose historical emissions have been low, and whose GDP per capita continues to trail rich country levels, have also become large emitters.<sup>17</sup> Brazil, India, China and South Africa (BASIC) have issued a Joint Statement condemning CBAM, including for its disregard for the CBDR principle.<sup>18</sup> With a broader base, UNCTAD has similarly urged that CBAM must be adjusted to take CBDR into account.<sup>19</sup> Within the EU, those calls have not found much resonance.<sup>20</sup> The draft report of the European Parliament on the CBAM proposal, issued in December 2021, proposes to use the revenues generated by the sale of CBAM certificates to finance the de-carbonization of LDCs, but does not touch upon the CBAM mechanism itself.<sup>21</sup>

Against this background of competing arguments of principle, practicality, and powerplay, we consider in our present contribution the legal issues surrounding differentiation between countries on the basis of the CBDR principle and discuss whether differentiation is permissible or even required. We develop our analysis with a focus on the law of the WTO. The Commission itself is adamant that CBAM should comply with WTO law.<sup>22</sup> Moreover, many of the largest economies—the United States, China, India, Brazil—can legally challenge CBAM at the WTO, but not elsewhere. Even if other (bilateral) trade agreements might be relevant, WTO law and jurisprudence continues to serve as a point of reference, whether these other

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<sup>16</sup> For China, see Hannah Ritchie and Max Roser (2020) China: CO2 Country Profile. Our World in Data <https://ourworldindata.org/co2/country/china?country=~CHN>. Last accessed 10 January 2022.

<sup>17</sup> Hannah Ritchie (2019) Who has contributed most to global CO2 emissions? Our World in Data. <https://ourworldindata.org/contributed-most-global-co2>. Last accessed 10 January 2022.

<sup>18</sup> See South African Government (2021) Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change hosted by India on 8 April 2021 <https://www.gov.za/nr/speeches/joint-statement-issued-conclusion-30th-basic-ministerial-meeting-climate-change-hosted>. Last accessed 10 January 2022.

<sup>19</sup> UNCTAD (2021) A European Union Carbon Border Adjustment Mechanism: Implications for developing countries. [https://unctad.org/system/files/official-document/osginf2021d2\\_en.pdf](https://unctad.org/system/files/official-document/osginf2021d2_en.pdf). Last accessed 10 January 2022, p. 9.

<sup>20</sup> Only the EU Parliament has encouraged differential treatment for Least Developed Countries (LDCs) and Small Island and Developing States (SILDSs). The ACP-EU Joint Parliamentary Assembly (2021) Communique of the ACP-EU Joint Parliamentary Assembly on climate action for COP 26. European Parliament. <https://www.europarl.europa.eu/acp/en/communique-of-the-acp-eu-joint-parliament/products-details/20211027CDT08722>. Last accessed 10 January 2022.

<sup>21</sup> European Parliament (2021) Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, 21 December 2021, COM(2021)0564, C9-0328/2021, 2021/0214(COD), p. 49.

<sup>22</sup> CBAM proposal, above n 1, preambular para 13.

agreements directly reference WTO law or not. Finally, the WTO has *de facto* been the main site where the pursuit of public policy objectives such as climate protection has been adjudicated in relation to other objectives, such as trade liberalization. On the basis of the WTO's rules and exceptions as well as its case law, and taking into account SDT provisions under WTO law, we will show that there is indeed scope for differentiation, but that both the acceptable criteria for differentiating and their application in practice are highly contested.

We continue by first offering a brief overview of the CBAM proposal's core elements as they related to the CBDR-RC principle (Sect. 7.2). We then show that, while there is considerable uncertainty as to how CBAM will be treated under trade law, it is likely to amount to a violation of WTO obligations (Sect. 7.3), which, however, is likely to be justifiable given its objective (Sect. 7.4). The main challenge for such justification will relate to the possibility of adding to a measure certain exceptions, grounded on countervailing reasons (such as CBDR-RC), that undermine the main policy objective of the measure (combating global warming or, more specifically, preventing carbon leakage). We then ask whether a more appropriate ground for justifying differential treatment is provided through the SDT principle as reflected in various provisions of the WTO Agreements (Sect. 7.5). Section 7.6 concludes by placing the discussion about CBAM and CBDR-RC within a broader political and historical context, cautioning against the tendency of relying on respective capabilities for mitigation and adjustment.

## 7.2 The Carbon Border Adjustment Mechanism in the Context of the European Green Deal

### 7.2.1 *The Climate Crisis and the European Green Deal*

At the end of 2019, the European Commission announced its European Green Deal (EGD). The EGD supports ideas, activities and operations that reduce emissions of carbon dioxide and other greenhouse gases (GHGs)<sup>23</sup> and disincentivizes practices that result in high emissions. In 2021, the Commission adopted the related 'Fit for 55' climate policy package, setting out the goal of reducing European GHG emissions by 55% by 2030, as compared to 1990 levels.<sup>24</sup>

To meet this commitment, the Fit for 55 package proposes to tighten the constraints imposed on European producers under the Emissions Trading System Regulation (ETS). The ETS, set up in 2008 and revised most recently in 2018, operates as a

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<sup>23</sup> For the purposes of the industrial products targeted by CBAM, carbon dioxide is by far the most significant GHG. Accordingly, like the EU Commission, we refer to 'carbon' and 'GHG' interchangeably.

<sup>24</sup> European Commission (2021) European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions, Press Release. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_3541](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541). Last accessed 10 January 2022.

‘cap-and-trade’ system. It obliges EU Member States and other ETS participants to establish a maximum amount of nationally permitted GHG emissions and to issue permits corresponding to specific amounts of emission allowances.<sup>25</sup> Carrying out production in sectors covered by the ETS requires the producer to subsequently surrender emission allowances.<sup>26</sup>

As currently applied, the ETS ensures a cap on carbon emissions by producers, but it does not yet impose a price on all these emissions. Under the current ETS Directive, most permits are allocated without cost (‘free allowances’), on the basis of a producer’s historical emissions. An ETS with significant free allowances might limit further growth in emissions, requiring any increase in production to be less carbon-intensive.<sup>27</sup> However, the free allowances mean that the ETS Directive stops short of imposing a price on carbon emissions themselves, as long as they remain under historic (and, pursuant to the scientific consensus, already unsustainable) levels.

The Fit for 55 package thus tightens the constraints under the ETS Directive, especially by phasing out free emission allowances and requiring producers of the targeted products to pay for the GHG emissions that result from the whole of their production.<sup>28</sup>

The difficulty generated by the tightened ETS Directive is twofold. First, from the viewpoint of European producers, having to pay for emissions makes their product less competitive when compared to that of producers that do not have to pay a similar price for their production. These EU producers demand that, should they be asked to internalize the cost of carbon emissions, some mechanism should exist to re-establish competitive equality—a supposedly ‘level-playing field’—with their competitors outside the EU. Second, from the viewpoint of the objective of EU regulators imposing a price on GHG emissions, the outcome of this difference in competitiveness might be the shifting of production of targeted products away from the EU. Whether through deliberate restructuring of supply chains by large companies or due to consumers shifting their purchases towards lower-priced products, the increased cost for European producers is likely, all else equal, to translate into decreased competitiveness of European production plants vis-à-vis plants located where similar costs are not imposed. The foreseeable outcome is that at least some of the production will not become less GHG-intensive, but will merely move overseas to where GHG emissions do not command a price. This phenomenon of production-shifting to where the social cost of GHG emissions is not internalized—so-called ‘carbon leakage’—not only prejudices European producers but also undermines the ultimate objective of the European Green Deal, which is the reduction of carbon emissions worldwide. This is where CBAM comes in.

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<sup>25</sup> ETS Directive, above n 2, Article 9.

<sup>26</sup> ETS Directive, above n 2, Articles 4, 10.

<sup>27</sup> Bayer and Aklin 2020, pp. 8804–8812.

<sup>28</sup> European Commission (2021) ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757, 14 July 2021, COM/2021/551 final, 2021/0211(COD).

### ***7.2.2 The CBAM in a Nutshell: The Concept of ‘Border Adjustment Measure’***

Under the CBAM proposal, targeted products imported into the EU would incur a price for the carbon emitted in their production. Rather than setting up a carbon charge directly, the proposed regulation requires importers of targeted products into the EU to purchase and surrender ‘CBAM certificates’ corresponding to the price set by the EU for the products’ embedded emissions. To be able to import CBAM products, first, importers must obtain an authorization and set up a CBAM account with the EU Member State of importation. Then, they must purchase from that EU Member State CBAM certificates (at a price to be adjusted over time so that it does not exceed the price paid by ETS participants), to be held in an account with that Member State and correspond, quarterly, to at least 80% of the CBAM certificates required for their imports. Finally, each year, they must surrender to the EU Member State of importation a number of CBAM certificates corresponding to the carbon emitted in the products’ production.<sup>29</sup> Under the CBAM proposal, CBAM certificates cannot be traded like EU emission permits under the ETS, but remain connected to the importers that acquired them. The European Commission has labelled this arrangement a ‘carbon border adjustment mechanism’.

Border adjustment measures are well-known by trade experts. These are measures that extend to imported products the treatment that a country applies to its own domestic products (or, conversely, that exempt domestic products from an obligation or requirement when they are exported).<sup>30</sup> A 1970 GATT Working Party report already discussed the international legal implications of border *tax* adjustments (BTAs), speaking of ‘tax adjustments applied to goods entering into international trade’, either on importation or on exportation, ‘to ensure, in the treatment of imports and exports, neutrality with home-produced goods’.<sup>31</sup> A typical and uncontroversial example of a BTA are excise taxes on alcohol or tobacco, which a Member may charge at the border on imported products, or repay on exportation. In many airports, individuals who take abroad recently purchased goods are for example offered a BTA: an exemption from value added tax (VAT).

### ***7.2.3 CBAM and International Trade Law: Four Questions***

In this article, we assess the legality of CBAM under trade agreements, with a focus on the GATT, and the potential pitfalls that may arise in its design and application, including the possibility to account for the principles of CDBR and SDT. This is made complex by the fact that different aspects of the same measure may be subject

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<sup>29</sup> CBAM proposal, above n 1, Articles 4–8.

<sup>30</sup> GATT (1970) Report of the Working Party on Border Tax Adjustments, adopted 2 December 1970, BISD 18S/97, L/3464, para 4.

<sup>31</sup> *Ibid.*, para 9.

to different provisions. Four questions will guide the analysis. The first question concerns whether CBAM and the ETS together indeed ensure ‘competitive neutrality’ between EU products and foreign competing products, or whether they instead advantage EU producers (or producers from ETS-covered or CBAM-exempted countries) vis-à-vis their competitors from other WTO Members.

The second question concerns whether CBAM has a fiscal or non-fiscal character, which is essential for determining which GATT obligations applies. A carbon border adjustment *tax* involves applying to imported products a tax equivalent to that which domestic products incur at production. A carbon border adjustment *measure*, as CBAM’s name suggests it is, would apply the same logic to a measure that is not (at least in name) a tax—a non-fiscal cost imposed on domestic production. This raises the question whether CBAM has a fiscal or a non-fiscal character.

A third question concerns the effect on CBAM’s legal characterization of the fact that the legal mechanism used to operationalize carbon pricing with respect to imported products (i.e. CBAM) is entirely separate, and significantly different, from that applied to domestic product for the same purpose (i.e. ETS). To characterize CBAM as an ‘adjustment’ measure, the CBAM proposal claims that its objective is to ‘complement[] the system established for greenhouse gas emission allowance trading within the [European] Union ... by applying an equivalent set of rules to imports’ of certain goods.<sup>32</sup> At the same time, the requirements imposed on foreign products (purchase of CBAM certificates) are not *the same* as those imposed on European producers. Whether the two systems are sufficiently similar will determine whether CBAM is a policy applied to imported products specifically or merely the means for applying to imported products a generally applicable domestic policy.

The fourth question concerns the objective of CBAM. The proposal’s declared aim is to prevent the ‘risk of carbon leakage’.<sup>33</sup> An additional effect of CBAM, acknowledged but not stated as an objective in the CBAM proposal, is to incentivize other countries to establish their own carbon pricing mechanisms using a system and a cost structure similar to those of the EU’s ETS, and foreseeably to lower their own level of emissions while promoting ‘the use of more GHG emissions-efficient technologies by producers from third countries’.<sup>34</sup> The ‘climate club’ aspect of CBAM, discussed below, incentivizes third countries to set up their own emissions pricing mechanisms, not only facilitating the entry of their products in the EU but also raising funds from carbon emissions for their own governments. Whether CBAM is a means of pursuing an internal objective, with incidental effects on the incentives faced by other WTO Members, or whether it constitutes a means of imposing EU-chosen policies on other governments, may be key for its compatibility with WTO obligations.

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<sup>32</sup> CBAM proposal, above n 1, Article 1(2).

<sup>33</sup> CBAM proposal, above n 1, Article 1(1).

<sup>34</sup> CBAM proposal, above n 1, preambular para 13.

## 7.3 A Violation of the GATT?

### 7.3.1 A Primer: What Is CBAM for the Trade Regime?

Understanding how CBAM is viewed under the trade regime is essential to assess its compatibility with the rules of the WTO and other trade agreements. This is because the trade regime applies different standards to ‘border measures’ than to ‘internal’ or ‘behind-the-border’ measures. The term ‘border measures’ encompasses all measures governing or applicable upon importation, usually but not necessarily applied at the border. When joining the WTO, each WTO Member negotiates a product-by-product list of tariff concessions, which dictates the maximum tariffs—also known as customs duties—that each Member may apply to the listed imported products upon importation.<sup>35</sup> To prevent the adoption of measures that undermine these concessions, the GATT in principle prohibits border measures that create additional barriers to trade, including fiscal measures such as taxes, duties or charges (under Article II:1(b)), and non-fiscal trade-restrictive measures, such as import bans, quotas or burdensome or arbitrarily accorded import licenses (prohibited by Article XI:1). Exceptions to this broad prohibition must be explicitly provided for in WTO law.

Regarding ‘internal’ or ‘behind-the-border’ measures, the GATT in principle allows Members to apply their internal laws, taxes and regulations to imported products, provided that these measures do not operate to the disadvantage of imported products when compared to domestic products. The core principle is established in GATT Article III, Paragraph 1. Internal measures, whether fiscal or non-fiscal, must not be adopted or applied ‘so as to afford protection’ to domestic production.<sup>36</sup> Paragraph 2 deals with taxes and internal charges, Paragraph 4 with regulations. The basic principle underlying this article is that, once a product (e.g. cement from Vietnam) has entered another market (e.g. that of the EU), and tariffs and other duties have been levied, it shall not be subject to any further hurdles due to its foreign origin, being treated no worse than like national products.<sup>37</sup> In other words, imported products must not be discriminated against when compared to like domestic products.

WTO rules thus allow the application to imported products of highly constraining and even prohibitive domestic policies, as long as imported products are not treated worse than competing domestic products. Importantly, ‘internal’ measures may be applied at the border to imported products. If a Member decides to completely prohibit a chemical component in products (as was the case, in *EC—Asbestos*, for fibres containing asbestos) or heavily tax its use (as is the case for excise taxes on tobacco or alcohol), with respect to imported products, the Member will usually control for

<sup>35</sup> GATT, above n 6, Article II:1(a).

<sup>36</sup> GATT, above n 6, Article III:1.

<sup>37</sup> For the EU, all tariffs and related measures can be retrieved from its TARIC database at [https://ec.europa.eu/taxation\\_customs/dds2/taric/taric\\_consultation.jsp?Lang=en](https://ec.europa.eu/taxation_customs/dds2/taric/taric_consultation.jsp?Lang=en). The TARIC builds on the Harmonized System (HS). It shows, for instance, that the EU imposes a 1,70% tariff on cement (HS code 2523) from third countries.

this prohibition or collect the relevant taxes or charges at its border. In this case, this is not assessed as a ‘border measure’ but as an internal measure or tax applied at the border.<sup>38</sup> This means that the relevant principle is not full prohibition of trade-restrictive measures, but instead the non-disadvantage to imported products vis-à-vis competing domestic products.

The distinct legal principles applied to ‘border measures’ and ‘internal measures’ explain why, in the CBAM proposal, the EU Commission repeatedly refers to the connection between CBAM and the EU’s carbon-restrictive and carbon-pricing policies, and in particular the EU’s internal ETS mechanism for imposing carbon prices on domestic production.<sup>39</sup> The CBAM proposal explicitly suggests that the combination of ETS and CBAM ‘should in no case result in more favourable treatment for Union goods’ compared to imported goods.<sup>40</sup> Article 31 of the CBAM proposal requires the number of CBAM certificates to be surrendered each year to be adjusted to reflect free allowances allocated to EU domestic producers under the ETS.<sup>41</sup> These provisions suggest that the EU Commission seeks to portray CBAM as an internal, *behind-the-border* measure *applied* at the border. This would make it legally subject to a comparison between the treatment dispensed to imported products and that applied to domestic products. We continue by discussing whether this view holds considering the design of the proposal.

### 7.3.2 *The Fiscal Element: CBAM as an Internal Charge Enforced at the Border*

To the extent that we focus on CBAM as a charge on carbon embedded in products, i.e. a fiscal measure, the EU’s proposal appears logical. The obligation of EU producers to purchase emission allowances, under the ETS, and the obligation of importers to purchase CBAM certificates, under the CBAM proposal, can both be viewed as mechanisms to impose a charge. As this charge will be collected from both EU-made and imported products—albeit through different mechanisms—we believe it is subject to GATT Article III:2.<sup>42</sup> The *Ad Note* to Article III clarifies that an internal

<sup>38</sup> GATT, above n 6, Note *Ad* Article III; GATT, Article II:2(a). See footnote 42 below.

<sup>39</sup> CBAM proposal, above n 1, preambular paras 13–33, Article 31(1).

<sup>40</sup> CBAM proposal, above n 1, preambular para 11.

<sup>41</sup> CBAM proposal, above n 1, Article 31(1).

<sup>42</sup> One might argue that the carbon charge is an ‘other duty or charge of any kind imposed on or in connection with the importation’, governed by GATT Article II:1(b). This would mean that this charge either is entirely prohibited—leading directly to the question of its justifiability under Article XX—or is exempted under Article II:2(a), as ‘a charge equivalent to an internal tax’ that complies with the principles of Article III:2. Despite the seemingly narrower scope of ‘tax’ when compared to ‘tax or charge’, the Appellate Body in *India—Additional Import Duties* accepted that excise duties on alcohol constituted a tax for the purposes of Article II:2(a). See Appellate Body Report, *India—Additional Import Duties*, 30 October 2008, WT/DS360/AB/R, 165–181, 203–214. The Appellate Body concluded that India’s additional duty on alcohol ‘would not be justified under

tax or charge, as well as a law, regulation or requirement, is to be examined under Article III if it ‘applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation’.<sup>43</sup> The Appellate Body has established in *China—Auto Parts* that the *reason* for paying the tax or charge is decisive, not the timing.<sup>44</sup> It stressed that the triggering factor as the decisive criterion for the scope of Article III:2.<sup>45</sup> ‘[T]he *obligation* to pay a charge must accrue due to an internal event’.<sup>46</sup> Although this is difficult to place exactly in the case of carbon emissions, there is at least room to argue that carbon emissions ‘embedded’ in a product become internal to the country where the product is consumed, so that, if its objective is to avoid being an ‘emissions consumer’, the obligation to pay the charge accrues due to an internal event.<sup>47</sup>

It may speak against characterizing CBAM as an internal charge applied at the border that the Court of Justice of the European Union (CJEU), in the context of a challenge to the EU’s 2008 Aviation Directive,<sup>48</sup> rejected the argument that the Directive’s obligation to buy emission allowances amounted to a tax on fuel load.<sup>49</sup> Its reasoning was that this obligation was ‘not intended to generate revenue for the public authorities’ and did ‘not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable per tonne of fuel consumed for all the flights carried out in a calendar year’.<sup>50</sup> Instead, the CJEU found, the Directive created a market-based mechanism, characteristic for cap-and-trade schemes, that severed the link between fuel consumption and money to be paid. The initiation and operation of the cap-and-trade scheme, and its extension to airline

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Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports in excess of the sales taxes, value-added taxes, and other local taxes *and charges* that India alleges are equivalent to the Extra-Additional Duty’ (Ibid., para 221, emphasis added). Thus, even if we assess CBAM under Articles II, III:2 will provide the controlling criteria for determining its WTO legality.

<sup>43</sup> GATT, above n 6, Note *Ad* GATT Article III.

<sup>44</sup> That is clear from the *Ad Note* to Article III stating that an internal charge that is ‘collected or enforced in the case of the imported product at the time or point of importation’, such a charge is nevertheless to be regarded as an internal charge.

<sup>45</sup> Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, 15 December 2008, WT/DS339, 340 & 342, AB/R (*China—Auto Parts*), para 162.

<sup>46</sup> Ibid.

<sup>47</sup> In this case, however, a consumer country would ordinarily exempt from the tax or charge the targeted products when they are exported and consumption takes place elsewhere. There is no sign that the EU aims to do this, and any suggestion that it should do so would probably be received negatively. The challenge here is that carbon emissions, regardless of place of emission or consumption, affect all countries.

<sup>48</sup> European Parliament and of the Council (2008) Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8/3, pp. 3–21.

<sup>49</sup> See Pauwelyn and Kleimann 2020.

<sup>50</sup> CJEU, *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*, Grand Chamber Judgment, 21 December 2011, Case C-366/10 (*ATA*), paras 143.

services to and from third countries, notably left open how many allowances would be required and what their price would be. According to the Court, it was not even certain that an air service operator would need to pay any money at all.<sup>51</sup> The Court therefore concluded that the ETS, under the Aviation Directive, ‘constitutes a marked-based measure and not a duty, tax, fee or charge on the fuel load’.<sup>52</sup> That is different for CBAM, however, which despite the complex mechanism involving certificates, appears to operate very much like a tax. Contrary to emission allowances, there is no market for CBAM certificates, which are assigned to individual operators and cannot be transacted. Unused CBAM certificates that are not resold to the Member State from which they were purchased expire after two years.<sup>53</sup>

Even considering the reasoning of the CJEU, two elements would still suggest analysing CBAM as a matter of WTO law, if not as a tax, then as a *charge*, equally governed by the principles of GATT Article III:2. First, a charge does not require a rate defined in advance but may relate to any aspect of a product, its production process, its circulation, or simply a government’s decision to impose a charge. ‘[I]t is always possible for governments to invent new charges’, as the Panel in *Dominican Republic—Import and Sale of Cigarettes* explained—with reference to the GATT Secretariat.<sup>54</sup> Charges are a residual category. Second, different regulatory mechanisms can be employed to collect the same substantive tax or charge. In *Argentina—Hides and Leather*, the Panel found that an internally applicable tax was the ‘internal analogue’ and ‘domestic equivalent’ of a differently calculated and differently collected tax, and the appropriate course of action was therefore to compare the two taxations under Article III:2.<sup>55</sup>

With regard to the fiscal aspect of CBAM—i.e., the amount of the relevant tax or charge—the EU’s obligation under GATT Article III:2 is twofold. The first obligation is not to levy a carbon tax or charge on imported products in excess of the tax or charge incurred by *like* domestic products. Under Article III:2, first sentence, the moment imported products are taxed or charged ‘in excess’ when compared to like

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<sup>51</sup> *Ibid.*, para 142.

<sup>52</sup> *Ibid.*, para 147.

<sup>53</sup> CBAM proposal, above n 1, Articles 23–24.

<sup>54</sup> Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, 25 April 2005, WT/DS302/R (*Dominican Republic—Import and Sale of Cigarettes*), paras 7.113–114. The footnote in the original quotes GATT document MTN.GNG/NG7/W/53.

<sup>55</sup> It quoted a GATT panel report that stated: “Article III:2 does not prescribe the use of any specific method or system of taxation. ... [T]here could be objective reasons proper to the tax in question which could justify or necessitate differences in the system of taxation for imported and for domestic products”. Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, 19 December 2000, WT/DS155/R (*Argentina—Hides and Leather*), paras 11.148–11.149. The quoted report was the GATT Panel Report, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216, 10 November 1987, BISD 34S/83, para 5.9.

domestic products, the measure at issue is deemed to have violated the national treatment obligation. There is no minimum threshold, nor are the respective measures' objectives of any relevance. The levying of taxes or charges 'in excess' is *eo ipso* deemed to be 'applied ... so as to afford protection' (SATAP) in the sense of the overall purpose of Article III.

Second, even for imported and domestic products that are not considered 'like' products, the second sentence of Article III imposes an obligation not to levy taxes on 'directly competitive or substitutable' (DCS) products 'so as to afford protection' to domestic producers. When it comes to DCS products under Article III:2, second sentence, the obligation is that taxes and charges must not be dissimilar.<sup>56</sup> The question of whether the measure is applied so as to afford protection then arises as an additional step of analysis. But even here the possibility of considering a policy's objective is truly narrow. In the path-setting *Japan—Alcoholic Beverages II* report, the Appellate Body held that establishing whether a measure is applied SATAP 'is not an issue of intent'.<sup>57</sup> Rather than 'sorting through the many reasons legislators and regulators often have for what they do ... the issue is how the measure in question is applied'.<sup>58</sup> The 'protective application ... can most often be discerned from the design, the architecture, and the revealing structure of a measure'.<sup>59</sup> The fact that imported and DCS domestic products are subject to different taxes or charges was considered indicative of such protective application.<sup>60</sup>

### 7.3.3 *The Non-fiscal Element: Internal or Border Measure?*

Besides the fiscal aspect (i.e., the pecuniary charge corresponding to carbon emissions), the CBAM proposal features a sophisticated mechanism to collect this charge, which requires an authorization to import, the purchase and surrender of CBAM certificates, and penalties for not complying with these requirements. If these non-fiscal aspects of CBAM are classified as an internal regulation applied at the border, a similar standard would apply to these aspects of the measure (whether one adopts the view that it is, as a whole, a 'market-based mechanism', and therefore a regulation, or whether one considers it as a separate aspect of the measure). Under Article III:4, the treatment dispensed by laws and regulation to products of WTO Members should be 'no less favourable' than that dispensed to like domestic products. Table 7.1 summarizes the core obligations contained in Article III.

<sup>56</sup> Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 4 October 1996, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/ (Japan—Alcoholic Beverages), p. 27.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid., p. 28.

<sup>59</sup> Ibid., p. 29.

<sup>60</sup> The reason for the Appellate Body's stance may well be linked to evidentiary difficulties and limited institutional powers to solicit information that could corroborate claims about protective application.

**Table 7.1** Overview of GATT Article III

	Scope	Product relationship	Obligation
III:1	Taxes & charges; regulations	Imported and domestic products	Not to afford protection
III:2, first sentence	Taxes & charges	Like products	Not in excess
III:2, second sentence & Ad Note III	Taxes & charges	DCS products	Similar taxation & not to afford protection (III:1)
III:4	Regulations	Like products	Not to afford treatment less favourable

Source The Author

Although the standard of national treatment in principle only requires a comparison between treatment given to different products, this requirement can be constraining. In particular, the Appellate Body has interpreted Article III in a way that has shrunk the space for taking into account a measure's regulatory purpose (such as CBAM's objective of preventing carbon leakage) in determination of whether a measure violates the national treatment obligation. It has curtailed the possibilities for distinguishing between products for regulatory purposes, whether on grounds that a regulatory distinction makes them 'unlike' or whether detrimental impact on imports is justified by a legitimate regulatory purpose.

### 7.3.4 Likeness

The national treatment obligation applies to imported products (e.g. cement from Vietnam) that are *like* domestic products (e.g. cement produced in Europe). The criteria for determining likeness stem from the 'Report of the Working Party on Border Tax Adjustments' (BTAs): 'the product's end-uses in a given market; consumers' tastes and habits, which change from country; the product's properties, nature and quality.'<sup>61</sup> WTO practice added, as a fourth and indicative criterion, whether the imported and domestic product have the same tariff classification.<sup>62</sup> While the Appellate Body has consistently relied on these criteria,<sup>63</sup> it has become clear that the crux of the matter is the products' competitive relationship on the market.

<sup>61</sup> GATT (1970) Report of the Working Party on Border Tax Adjustments, above n 30, para 18. These criteria have been reiterated in every panel and Appellate Body report concerning the question of likeness. See, with further references, Appellate Body Report, *Japan—Alcoholic Beverages*, above n 56, p. 20, fn 46.

<sup>62</sup> *Ibid.*, p. 21.

<sup>63</sup> Appellate Body Report, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, 12 March 2001, WT/DS135/AB/R (*EC—Asbestos*), paras 110–111: criticizing the panel i.a. for convoluting first and second criteria and urging a separate treatment of each criterion.

The argument once used to have traction that Article III's overall purpose of avoiding protectionism after a product of foreign origin has entered the market, as expressed in its Para 1, should inform the assessment of likeness. The US was a main advocate this 'aims and effects test', which found recognition in panel reports up until the 1990s.<sup>64</sup> The US appealed the WTO panel report in *Japan—Alcoholic Beverages II* not least because the panel's reasoning had not embraced the aims and effects test. But the Appellate Body in that dispute, and then in *EC—Asbestos*, put that line of argument to rest, highlighting that, since the concern is protectionism, it is necessary to know which products are competing to begin with. For the Appellate Body, conceptually, the relationship between products does not depend on a measure's policy objectives. A Member's legitimate objectives—the 'aims and effects' of the measure—could be taken into account in other steps of determining a measure's ultimately WTO-legality, namely in the exceptions of Article XX.<sup>65</sup>

*EC—Asbestos*, however, pointed to an important difficulty when likeness is determined on the marketplace alone. At issue was a French regulation that prohibited the sale of products containing asbestos. While it was clear that asbestos is carcinogenic and thus poses health risks, there was no data readily supporting that fibres containing and not containing asbestos were in fact treated differently on the marketplace.<sup>66</sup> The panel had found the two products to be like in view of their same end uses.<sup>67</sup> The Appellate Body reversed this finding, holding that carcinogenicity must be considered as a physical characteristic of a product<sup>68</sup> and, notably, that it is likely that such carcinogenicity *would be* considered by consumers if they were aware of this property. It conceded that consumer behaviour did not show different treatment, but still found a difference by considering that fully informed consumers would treat the products differently. As one member noted in an individual opinion,<sup>69</sup> the Appellate Body had put itself in a bind by emphasizing that all that really matters is whether products are in a competitive relationship and by treating the received four criteria as indicators of such a relationship.<sup>70</sup> It thus had to assert, even in the absence of related market data, that consumer behaviour would not remain unaffected by differing health risks.

<sup>64</sup> GATT Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, DS23/R, 19 June 1992, BISD 39S/206 (*US—Malt Beverages*). Cf. Hudec 1998, pp. 619–649.

<sup>65</sup> Appellate Body Report, *Japan—Alcoholic Beverages*, above n 56, pp. 16–7; Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, 22 May 2014, WT/DS401 (*EC—Seal Products*), paras 5.112–6. See also Weiler 2009, pp. 749–772.

<sup>66</sup> On this factual point, see in particular Appellate Body Report, *EC—Asbestos*, above n 63, para 122, fn 103.

<sup>67</sup> Panel Report, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, 18 September 2000, WT/DS135/R (*EC—Asbestos*), para 8.150.

<sup>68</sup> Appellate Body Report, *EC—Asbestos*, above n 63, para 118.

<sup>69</sup> Formal dissents or separate opinions are not possible in the WTO dispute settlement procedure, but they can be made out as such in Panel or Appellate Body reports.

<sup>70</sup> Individual dissenting opinion in Appellate Body Report, *EC—Asbestos*, above n 63, para 149.

This argument may be pertinent when it comes to the climate crisis, too. Even if scientists know that carbon emissions have a harmful effect on the atmosphere, it takes time until scientific knowledge trickles down to be reflected in consumer choices. Would public policies then always run the risk of violating WTO law's national treatment obligation? If the reasoning adopted in *EC—Asbestos* were followed, perhaps products with starkly different carbon footprints should be found 'unlike', even with little indication that they are treated differently among consumers.<sup>71</sup>

### 7.3.5 *Curbing Protectionism? Standards of Treatment*

If CBAM is considered as a regulation under Article III:4, then the obligation is to treat imported products no less favourably than domestic products. Should they be accorded treatment less favourable, that is *eo ipso* deemed to amount to an application 'so as to afford protection', which is once again not tested separately. The practicalities of regulations when compared to taxes or charges render the case-law on the former slightly more intricate. Already in *EC—Asbestos*, the Appellate Body held that Members *could* indeed draw distinctions between imported and domestic products to treat them differently.<sup>72</sup> There may be good practical reasons for doing so, and differential treatment is not *per se* enough for establishing less favourable treatment. There is a minimum threshold for a violation to arise.<sup>73</sup> In *Dominican Republic—Cigarettes*, the Appellate Body found that a regulatory distinction was still in conformity with Article III:4 even though it placed a heavier burden on imported when compared to like domestic products.<sup>74</sup> In *US—Clove Cigarettes*, however, the Appellate Body explained this as meaning that different economic agents may incur different obligations (in this case, due to different sales volumes), without this *per se* amounting to less favourable treatment on the foreign products.<sup>75</sup> This was confirmed in *EC—Seal Products*, where the Appellate Body stated that, in an assessment under Article III:4, all that matters is whether the internal regulation has a detrimental impact on the competitive opportunities of imported products when compared to like

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<sup>71</sup> The fact that such a product's carbon footprint is not, in contrast to *EC—Asbestos*, reflected in the physical characteristics of the product, poses an additional challenge, as does the fact that the binary distinction between carcinogenic and non-carcinogenic products does not carry over to carbon-intensive products. For the foreseeable future, all production of the relevant products will be carbon-emitting.

<sup>72</sup> Appellate Body Report, *EC—Asbestos*, above n 63, para 100.

<sup>73</sup> Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, 11 December 2000, WT/DS161/AB/R (*Korea—Various Measures on Beef*), paras 137–8.

<sup>74</sup> Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, 25 April 2005, WT/DS302/AB/R (*Dominican Republic—Import and Sale of Cigarettes*), para 98.

<sup>75</sup> Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, 4 April 2012, WT/DS406/AB/R (*US—Clove Cigarettes*), fn 372.

domestic products.<sup>76</sup> There is no need to examine whether this detrimental impact is explained by a legitimate regulatory purpose of the measure—such a justification must be found under GATT Article XX.

### 7.3.6 *CBAM as a Border Measure?*

Considering CBAM as an internal measure applied at the border, thus subject to the national treatment obligation of Article III, emphasizes the *substance* rather than the *form* of the obligations imposed by CBAM. The logic for this treatment would be that the regulatory aspects of CBAM and ETS are alternative forms of operationalizing the essential element of the measure: the imposition of a charge on embedded carbon emissions. CBAM and ETS would be comparable as two different payment mechanisms leading to the same charge being applied; that is, a charge corresponding to the carbon emitted on production.

At the same time, in terms of the mechanics through which the carbon charge is collected, the CBAM proposal does not merely apply the EU's ETS to imported products. Instead, CBAM is a self-standing measure that, through a separate mechanism, aims to impose on products imported into the EU a cost for carbon emissions equivalent to that imposed by the ETS on EU domestic production of similar goods. It imposes on those wishing to import CBAM-targeted products the obligations to (i) apply for an authorization prior to importing these goods;<sup>77</sup> (ii) purchase, and keep in an account with an EU Member State, CBAM certificates, which must at the end of every quarter correspond to at least 80 per cent of the emissions estimated to be embedded in the products it has imported since the beginning of the calendar year;<sup>78</sup> and (iii) by 31 May each year, surrender to the EU Member State of importation a number of CBAM certificates corresponding to the emissions embedded in all of its imports carried out the previous year.<sup>79</sup> Non-authorized persons are precluded from importing goods covered by CBAM.<sup>80</sup>

This distinction is relevant for the applicability of the Note *Ad* Article III. This interpretative Note, which is an integral part of the GATT, clarifies that the national treatment obligation—which only requires 'treatment no less favourable' of imported products—covers laws, regulations and requirements applied 'to an imported product and to the like domestic product', and 'enforced in the case of the imported product at the time or point of importation'. The CBAM requirements applied to imported products, however, do not apply to 'the like domestic product[s]' at all. Rather, the production of the domestic product (not the product itself) is subject to a different regulation, the ETS. This would make the regulatory aspects of CBAM subject to the

<sup>76</sup> Appellate Body Report, *EC—Seal Products*, above n 65, paras 5.104–5.110.

<sup>77</sup> CBAM proposal, above n 1, Article 5(1).

<sup>78</sup> CBAM proposal, above n 1, Article 22(2).

<sup>79</sup> CBAM proposal, above n 1, Article 22(1).

<sup>80</sup> CBAM proposal, above n 1, Article 25(1).

stricter requirement of Article XI:1, which prohibits WTO Members from instituting or maintaining ‘prohibitions or restrictions other than duties, taxes or other charges’ on the importation of products from other Members.<sup>81</sup>

It should be noted that Article XI:1 does not prohibit all restrictions or requirements on importation but only those that have a limiting effect on importation. As the Appellate Body noted in *China—Raw Materials*, Article XI:1 is a broad provision, which forbids all ‘prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported’,<sup>82</sup> with the aim of preventing WTO Members from undermining their tariff concessions to each other. In *Argentina—Import Measures*, the Appellate Body added that, for a measure to be found in breach of Article XI:1, its limiting effects on importation must be demonstrated, highlighting that these effects ‘can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context’.<sup>83</sup> In the context of a charge whose collection mechanism involves an administrative procedure, Article XI:1 may prohibit administrative procedures that operate to limit or restrict imports in manners not strictly required for the purpose of collecting the charge.<sup>84</sup> Thus, in itself, the requirement to apply to and be granted an authorization to import CBAM-targeted products is not necessarily in violation of Article XI:1. If this authorization proves difficult to obtain, however, or if it can be revoked (as is proposed in the CBAM proposal),<sup>85</sup> these elements could characterize restrictions on importation prohibited by Article XI:1, in need of specific justification under, for example, Article XX.

In the scenario envisaged in this section, we would see CBAM as a single regulation containing two separate aspects (or, in WTO-speak, measures). First is a charge on carbon that, in the spirit of a border adjustment, aims ‘to ensure, in the treatment of imports and exports, neutrality with home-produced goods’.<sup>86</sup> This charge would be fiscal in nature and would be assessed, as directed by the Note *Ad Article III*, under GATT Article III:2. Second is a regulation that enforces this charge, requiring the obtainment of an authorization to import the relevant products, and the purchase and surrender of CBAM certificates. This regulation, being applied solely to imported

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<sup>81</sup> One could insist that Article III applies even in this case; see Panel Report, *India—Measures Affecting the Automotive Sector*, 21 December 2001, WT/DS146/R; WT/DS175/R (*India—Autos*), para 7.306. This would trigger a comparison between the effects on competitive conditions of the bureaucratic aspects of ETS versus those of CBAM.

<sup>82</sup> Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, 30 January 2012, WT/DS394/AB/R (*China—Raw Materials*), paras 319–320.

<sup>83</sup> Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, 15 January 2015, WT/DS438/AB/R (*Argentina—Import Measures*), para 5.217.

<sup>84</sup> In *Argentina—Import Measures*, the Appellate Body referred as context for its interpretation to a provision of the Import Licensing Agreement (Article 3.2) which provides that ‘[n]on-automatic licensing shall not have trade-restrictive ... effects on imports additional to those caused by the imposition of the restriction’ and that such procedures ‘shall be no more administratively burdensome than absolutely necessary to administer the measure’.

<sup>85</sup> CBAM proposal, above n 1, Article 17(9).

<sup>86</sup> GATT (1970) Report of the Working Party on Border Tax Adjustments, above n 30, para 9.

products, would be subject to the general prohibition on trade-restrictive border measures in Article XI:1 of the GATT. In this case, any trade-restrictive effects of the CBAM regulation, regardless of whether domestic products are subject to similarly constraining requirements, would then have to be justified under an exception.

This uncertainty regarding the applicable standard adds complexity to the present analysis. However, it is in line with current practice. The line between measures subject to the national treatment obligation in GATT Article III:4 and those subject to the prohibition on trade-restrictive measures in Article XI:1 may sometimes be difficult to draw. The same measure can have restrictive effects on the competitive opportunities of imported products in the domestic marketplace and, at the same time, produce restrictive effects on importation. The panel in *India—Autos* noted this challenge, reasoning that ‘different aspects of a measure may affect the competitive opportunities of imports in different ways’.<sup>87</sup> The panel explained that Article III covers those situations ‘where competitive opportunities on the domestic market are affected’, while Article XI relates to situations ‘where the opportunities for importation itself, i.e. entering the market, are affected’.<sup>88</sup> The panel noted that, exceptionally, a single measure might even be subject to both obligations.<sup>89</sup>

For the reasons above, it is significant to note and consider in this piece the two possible standards. In both cases it is likely that some discrepancy between the proposed trade-neutrality of CBAM and its actual impact on imports will lead to a violation—which will then need to be justified under Article XX. Prior to turning to this issue, we consider a final possible violation: that of the Most-Favoured Nation obligation.

### 7.3.7 *Conditionality and Most-Favoured-Nation Obligation*

In addition to the possible violations of the GATT national treatment obligation (Article III)<sup>90</sup> and the prohibition on quantitative restrictions (Article XI), an additional question concerns the possible violation of the Most-Favoured Nation (MFN) obligation (Article I). No matter whether CBAM is treated as a border or a behind-the-border measure, a fiscal or a non-fiscal measure, it is still subject to the MFN obligation. The MFN obligation, conveyed in GATT Article I, stipulates that any advantage that is accorded to any product from any country (or destined for any country) must also accorded immediately and unconditionally to like products from

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<sup>87</sup> Panel Report, *India—Autos*, above n 81, para 7.224.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Article III:2 may apply directly or by virtue of Article II:2(a).

(or destined for) all WTO Members.<sup>91,92</sup> In other words, while Article III requires a comparison between the conditions of competition of domestic products and that of imported products, under Article I one considers whether imports from (or exports to) WTO Members are disadvantaged vis-à-vis other imports (or exports).

For the purposes of Article I, the most striking aspect of CBAM is that it exempts imports from certain countries from the obligation to purchase emission allowances. Per Annex II of the proposal, exempted States are Iceland, Liechtenstein, Norway and Switzerland. The first three are covered by the EU ETS under the European Economic Area (EEA)<sup>93</sup> and Switzerland has an independent emissions trading system that, by agreement, is linked to the EU ETS.<sup>94</sup> Article 5 of the CBAM proposal opens the possibility for other States to be added to this list, subject to the same conditions: either accepting the application of the EU's ETS system or concluding an agreement with the EU 'fully linking' its emissions trading system with the EU ETS, and charging for carbon emissions the same as the EU.<sup>95</sup> We will get back to these requirements in the analysis of the exceptions (Sect. 7.4 below). At this stage, regarding Article I, it is clear that CBAM offers an advantage (not having to purchase emission allowances) to products imported from some countries (those that have an EU-equivalent and EU-approved ETS) that is not accorded immediately and unconditionally to like products from other countries.

Additionally, Article 9 of the CBAM proposal allows importers to compensate for the price paid for carbon in the country of origin, decreasing the amount of CBAM certificates required, to account for 'embedded emissions [that] were subject to a carbon price in the country of origin of the goods'.<sup>96</sup> Products from different countries that have not qualified for an exemption might thus be treated differently depending on whether they have already paid carbon charges. China, for instance, recently set up its own emissions trading system, which prices a ton of carbon emissions at just under EUR 7, which is low when compared to the price under the European ETS, which currently hovers around EUR 50 and is programmed to increase.<sup>97</sup> Importers of Chinese CBAM-targeted products would be allowed to surrender fewer CBAM

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<sup>91</sup> As other provisions, Article I sets up a rule, to which exceptions apply. In addition to the Article XX general exceptions, MFN is subject to specifically relevant exceptions, in Article XXIV and the Enabling Clause.

<sup>92</sup> In the case of restrictions on importation under Article XI, a specific MFN obligation, contained in Article XIII, applies.

<sup>93</sup> CBAM proposal, above n 1, p. 1.

<sup>94</sup> Agreement between the European Union and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems, signed 23 November 2017, OJ L 322/3 (entered into force 1 January 2020).

<sup>95</sup> CBAM proposal, above n 1, Article 2(5).

<sup>96</sup> CBAM proposal, above n 1, Article 9(2).

<sup>97</sup> EURACTIV.com with AFP (2021) China steps up climate fight with emissions trading scheme. <https://www.euractiv.com/section/climate-environment/news/china-steps-up-climate-fight-with-emissions-trading-scheme/>. Last accessed 10 January 2022.

certificates to account for carbon costs already incurred in China. This means that, given the difference in prices, importers of Chinese steel would still be required to surrender certificates that correspond to around EUR 43 per ton of carbon emitted, after providing proof of actual payment of the carbon price.

In the first ever case decided in the GATT regime, *Belgian Family Allowances*, the panel found, short and crisp, that Article I does not allow distinctions based on whether countries' policies match those of the importing country.<sup>98</sup> Later case-law added some nuance regarding policies linked to criteria other than national origin, and in fact folded the question of conditionality into the issue of discrimination (*de jure* or *de facto*) between products of different origins.<sup>99</sup> In *EC—Seal Products*, the Appellate Body stated that Article I:1 'permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member'.<sup>100</sup> At the same time, the Appellate Body found that Article I is not the appropriate provision within which to have arguments about whether a certain detrimental impact is justified, once more pushing that question of legitimate policy-based justification for distinctions between products on to the general exceptions of Article XX.<sup>101</sup>

The possibility of receiving a credit for a carbon price already paid in the country of origin, being equally available to products originating in all countries, is not in itself incompatible with Article I. A trickier question is whether the specificity of the requirement imposed by the EU to give this discount is discriminatory, in that it requires producing countries to have a system involving monetary payments, thus excluding regulatory mechanisms for reducing carbon emissions—such as those imposed within the United States—that do not involve any monetary payments. In any case, since the CBAM regulation as proposed explicitly exempts specific countries from its scope of application, this would in itself run afoul of Article I. Additionally, we add, it would seem that any exemptions given to developing countries and even least-developed countries in the application of CBDR would likewise be characterized as a violation of Article I, in need of specific justification. It is to such justifications that we now turn.

## 7.4 Justifying CBAM: Which Distinctions Are Justifiable?

GATT Article XX provides that, subject to certain requirements, 'nothing in [the GATT] shall prevent' WTO Members from pursuing a list of legitimate policy objectives, thus allowing Members to adopt and enforce measures that would in principle

<sup>98</sup> GATT Panel Report, *Belgian Family Allowances*, G/32, 7 November 1952, BISD 1S/59, para 3.

<sup>99</sup> Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, 11 February 2000, WT/DS139/R (*Canada—Autos*), paras 10.23–24.

<sup>100</sup> Appellate Body Report, *EC—Seal Products*, above n 65, para 5.88.

<sup>101</sup> Appellate Body Report, *EC—Seal Products*, above n 65, para 5.93.

contradict their GATT obligations. Thus, a measure may violate GATT Articles I, III, or XI, and still be permissible under WTO law seen as a whole.

To be justified under Article XX, a measure must, first, fall within the scope of one of its subparagraphs—the list of policy objectives that justify departing from GATT obligations. For CBAM, two subparagraphs are of particular relevance, permitting measures ‘necessary to protect human, animal or plant life or health’ (lit. b) and ‘relating to the conservation of exhaustible natural resources’ (lit. g).<sup>102</sup> Second, measures covered by any of the subparagraphs must meet the requirements of Article XX’s opening paragraph, known as the ‘chapeau’, prescribing that measures must not be ‘applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’, or otherwise amount to a ‘disguised restriction on international trade’.<sup>103</sup>

### 7.4.1 Contribution to Legitimate Objectives

There is little doubt that the objective of reducing carbon emissions is legitimate and covered by the scope of Article XX’s subparagraphs. *US—Gasoline*, the WTO’s first Panel report, already contained the finding that ‘a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g)’.<sup>104</sup> In *US—Shrimp*, the Appellate Body added that the ‘objective of sustainable development’, mentioned explicitly in the preamble to the WTO Agreement, embodies the recognition by all WTO Members of the ‘importance and legitimacy of environmental protection as a goal of national and international policy’, and informs the interpretation of all the provisions of the WTO Agreements.<sup>105</sup> Following the wealth of scientific evidence that has emerged over the past decades concerning anthropogenic climate change, endorsed within various multilateral fora, it seems undeniable that the Earth’s climate is a natural resource that is exhaustible and that

<sup>102</sup> Other possible subparagraphs are Article XX(a), which allows measures ‘necessary to protect public morals’, and Article XX(d), which allows the taking of measures ‘necessary to secure compliance with laws or regulations which are not inconsistent with [the GATT]’. The former would require focus on the moral aspects of climate change; the latter would require separating conceptually the ‘charge on carbon’ from the specific obligations under the CBAM regulation, which seek to ‘secure compliance’ with this charge. The subsequent legal questions (necessity and the chapeau test) would be adjusted according to this declared objective.

<sup>103</sup> GATT, above n 6, Article XX. For the article’s interpretation and sequence of legal analysis, generally see the pivotal Appellate Body Reports in Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R (*US—Gasoline*) and Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R (*US—Shrimp*).

<sup>104</sup> Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, 29 January 1996, WT/DS2/R (*US—Gasoline*), para 6.37.

<sup>105</sup> Appellate Body Report, *US—Shrimp*, above n 103, para 129.

measures to control carbon emissions are measures ‘relating to’ the conservation of this resource. As long as it is ‘made effective in conjunction with restrictions on domestic production or consumption’, a CBAM, as a measure relating to the conservation of the Earth’s climate, would fall within the scope of Article XX(g).<sup>106</sup>

Measures that the EU and its Member States have adopted over the past decade to curb carbon emissions in view of the climate crisis, including the ETS, as well as the drafting history of the CBAM proposal, sufficiently demonstrate that CBAM relates to the objective of conservation of the Earth’s climate. This relationship also derives logically from the measure’s operation and design, which counters carbon leakage and would logically lead to a reduction in GHG emissions. When implemented, CBAM will be adopted together with limitations on domestic production, as is required under Article XX(g).

The consequences of the climate crisis may also justify considering CBAM as a measure ‘to protect human, animal or plant life or health’ under Article XX(b). Article XX(b) imposes the requirement that measures be ‘necessary’ for their objective. This imposes a higher requirement when compared to Article XX(g), since it is in principle easier to provide evidence that a measure *relates to* an objective than to show that it is *necessary*. At the same time, the reference to necessity in Article XX(b) should not be interpreted too strictly either. A measure is ‘necessary’ within the meaning of Article XX subparagraphs not only when it is indispensable, but also when it ‘brings about a material contribution to the achievement’ of the relevant objective. The key constraint imposed by the necessity requirement is that there should not be a reasonably available alternative measure that would make at least the same type of contribution to the objective, at a not lower level, and would at the same time be less trade restrictive.<sup>107</sup>

Thus, even a total import ban can be considered necessary if a complainant cannot demonstrate that there is a less trade-restrictive measure that could replace it and fulfil

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<sup>106</sup> In *US—Shrimp*, the Appellate Body noted a controversy regarding measures taken to protect exhaustible natural resources outside a Member’s jurisdiction. It found that Article XX contains safeguards to prevent Members from imposing the costs of legitimate policies on other Members; at the same time, excluding from its scope, *a priori*, all measures with extraterritorial effect, would ‘render[] most, if not all, of the specific exceptions of Article XX inutile’ (Appellate Body Report, *US—Shrimp*, above n 103, para 121). It concluded that the jurisdictional connection was not an issue when ‘a sufficient nexus’ existed between the relevant resource and the Member seeking to conserve it (Appellate Body Report, *US—Shrimp*, above n 103, para 133). Each WTO Member would seem to have ‘sufficient nexus’ with the Earth’s climate and to be directly affected, within its territory, by climate change. In subsequent cases addressing regulation imposing requirements on the production process outside a Member’s territory to comply with its domestic policies (in particular Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 16 May 2012, WT/DS381/AB/R (*US—Tuna II*) and Appellate Body Report, *EC—Seal Products*, above n 65, but also Panel Report, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, 17 October 2017, WT/DS484/R (*Indonesia—Chicken*)), the assessment of the measure circumvented the debate on extraterritoriality and focused on the substantive requirements of nexus between policies and objectives, non-discrimination in the policy’s application, and absence of disguised restrictions on trade, imposed by WTO law.

<sup>107</sup> Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, 3 December 2007, WT/DS332/AB/R (*Brazil—Retreaded Tyres*), para 152.

its objective to the precise degree sought by the Member adopting it. In *Brazil—Retreaded Tyres*, the AB accepted that Brazil’s import ban on retreaded tyres was necessary to attain its public health objective, despite making a non-decisive contribution to the objective when considered in isolation, due to its role within a broad set of measures aimed at pursuing this objective. The AB highlighted that ‘certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures’.<sup>108</sup> The ban was found to be a key element within a ‘comprehensive regulatory scheme ... apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors’.<sup>109</sup> The Appellate Body clarified that merely offering a substitute measure that would also contribute to the relevant objective is not sufficient to show that the existing measure is not necessary, unless the alternative measure is able to fulfil the same role in the Member’s comprehensive strategy. Otherwise, ‘[s]ubstituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect’.<sup>110</sup> Bringing this reasoning to the case at hand, given the EU’s broad climate strategy, CBAM makes a material contribution to the objective of protecting human, animal and plant life in the climate crisis. As long as it performs a role in the climate strategy (avoiding carbon leakage) that cannot be performed equally well by a reasonably available and less trade-restrictive alternative measure, CBAM would be found ‘necessary’ to attain the EU’s objectives under Article XX(b).

Thus, CBAM is very likely to meet the thresholds of both Articles XX(g) and XX(b). If this is correct, the EU’s essential challenge will be to demonstrate (to an adjudicator or to its trade partners) that CBAM is non-discriminatory and not a disguised restriction on trade, as required by the chapeau of Article XX. Within this context, we continue by focussing on a specific but crucial nuance: What if CBAM and similar measures took principles of Common but Differentiated Responsibilities (CBDR) into account and distinguished between products depending on their country of origin? What if it subjected imports from high-income countries to the full set of CBAM requirements, which have also contributed relatively more to carbon emissions in the past and have greater capacity both to decarbonize their production and to provide evidence of low-carbon production, while lowering its burden on countries with lower historic contributions and a lower capacity to implement and demonstrate low-carbon production? Such differential treatment might be seen as compromising on the objective of combatting the climate crisis. But it would do so on the basis of another widely recognized public policy objective—the one expressed in the principles of CBDR. Could such a distinction be justified under the GATT?

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<sup>108</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, above n 107, para 151.

<sup>109</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, above n 107, para 154.

<sup>110</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, above n 107, para 172.

### 7.4.2 *Legitimate Discrimination Narrowly Construed*

To be justified under Article XX, measures found to pursue a legitimate objective under one of the subparagraphs must still meet certain conditions, conveyed in the chapeau, in the way they are applied. Measures that violate GATT obligations to pursue legitimate objectives can only be justified if, in their application, they do not constitute either (i) arbitrary or unjustifiable discrimination between countries where the same conditions prevail or (ii) a disguised restriction on trade. In practice, the latter element has always been assessed by reference to the former, on which we will focus.<sup>111</sup> In this regard, the question is not discrimination in the sense of a distinction between different situations—the possibility of which is decidedly recognized—but whether such discrimination is arbitrary or unjustifiable.

This brings us to the crucial issue: What would be ‘arbitrary or unjustifiable’? Put otherwise, which grounds count for permissible differential treatment? The CBAM proposal does contain an ostensibly discriminatory element, exempting from its scope the four EFTA Member States and others that establish emissions trading systems linked to the EU’s ETS.<sup>112</sup> This discrimination would seem to be *prima facie* permissible, if one applies the reasoning used by the Appellate Body in *Brazil—Retreaded Tyres*. In this dispute, the Appellate Body had to deal with the following question: Could compliance with a ruling by a Mercosur arbitral tribunal, which required Brazil to lift its ban on retreaded tyres with respect to Mercosur countries, constitute permissible grounds for discriminating between Mercosur countries and other WTO Members? Or would such differentiation constitute arbitrary or unjustifiable discrimination in the sense of the chapeau of Article XX? The Appellate Body reversed the Panel’s finding that a ruling by a Mercosur tribunal, requiring Brazil to remove its ban vis-à-vis Mercosur Member States, was an ‘acceptable rationale for the discrimination’. The Appellate Body backed up its decision with the argument that compliance with the Mercosur arbitral ruling bore ‘no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree’.<sup>113</sup> The Appellate Body stated that ‘discrimination can result from a rational decision or behaviour, and still be “arbitrary or unjustifiable”, because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective’.<sup>114</sup>

Were the EU to exempt EFTA countries from CBAM due to their historic connections to or deep trade ties with the EU, this discrimination would fall foul of the

<sup>111</sup> Appellate Body Report, *US—Gasoline*, above n 103, p. 25.

<sup>112</sup> CBAM proposal, above n 1, Article 2.5.

<sup>113</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, above n 107, para 228.

<sup>114</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, above n 107, para 232. In *Brazil—Retreaded Tyres*, Brazil did not explore the possibility that its discrimination could be justified under GATT Article XXIV. This is less relevant in the case of CBAM, since the relevant distinction in the CBAM proposal is not whether countries have a trade agreement with the EU but whether they have implemented an EU-equivalent and EU-approved ETS.

*Brazil—Retreaded Tyres* test. Conversely, exempting products from countries that have an emissions trading system is in principle a discrimination explained by the same rationale—avoiding carbon leakage to countries where carbon emissions do not have a price—that justifies the CBAM itself. The main challenges in this regard would be, first, the requirement that the emissions trading system be ‘fully link[ed]’ to the EU’s ETS, and second, the requirement that they curb emissions through substantially the same mechanism as the ETS: charging monetary payments. In *US—Shrimp*, the Appellate Body found the United States regime to be unjustifiably discriminatory in that it ‘require[d] other Members to adopt essentially the same comprehensive regulatory program’ as the United States and ‘d[id] not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries’.<sup>115</sup> The same charge could be brought against the requirements for exemption in the CBAM proposal.

What if CBAM distinguished between countries along the lines of the CBDR principle? Would it be possible to compromise on the pursuit of one objective by invoking another? Following *Brazil—Retreaded Tyres* alone, the answer would seem to be ‘no’.<sup>116</sup> Any differentiation, in order to be non-arbitrary and justifiable, would need to be explained by the objective of combating global warming or, more specifically, of preventing carbon leakage. It would not be possible to justify discounting or exempting States or territories on the basis of their level of development or historical contributions to carbon emissions. Put more broadly, the test developed by the Appellate Body in *Brazil—Retreaded Tyres* is unidimensional, in the sense that a single policy objective—the one that justifies the original measure—is the metric for the legitimacy of discrimination. This unidimensional test would, almost by necessity, make WTO-inconsistent all regulatory adjustments intended to balance a measure’s principal objective against different, equally legitimate, societal objectives.

### 7.4.3 *Legitimate Discrimination with Countervailing Reasons*

Should the CBAM combine the objectives of combatting global warming and avoiding carbon leakage with respect for the principle of CBDR and considerations of equitable burden-sharing, it would necessarily involve a combination of objectives. Rather than *Brazil—Retreaded Tyres*, *EC—Seal Products* provides the better parallel. In the latter dispute, the Appellate Body rightly accepted that competing legitimate objectives may interfere with the pursuit of a public policy objective, possibly leading to legitimate discrimination unrelated to a measure’s primary objective. While the EU’s measure in *EC—Seal Products* pursued the primary objective of protecting animal welfare (under Article XX paragraph (a), relating to measures ‘necessary to protect public morals’), the EU also sought to respect and protect the ways of life and hunting of indigenous (Inuit) communities. This secondary objective, pursued

<sup>115</sup> Appellate Body Report, *US—Shrimp*, above n 103, paras 164–165.

<sup>116</sup> For the argument that this test is indeed too narrow, see Bartels 2015, pp. 95–125, 108.

through an exception in the EU's regulation for seal products derived from Inuit hunting, stood in tension with that of protecting animal welfare, but offered countervailing reasons for deviating from this primary objective. The EU thus argued that its actual objective was to stop the infliction of animal suffering *without sufficient justification*.<sup>117</sup> That makes good sense: real-life policies typically need to strike balances between competing legitimate objectives.<sup>118</sup> Stronger still, the justification for discrimination, as Lorand Bartels has argued convincingly, is 'necessarily independent of the objective of the measure, and may even—and should be able to—undermine that objective'.<sup>119</sup>

The Appellate Body in *EC—Seal Products* was however ambivalent in accepting the possibility of countervailing reasons to deviate from a measure's primary objective. As it had done in *Brazil—Retreaded Tyres*, the Appellate Body stated that the reasons for discrepant treatment would need to rationally relate to the measure's primary objective (protecting animal welfare). At the same time, the Appellate Body noted that this was 'not the sole test [] relevant to the assessment of arbitrary or unjustifiable discrimination'.<sup>120</sup> It rightly accepted the exception for hunting by Inuit communities as a countervailing reason, one decidedly not connected to protecting animal welfare—all parties had argued and agreed that the suffering inflicted on seals was the same.

What are the constraints on secondary, countervailing justifications, if any? Would they again need to meet the requirements of Article XX? Are they limited by the scope of the subparagraphs of Article XX itself? It is often the case that public policies and related trade measures pursue a complex mix of objectives, not only because of overlapping societal goals but also due to the intricacies of politico-legislative processes and the need for finding workable compromises. On the one hand, it is thus unrealistic to demand clear-cut, unambiguous and unidimensional policies.<sup>121</sup> On the other hand, some objectives or political necessities should not be allowed to enter the mix. It might for instance be opportune, even politically necessary, to favour some local producers to move a political process along, but it is difficult to see how such a consideration could be a *justification* for discrimination. This may well be the crux of tensions between the economic and environmental law regimes. In the abstract, tensions may be reconciled even if rationalities diverge, but real-life political processes seldom live up to economic law's ideal assumptions. For instance, special or closer relationships between the EU and specific countries could not in themselves justify more favourable treatment.<sup>122</sup> The exemption of EFTA Member

<sup>117</sup> Appellate Body Report, *EC—Seal Products*, above n 65, para 5.143.

<sup>118</sup> Bartels 2015, p. 116; Howse and Langille 2012, pp. 367–432; Lydgate 2017.

<sup>119</sup> Bartels 2015, p. 97.

<sup>120</sup> Appellate Body Report, *EC—Seal Products*, above n 65, para 5.321.

<sup>121</sup> Also see Howse and Langille 2012.

<sup>122</sup> WTO rules do allow WTO Members to offer trade preferences, for example by entering into reciprocal trade agreements that meet stated conditions.

States is justifiable only insofar as there is a substantive difference in circumstances between these countries and other WTO Members—in this case, the fact that the EU has agreements with them that prevent carbon leakage.

Bringing CBDR into the mix requires an objectively justifiable basis. This is a challenge insofar as the very scope of CBDR is in dispute. We have noted that, for decades, parties to the UN Framework Convention on Climate Change (UNFCCC) have tried to put CBDR into practice.<sup>123</sup> An exact formula would be less important than an articulation of principles and reasoned policy decisions as well as reviewable individual determinations. Distinctions should relate, we submit, to levels of development as well as past and present emissions, and should be based on objectively verifiable criteria, transparently administered. In *EC—Seal Products*, the AB faulted the EU for the vagueness of the Inuit exception, and for the considerable discretion that the EU thus retained in deciding which communities qualified.<sup>124</sup> But then again, in contrast to the Inuit community exception, taking CBDR into account in the operation of CBAM already brings into the assessment an internationally recognized and shared principle, even if this principle's operationalization remains much contested.

Such a stance would be further supported by the Preamble to the WTO Agreement, which recognizes that

relations in the field of trade and economic endeavour should be conducted with a view to ... allowing for the optimal use of the world's resources in accordance with the *objective of sustainable development*, seeking 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* [emphasis added].

As the Appellate Body already stated in *US—Shrimp*, the preamble of the WTO Agreement 'must add colour, texture and shading to [the] interpretation' of rights and obligations.<sup>125</sup> Similarly to the precautionary principle, CBDR should be viewed not 'as a ground for justifying ... measures that are otherwise inconsistent with the obligations of Members', but instead as a principle that 'finds reflection' in the WTO Agreements themselves.<sup>126</sup> This principle is reflected specifically in the many legal provisions and decisions by the WTO Membership that allow distinctions between Members on the basis of their historical role in the international trading system as well as on the capacity of their States and economies. The notion of CBDR is thus not alien to the trade regime and should weigh in favour of this take on legitimate discriminations which allows for countervailing reasons.

A further, related question is whether Members are obliged to pursue a certain public policy objective consistently. Does it speak against CBAM's justification under Article XX that it extends to specific sectors and not to others? Why does

<sup>123</sup> See above notes 13 and 14.

<sup>124</sup> Appellate Body Report, *EC—Seal Products*, above n 65, para 5.325. The AB specifically took issue with the criterion that the products of seal hunts would at least "*partially* be used, consumed or processed within the communities according to their traditions" (italics added).

<sup>125</sup> Appellate Body Report, *US—Shrimp*, above n 103, paras 153, 155.

<sup>126</sup> Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, WT/DS26/AB/R (*EC—Hormones*), para 124.

it not at all consider textiles, for instance, whose production contributes a high percentage of carbon emissions?<sup>127</sup> Does such a choice, arguably inconsistent with the measure's stated rationale, suggest arbitrary and unjustifiable discrimination? Canada had suggested in *EC—Seal Products* that inconsistencies in the EU's policy indicated insincere motives. Why does the EU care about the well-being of seals and does little about cruelty in its own slaughterhouses for pigs, for instance?<sup>128</sup> On this matter, the AB held, again rightly, in our view, that it is unrealistic to require polities to achieve rational coherence before they are allowed to pursue any objective. Consistency is not a requirement.<sup>129</sup> The WTO Agreements allow, and should allow, different societies to pursue different societal goals at different speeds. It is almost certain that political processes will lead Members to recognize and pursue certain objectives progressively, unevenly, and inconsistently, and the WTO Agreements should recognize that.

#### 7.4.4 *Same Conditions?*

The chapeau of Article XX recognizes that equal treatment under unequal conditions can be just as discriminatory as unequal treatment under equal conditions.<sup>130</sup> It notably includes the qualification that measures must not be applied in a manner so as to amount to arbitrary or unjustifiable discrimination between countries *where the same conditions prevail*. That qualification draws specific attention to something that establishing arbitrariness or justifiability should arguably do anyway, that is to consider whether the relevant conditions are the same or whether they are such that non-discrimination in fact mandates *different* treatment. The Appellate Body stated fittingly in *US—Shrimp* that

it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members. ...

<sup>127</sup> See, e.g., Valodka et al. 2020, pp. 314–322.

<sup>128</sup> Appellate Body Report, *EC—Seal Products*, above n 65, para 5.194.

<sup>129</sup> Appellate Body Report, *EC—Seal Products*, above n 65, para 5.200. See on this Lydgate 2017, pp. 561–582.

<sup>130</sup> Classically, Aristotle 1962, 271–272: 'It follows therefore that justice involves at least four terms, namely, two persons for whom it is just and two shares which are just. And there will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal shares, that quarrels and complaints arise'. This is a stronghold of feminist and postcolonial contributions in particular. The former have been powerful in debunking law's gender neutrality and the latter in foregrounding the substantially different treatment under conditions of formal sovereign equality. See MacKinnon 1993; Bedjaoui 1979. On the related construction of normalcy, see Tarullo 1985, pp. 533–552; Lamp 2015, pp. 743–771.

We believe 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.<sup>131</sup>

In *US—Shrimp*, the U.S. sought to justify its trade-restrictive measure under the general exceptions by relying on the measure's aim of protecting sea turtles while catching shrimp. The harm to sea turtles however varied in different geographic areas and the U.S. regulation would need to distinguish between areas accordingly. Since it did not, the Appellate Body held that the manner in which the regulation pursued the protection of sea turtles amounted to unjustified discrimination. As in most cases, the question whether discrimination was justified in *US—Shrimp* concerned the primary public policy objective of protecting sea turtles and its pursuit in countries where different conditions prevail. We see no reason why this reasoning would not extend to secondary, countervailing reasons just as well.<sup>132</sup>

In sum, we argue that seeking to justify a CBDR-adjusted CBAM under the general exceptions of Article XX is ultimately possible. The most significant hurdle it needs to overcome is the application of criteria for countervailing, CBDR-related reasons.

## 7.5 Whither Special and Differential Treatment (SDT)?

### 7.5.1 SDT as a Concept and a Principle

Another means for justifying differentiation is through recourse to the concept of Special and Differential Treatment. SDT offers a correspondent, within international trade law, to the CBDR principle in international environmental law: a means to acknowledge that States share a common legal framework for action but, in light of their different economic conditions, should be subject to different obligations within this framework. The idea of SDT arose in the early days of the push for a New International Economic Order (NIEO) during which mostly newly independent States contested past and ongoing injustices arising from the legal ordering of the global economy.<sup>133</sup> SDT recognizes that formally equal treatment can lead to materially different impacts on different countries, allowing special treatment for certain categories of countries (although their membership is increasingly contested

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<sup>131</sup> Appellate Body Report, *US—Shrimp*, above n 103, paras 164–5. See, however, the Appellate Body Report on Article 21.5 DSU, *US—Shrimp*, 22 October 2001, WT/DS58/AB/RW, para 149: 'this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in every individual exporting Member'.

<sup>132</sup> In *EC—Seal Products* none of the parties argued for different country conditions. The complainants, Norway and Canada, rather argued that the EU's application of the Inuit exception de facto favoured Greenland. Nor did the EU submit that the relevant conditions in the relevant countries differed significantly.

<sup>133</sup> See, in particular, Bedjaoui 1979; Anghie 2015, pp. 145–148; Özsu 2015; Venzke 2018, pp. 263–302.

in practice), those of ‘developing countries’ and ‘least developed countries’ (LDCs), when opposed to ‘developed countries’.<sup>134</sup>

Focusing initially on tariff concessions and subsequently non-tariff preferences, SDT provisions allowed developing countries and LDCs to receive benefits that did not need to be extended to others, thus in principle going against the Most-favoured Nation obligation. SDT and amendments to the GATT, such as the addition of Part IV on ‘Trade and Development’ in 1965, should not only, not even primarily, be understood as catering to developing countries and LDCs, but also as embedding them in a regime that has been most advantageous to developed countries.<sup>135</sup> The claim that SDT has delivered meaningful benefits for developing and LDC countries is in fact uncertain.<sup>136</sup>

Today, SDT has different areas of application beyond trade preferences and includes arrangements that seek to provide developing countries and LDCs with rights, procedural advantages, and flexibilities in the implementation of their obligations.<sup>137</sup> SDT provisions that establish substantive rights and obligations, rather than procedural or hortatory provisions, can be split into three categories. First are the original trade preferences. Whereas developing countries hardly had a voice at the outset of the GATT, they made themselves heard at UNCTAD, where they devised, in 1968, the Generalized System of Preferences (GSP) and demanded that GATT parties provide preferences to developing countries and LDCs without extending them to others. At first based on temporary waivers, the possibility of such preferential treatment was then enshrined in the so-called Enabling Clause of 1979.<sup>138</sup> Second are exemptions and extended timelines for compliance. Examples are the right to maintain higher levels of trade-distortive agricultural subsidies<sup>139</sup> or the temporary exemption for LDCs from the obligation to enforce intellectual property rights under the TRIPS Agreement.<sup>140</sup> A third category of substantive SDT provisions concerns technical assistance, including capacity-building and financing.

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<sup>134</sup> The concept of development is deeply problematic in this context, above all for its Eurocentrism—understood as a set of beliefs, not a geographic location. The terminology still prevails in international economic law and we, too, continue to use it, though with critical distance. On the concepts of Eurocentrism and development, see Chakrabarty 2008; Pahuja 2011.

<sup>135</sup> Wolfrum et al. 2009; Lamp 2015.

<sup>136</sup> For a nuanced discussion, see Trebilcock et al. 2013, pp. 620–635; Kuhlmann and Agutu 2020, pp. 753–808.

<sup>137</sup> The WTO Secretariat keeps a compilation of these provisions. See Note by the Secretariat, Special and Differential Treatment in WTO Agreements and Decisions, 2 March 2021 (WT/COMTD/W/258). See further Simo 2021, pp. 233–281; Hegde and Wouters 2021; Michalopoulos 2000.

<sup>138</sup> GATT (1979) Decision of 28 November 1979: Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903 (Enabling Clause).

<sup>139</sup> WTO Agreement on Agriculture, signed 15 April 1994, LT/UR/A-1A/2 (entered into force 1 January 1995) (Agreement on Agriculture), Article 6:4(b).

<sup>140</sup> WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, signed 15 April 1994, LT/UR/A-1C/IP/1 (entered into force 1 January 1995) (TRIPS Agreement), Article 66. This exemption was granted initially for ten years and was subsequently extended. On 29 June 2021, WTO Members extended it until 1 July 2034 (Council for Trade-Related Aspects of Intellectual

Their purpose is both to permit compliance with trade obligations and to increase the participation of developing countries and their industries in international trade. Examples of provisions mandating technical assistance include Article 12.7 of the TBT Agreement or Article 9.2 of the SPS Agreement. Although there is no consolidated formulation of SDT as a legal principle of international trade law, the concept both underlies a series of generally applicable legal provisions and informs negotiations of country-specific rights and obligations. Although adjudicators may be wary of inferring from this concept rights and obligations not provided for specifically, they have taken into consideration elements such as ‘the capacity of a country’<sup>141</sup> to determine the necessity of a measure to fulfil its objective.

### 7.5.2 SDT and CBAM

The CBAM proposal refers to the CBDR principle in its Explanatory Memorandum<sup>142</sup> but does not derive any consequences from it for its policy. It does not refer to SDT. Only a preambular provision declares that the EU ‘stands ready to work with low and middle-income countries towards the de-carbonisation of their manufacturing industries’, and recognizes that it ‘should support less developed countries with the necessary technical assistance in order to facilitate their adaptation to the new obligations established by this regulation’.<sup>143</sup> All of this suggests that the EU would not adjust CBAM to lessen the burden imposed on producers from developing and least developed countries. At best, it suggests that some of the incoming revenue may be used for assisting developing countries and LDCs in decarbonizing their economies. That is, of course, most in line with the objective of combating the climate crisis. It is not in line, however, with the CBDR or SDT principles.

The EU could seek to justify a measure contrary to MFN treatment under the 1979 Enabling Clause allowing trade preferences for developing countries ‘to facilitate and promote the trade of developing countries’.<sup>144</sup> Paragraph 2(b) of the Enabling Clause permits all WTO Members to offer preferential treatment to developing countries with respect to certain non-tariff measures, thus contravening the MFN principle. Within the context of this preferential treatment, Paragraph 2(d) allows ‘special treatment’ to be granted to LDCs in comparison to other developing countries.

The scope of the non-tariff measures covered by Paragraph 2(b) was in dispute in *Brazil—Taxation*. In this dispute, Brazil sought to justify an exemption from an internal tax granted to cars imported from Mexico. The panel and the Appellate Body both concluded that the violation of Article III:2 would not be justified by Paragraph

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Property Rights (2021) Decision of the Council for TRIPS of 29 June 2021: Extension of the Transition Period under Article 66.1 for Least Developed Country Members, IP/C/88).

<sup>141</sup> Appellate Body Report, *Brazil—Retreaded Tyres*, above n 107, para 171.

<sup>142</sup> CBAM proposal, above n 1, p. 2.

<sup>143</sup> CBAM proposal, above n 1, para 55.

<sup>144</sup> Enabling Clause, above n 138, Article 3(a).

2(b), which only covers preferences authorized by ‘instruments multilaterally negotiated under the auspices of the GATT’.<sup>145</sup> While the Appellate Body was unclear on this, it seems that this allows WTO Members to justify under the GATT distinctions on the basis of SDT provisions in other WTO Agreements, which were ‘negotiated under the auspices of the GATT’. This is relevant because, for instance, Article 12 of the TBT Agreement provides that:

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

The panel in *US—COOL* interpreted the latter provision to mean that ‘Members are obliged to accord active and meaningful consideration to the special development, financial and trade needs of developing country Members’.<sup>146</sup> Read together, these provisions permit the application of ‘differential and more favourable treatment’ to prevent disadvantages for developing countries that would otherwise result from failing to consider their special development, financial and trade needs. Paragraph 2(b) of the Enabling Clause prevents such preferential treatment from being considered a violation of the GATT.<sup>147</sup> Preferential treatment would thus be allowed for developing countries and LDCs with regard to the regulatory aspects of CBAM such as the measurement of carbon emissions and the certification requirements.<sup>148</sup>

Although, strictly speaking, the Enabling Clause refers solely to the MFN clause in Article I of the GATT, the various SDT provisions may provide relevant context—together with other elements, such as the Preamble to the WTO Agreement—for the interpretation of ‘arbitrary or unjustifiable discrimination’ under the chapeau of Article XX. An SDT element in CBAM that is explicitly permissible under the TBT

<sup>145</sup> Appellate Body Report, *Brazil—Certain Measures Concerning Taxation and Charges*, 13 December 2018, WT/DS472/AB/R, WT/DS497/AB/R (*Brazil—Taxation*), para 5.413.

<sup>146</sup> Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, 18 November 2011, WT/DS384/R, WT/DS386/R (*US—COOL*), para 7.786.

<sup>147</sup> The articulation between different WTO Agreements is not always clear. While some agreements, like the Agreement on Sanitary and Phytosanitary Measures, provide rules for their articulation with the GATT, other agreements, like the TBT Agreement, do not. In principle, a regulation can be found compatible with an obligation in the TBT Agreement but incompatible with the functionally equivalent obligation in the GATT.

<sup>148</sup> It is more doubtful that the Enabling Clause covers the fiscal aspect of the CBAM, i.e. the price of carbon emissions itself, since it is not the subject of any instruments multilaterally negotiated under the GATT. The SDT principle can still be relevant for fiscal aspects when it comes to their justification under the general exceptions of Article XX.

Agreement, for example, should not be considered arbitrary or unjustifiable discrimination under Article XX of the GATT. The Enabling Clause thus adds to the context of the Preamble of the WTO Agreement, being relevant to establish the meaning of ‘respective needs and concerns at different levels of economic development’.

### 7.5.3 *SDT Provisions and Discrimination Between Developing Countries*

A related question with regard to the use of SDT provisions as context for interpreting ‘arbitrary or unjustifiable discrimination’ concerns their ability to justify distinctions between different developing countries, on the basis of their individual situation and capabilities. One key provision in this regard is Paragraph 3(c) of the Enabling Clause, which states that preferential treatment accorded by developed countries to developing countries ‘shall ... be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries’. In *EC—Tariff Preferences*, the AB found that this provision should be interpreted as permitting responses to needs of *individual* developing countries, since different ‘developing countries may have different needs according to their levels of development and particular circumstances’.<sup>149</sup> Responding to the needs of developing countries, the AB concluded, ‘may ... entail treating different developing country beneficiaries differently’.<sup>150</sup> The key limitation is that the differences must be designed ‘with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue’.<sup>151</sup>

But what counts as ‘needs and concerns’ that justify discrepant treatment? On the one hand, we have stressed that the urgency of the climate crisis hardly squares with considering carbon emissions as a development need. On the other, permitting and even demanding different levels of reductions in emissions is precisely what the CBDR principle, has traditionally done, not only relaxing responsibilities, but also dialling them up for developed countries. The tensions between these two responsibilities, or ‘needs’, are at the heart of climate negotiations and it would be odd, if not disingenuous, to undo them now with seeming simplicity by suggesting that preventing carbon leakage through a blanket price is not affected by this tension.

In *EC—Tariff Preferences*, the Appellate Body found that ‘the existence of a “development, financial [or] trade need” must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as

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<sup>149</sup> Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, 7 April 2004, WT/DS246/AB/R (*EC—Tariff Preferences*), para 161.

<sup>150</sup> *Ibid.*, para 162.

<sup>151</sup> *Ibid.*, para 164.

such a standard'.<sup>152</sup> In its view, the needs identified must warrant the relevant distinction: '[A] sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant "development, financial [or] trade need"'.<sup>153</sup> Paragraph 3(c) in fact requires ('shall') preferential treatment measures to respond positively to specific development, financial and trade needs of developing countries.

In conclusion, the Preamble of the WTO Agreement, the Enabling Clause and Article 12 of the TBT Agreement, all indicate that it is permissible to take into account the different development needs and contributions of countries in assessing whether distinctions made within a measure amount to 'arbitrary or unjustifiable discrimination'. Measures designed to reflect these needs and contributions could include, for example, permitting countries with scarce governmental, financial or bureaucratic resources to verify emissions to receive more favourable treatment in response to these specific needs. This requirement would seem to go hand in hand with the idea enshrined in the CBDR principle, which involves not only the different responsibilities of States for past and present emissions but also the capabilities of States to contribute to reductions in emissions. In fact, the principle has been expanded in the climate regime since the Bali Action Plan and Copenhagen Accord to emphasise Common but Differentiated Responsibilities *and Respective Capabilities*.

## 7.6 Conclusions

As proposed by the European Commission, CBAM would not distinguish between countries, be it according to their past or present emissions. Instead, CBAM would further corroborate a questionable overall trend—visible for some time in the climate regime—to treat countries alike in their responsibility for emissions and to distinguish them only in their capabilities regarding mitigation and adaptation. The trend is evident in all policies that distribute the remaining carbon budget on the seemingly apolitical basis of the respective population share. Different responsibilities and capabilities are then only reflected in climate finance. When the EU Commission now considers differences between countries in the context of CBAM, it is to offer its help to build up capacity for green production. However, there is scope for the EU to consider the principle of Common but Differentiated Responsibilities in designing the requirements imposed by CBAM on different countries too. This scope is also reflected in the provisions allowing Special and Differential Treatment of developing and least-developed countries in the trade regime.

CBAM runs the risk of encountering the critique that has been levelled against the GATT's 'Trade and Development' chapter, namely that the international economic law regime has included countries in the Global South and accepted them as formal

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<sup>152</sup> Ibid., para 163.

<sup>153</sup> Ibid., para 164.

equals while both setting aside the inequality of their underlying conditions and legally framing their demands as exceptions or as long-term aspirations rather than enforceable rights. Critical discussions of the concept of development have highlighted how it has placed developing countries in the waiting room of history, sending the message that they are ‘not yet’ there.<sup>154</sup> Via the CBDR and SDT principles international law instruments have to some extent sought to recognize and adjust for material differences to developing countries’ advantage. But CBAM now tells so-called developing countries that they cannot access the European market, ‘not yet’, unless they first green their production or otherwise pay for their emissions. This payment is expected at the same absolute price falling on their EU competitors, which benefit not only from a wide array of objective competitive advantages, deriving from their location in a developed economy, but also from a significant transition period that can be traced back to the 2003 ETS Directive and that has involved all manners of warnings, qualification programs, and subsidies. While CBAM aims at preventing carbon leakage and may incidentally incentivize decarbonization processes globally, it runs into critiques of developmentalism and risks further entrenching North/South divides.<sup>155</sup>

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<sup>154</sup> Chakrabarty 2008.

<sup>155</sup> See, especially, Pahuja 2011; Rist 2019; Escobar 1995; Natarajan 2021, 102; Mickelson 2009, 411.

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