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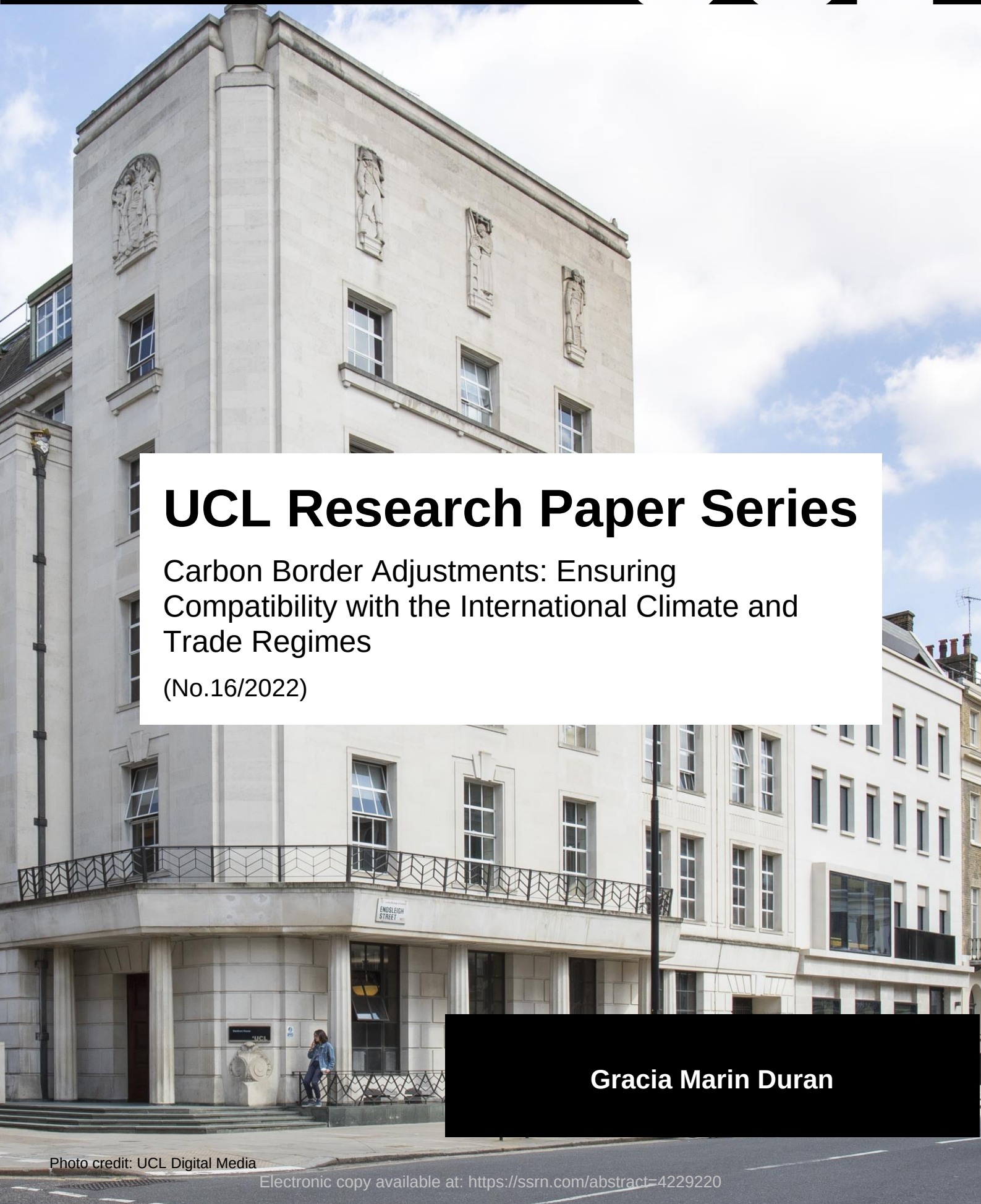

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Carbon Border Adjustments: Ensuring Compatibility with the International Climate and Trade Regimes

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CARBON BORDER ADJUSTMENTS: ENSURING COMPATIBILITY WITH THE INTERNATIONAL CLIMATE AND TRADE REGIMES

Gracia Marín Durán*

ABSTRACT

The European Union is contemplating the adoption of a carbon border adjustment mechanism (CBAM), which would extend its domestic carbon price to emissions that are produced outside its borders but are embedded into its imports of carbon-intensive commodities. In doing so, the EU is testing the boundaries of permissible unilateral action at the interface of international climate and trade law. However, the question of whether the proposed CBAM is compatible with these two multilateral legal regimes is yet to be addressed in an integrated manner. This article seeks to fill this gap in the scholarship and makes two arguments. First, the CBAM as presently designed does not respect the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) and needs to be adjusted through two forms of differential treatment: a full exemption for least-developed countries and Small Island Developing States and use of CBAM-generated revenue to support decarbonisation efforts in other affected developing countries. Second, this CBDRRC-based differentiation should be permissible under WTO law on grounds that it does not amount to discrimination between countries where same conditions prevail.

I. INTRODUCTION

While carbon border adjustment measures (CBAMs) have been a popular topic in the scholarship over the past two decades, prospects for their actual implementation seemed fairly remote until recently since policymakers had generally dismissed such measures for being complex to administer and likely to trigger trade disputes and undermine multilateral climate change negotiations.[1] And yet, as the Intergovernmental Panel on Climate Change (IPCC) has recently observed, the previously academic debate on carbon border adjustments is shifting to real policymaking as an increasing number of jurisdictions is considering the introduction of CBAMs.[2] The European Union (EU) has taken the lead in this trend, with the Commission publishing a proposal for an EU regulation establishing a carbon border adjustment mechanism on 14 July 2021,[3] about four months ahead of the global climate summit in Glasgow. If adopted by the European Parliament (EP) and Council,[4] the proposed CBAM would make the EU the first jurisdiction worldwide to extend its domestic carbon price to emissions that are generated

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[1] For an overview of earlier proposals, see M Mehling et al, 'Designing Border Carbon Adjustments for Enhanced Climate Action' (2019) 113(3) AJIL 448–456.

[2] IPCC, 'Climate Change 2022: Mitigation of Climate Change' (April 2022), chapter 11, 97; chapter 14, 72-3 [IPCC Report 2022].

[3] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism' COM(2021) 564 final [CBAM Proposal].

[4] At the time of writing, EU Member States have agreed a 'general approach': Council of the European Union, 'Draft regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism – General Approach' (15 March 2022). The EP has adopted its position: 'Amendments adopted by the European Parliament on 22 June 2022 on the proposal for a regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism' (P9_TA(2022)0248) [EP CBAM Position]. 'Trilogue' negotiations are ongoing between the three EU institutions.

outside its borders but are 'embodied' into its imports of carbon-intensive commodities. Canada and the United States (US) are exploring to put in place similar measures.[5] For their part, the BASIC countries (i.e., Brazil, China, India and South Africa), as well as Russia, have expressed grave concerns over CBAMs, claiming that they go against World Trade Organisation (WTO) law and the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC).[6]

International trade scholars have split much ink in assessing the WTO-compatibility of CBAMs, both before and after the EU's proposal was revealed.[7] Conversely, the question of consistency with the CBDRRC principle has received less attention in the scholarship,[8] presumably because it is perceived as being a secondary consideration in practical terms (i.e., CBMAs can be legally challenged in the WTO dispute settlement system, but not really elsewhere), or even seen as an obstacle towards ensuring WTO-compatibility. This article seeks to fill a gap in these academic discussions by considering for the first time both issues together. In fact, is it possible to design CBAMs in a manner that is consistent with both the CBDRRC principle and WTO law?

This integrated approach is necessary because CBAMs are, after all, trade-related climate measures that ought to be duly embedded into the existing multilateral legal frameworks. And yet, how to ensure this twin compatibility is not straightforward. On the one hand, the CBDRRC principle, as the most important and enduringly controversial principle of the United Nations (UN) climate regime, raises fundamental questions of fairness and burden-sharing in global climate mitigation action. In particular, it demands us to think about whether certain countries should be granted differential treatment in the context of CBAMs in light of their differentiated responsibilities for causing climate change and respective capabilities to address it. On the other hand, it is not clear whether any such country differentiation would be permissible under WTO law. This requires us to reflect on how to foster 'mutual supportiveness' between the multilateral climate and trade regimes.[9]

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[5] See US, FAIR Transition and Competition Act, S. GAI21718 59G, 117th Cong. (2021); Canada, 'Government Launches Consultations on Border Carbon Adjustments' (5 August 2001) <https://www.canada.ca/en/department-finance/news/2021/08/government-launches-consultations-on-border-carbon-adjustments.html>.

[6] BASIC, '30th Ministerial Meeting on Climate Change – Joint Statement' (8 April 2021) para 19.

[7] Specifically on the EU's proposal, see A Dias, S Seeuws and A Nosowicz, 'Border Carbon Adjustments and the WTO: Hand in Hand Towards Tackling Climate Change' (2020) 15(1) Glob. Trade Cust. J.; S Sato, 'EU's Carbon Adjustment Mechanism: Will It Achieve Its Objective(s)?' (2022) 56(3) JWT; ML Shippers and W De Witt, 'Proposal for a Carbon Border Adjustment Mechanism' (2022) 17(1) Glob. Trade Cust. J. More generally, see among others, T Meyer and T N Tucker, 'A Pragmatic Approach to Carbon Border Measures' (2022) 21(1) WTR; J Pauwelyn, 'Carbon Leakage Measures and Border Tax Adjustments under WTO Law' in D Prévost and G Van Calster (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar 2012); L Tamiotti, 'The Legal Interface Between Carbon Border Measures and Trade Rules' (2011) 11(5) Clim. Policy; J Trachtman, 'WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes' (2017) 70(12) Natl. Tax J.

[8] Most contributions in this regard pre-date the Paris Agreement: see C Brandi, 'Trade and Climate Change: Environmental, Economic and Ethical Perspectives on Border Carbon Adjustments' (2013) 16(1) Ethics Policy Environ.; R Eckersley, 'The Politics of Carbon Leakage and the Fairness of Border Measures' (2010) 24(4) Ethics Int. Aff.; M Hertel, 'Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities' (2011) 45(3) JWT; SD Ladly, 'Border Carbon Adjustments, WTO Law and the Principle of Common But Differentiated Responsibilities' (2012) 12 Int. Environ. Agreem.: Politics Law Econ.; P Larbprasertpon, 'The Interaction between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments' (2014) 6(1) Gött. J. Int. Law; J. O'Brien, 'The Equity of Levelling the Playing Field in the Climate Change Context' (2009) 43(5) JWT.

[9] This term is here understood in its classical 'permissive' (or 'exception-based' model) dimension, rather than its newer 'prescriptive' (or promotion-based model) dimension: see generally, E Cima, *From Exception to Promotion: Rethinking the Relationship Between International Trade and Environmental Law* (Brill 2021).

Based on this premise, the article proceeds as follows. Section II begins with an overview of the main design features of the proposed EU CBAM. Using the EU's proposal as a case-study is useful in terms of contextualising the subsequent analysis under the CBDRRC principle and WTO law, but the core arguments made have broader implications for CBAMs being contemplated by other jurisdictions. Section III turns to assessing its compatibility with the UN climate regime, and in particular the CBDRRC principle. This involves dealing with the vexing question of which forms of differential treatment does the principle entail and for which countries. It is argued that this question cannot be answered on the basis of an abstract articulation of the CBDRRC principle, as often done in previous contributions,[10] but necessitates a careful analysis of how it has been *operationalised*[11] in the mitigation provisions of climate change treaties –and most notably at present, the 2015 Paris Agreement (PA).[12] On this basis, it is shown that the CBAM does not, contrary to what the European Commission maintains, respect the CBDRRC principle and needs to be adjusted to ensure that it does. However, this does not mean the non-application of the CBAM to all developing countries,[13] as several scholars have argued in the pre-Paris context. Rather, it calls for more nuanced forms of differentiation among developing countries.

Section IV explores whether this CBDRRC-adjusted CBAM is consistent with WTO law. It is argued that, while CBDRRC-based differential treatment is *prima facie* in conflict with the most-favoured-nation (MFN) treatment obligation of the General Agreement on Tariffs and Trade (GATT), it should be permitted under Article XX GATT and, hence, be WTO-compatible. In making this argument, attention is drawn to an important aspect of the introductory clause (or chapeau) of Article XX GATT, which has received little attention in WTO jurisprudence thus far. That is, by its express terms, the chapeau only prohibits discrimination between 'countries where the *same conditions* prevail'. It is submitted that CBDRRC-grounded country differentiation does *not* amount to discrimination under GATT Article XX-chapeau because conditions in the countries involved are relevantly different in terms of their responsibilities/capabilities for climate conservation. Section IV concludes.

II. OVERVIEW OF THE EU'S CBAM PROPOSAL

The Commission first announced its intention to propose a CBAM in the European Green Deal of December 2019 and the proposed regulation forms part of its 'Fit for 55 Package' adopted in July 2021,[14] which puts forward a set of legislative proposals with a view to meeting the targets enshrined in the European Climate Law – i.e., a reduction in EU greenhouse gas (GHG) emissions by (at least) 55 per cent compared to 1990 levels by 2030, and the ultimate objective of 'climate-neutrality' (net-zero GHG emissions) by 2050.[15] Among these legislative initiatives, the most closely linked to the CBAM is the revision of the EU's Emissions Trading

[10] See e.g., Ladly (n 8) 69-71; Hertel (n 8) 664-7; Mehling et al (n 1) 472-3; and I Venzke and G Vidigal, 'Are Trade Measures to Tackle Climate Change the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism' (2022) Amsterdam Law School Legal Studies Research Paper No 2022-02, 3-4.
[11] This article borrows the distinction between the 'articulation' and 'operationalisation' of the CBDRRC principle in: L Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) ICLQ.
[12] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS.
[13] The term 'developing countries' has resisted definition in international law. Under the United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), the division between Annex I and non-Annex I Parties is often equated with the division between developed and developing countries, although the Convention does not make this association explicit.
[14] European Commission, 'The European Green Deal' COM(2019) 640 final; and legislative proposals available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541>.
[15] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality [2021] OJ L243/1, arts 2 (1) and (4).

System (ETS), which is the market-based mechanism for pricing carbon and reducing GHG emissions that presently operates in the European Economic Area (EEA) and covers emissions from energy-intensive power stations and industrial plants, as well as commercial flights between the thirty EEA countries.[16]

The CBAM is expected to enter into force on 1 January 2023 and would apply to products in five sectors (i.e., cement, iron and steel, aluminium, fertilizers and electricity) imported into the EU from all third countries, with the exception of Iceland, Liechtenstein, Norway (already part of the EU's ETS) and Switzerland (whose ETS is linked to the EU one).[17] After a three-year transition period, from 1 January 2026,[18] importers of targeted products would have to: (i) apply for authorisation to import and set up a CBAM account with competent authorities of the EU Member States where they are established;[19] (ii) submit a 'CBAM Declaration' by 31 May of each year with the total actual direct[20] emissions embedded in their imports,[21] as verified by accredited verifiers;[22] and (iii) buy and surrender sufficient 'CBAM certificates' to cover these emissions.[23] The price of these CBAM certificates will mirror the weekly average price of emission allowances auctioned under the EU ETS,[24] thereby ensuring that imported and domestic products are subject to the same carbon price. However, unlike ETS emission permits, CBAM certificates cannot be traded.[25]

According to European Commission, the carbon price alignment sought by the CBAM is necessary to address the risk of carbon leakage as the EU increases its climate ambition in line with the 2030 and 2050 targets. Carbon leakage would occur *if* reduced carbon emissions within the EU are offset by increasing carbon emissions outside the Union, through the relocation of EU industries to countries with less stringent climate policies and/or increased EU imports of carbon-intensive products from such countries. This would not only diminish the effectiveness of the EU's mitigation efforts, but could also result in no net reduction (or even an increase) in carbon emissions at the global level.[26] Hence, the declared overarching objective of the CBAM is to 'prevent the risk of carbon leakage in order to fight climate change by reducing GHG emissions in the Union and globally'.[27] However, these environmental goals are closely intertwined with economic concerns about a 'level playing field' between EU and third-country producers in the absence of an internationally-agreed uniform carbon price.[28] In

[16] Consolidated version of Directive (EC) 2003/87 of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Union [2021] OJ L87/1 [ETS Directive].
[17] CBAM Proposal (n 3) arts 2(1)-(3) and Annexes I-II.
[18] Ibid, arts 32-35, laying down reporting obligations during the transition period.
[19] Ibid, arts 4-5.
[20] Unlike the ETS, the CBAM would only cover *direct* emissions (i.e. 'emissions from the production processes on which producers have direct control') and not *indirect* emissions (e.g. emissions from electricity used in production processes).
[21] CBAM Proposal (n 3) arts 6-7. Actual embedded emissions are to be calculated in accordance with the methods set out in Annex III. When actual embedded emissions cannot be adequately determined based on available data, EU-determined 'default values' are provided. A different approach applies to imports of electricity: default values are used as a general rule, unless the importer chooses to determine the actual embedded emissions.
[22] Ibid, art 8, based on the verification principles set out in Annex V.
[23] Ibid, art 22(1)-(2). In addition to the annual surrender requirement, importers are required, by the end of each quarter, to have purchased CBAM certificates corresponding to at least 80 per cent of the embedded emissions of all goods imported since the beginning of the year.
[24] Ibid, art 21.
[25] Ibid, Preamble, recital 22.
[26] CBAM Proposal (n 3), Explanatory Memorandum, 1; European Commission, 'Staff Working Paper – Impact Assessment Report' SWD (2021) 643 final, 4 [CBAM Impact Assessment].
[27] CBAM Proposal (n 3) art 1(1) and Explanatory Memorandum, 2.
[28] P Low, G Marceau and J Reinaud, 'The Interface between Trade and Climate Change Regimes: Scoping the Issues' (2012) 46(2) JWT 485-6.

fact, carbon leakage has been described as a 'lose-lose' scenario: a loss of competitiveness for EU industries on global markets and no environmental gain as emissions just migrate to other locations with no or lax climate regulation.[29] To date, carbon leakage risks have been mitigated through the free allocation of emission allowances under the ETS to EU industries in energy-intensive and trade-exposed sectors.[30] But this is considered one of the problematic aspects of the ETS for weakening the carbon price signal to EU industries compared to full auctioning and thereby damping the incentive to invest in low-carbon production.[31] As free allowances are expected to be gradually phased out under the revised ETS by 2035, the CBAM would be phased-in as an alternative mechanism to address carbon leakage risks.[32]

Besides this overarching objective, the design of the CBAM reveals that it aims to push for more ambitious climate action in the EU's trading partners. At a general level, the EU-equivalent carbon price seeks to act as an economic incentive for foreign producers to uptake cleaner production technologies and lower emission levels.[33] More specifically, the CBAM seeks to encourage trading partners to adopt carbon pricing as the preferred mitigation policy option, and moreover to closely follow the EU's own pricing system. This is most evident through the 'EU-led carbon club' aspect of the CBAM which, as noted above, currently exempts four countries from the application of the scheme. There is a possibility to add other countries to the list subject to the same conditions: either accepting the application of the EU's ETS or concluding an agreement with the EU fully linking their emissions trading systems with that of the EU, and charging for carbon emissions the same price as the EU.[34] For products originating in non-exempted countries, an importer may claim a reduction in the number of required CBAM certificates to take account of any carbon price paid in the country of production.[35] This 'CBAM discount', however, only applies to explicit carbon policies (whether in form of a carbon tax or under an ETS) and ignores costs associated with other regulatory approaches to climate mitigation. At present, only a few of the top exporters in CBAM-covered sectors would be able to benefit from the CBAM discount, namely China, South Korea and the United Kingdom (UK).

To further contextualise the discussion of CBDRRC-compatibility in the next section, it is important to look at the EU's trading partners that would be most exposed to the CBAM if adopted as currently designed. According to the Commission's Impact Assessment, based on a simple analysis of current trade flows, such countries include Russia, Ukraine, Turkey, ranking among the top-ten exporters for most CBAM-covered sectors, followed by some European countries (Belarus and UK). BASIC countries, which have voiced fierce opposition to the CBAM, also feature among the top exporters for specific sectors, notably: aluminium (China and India) and iron/steel (China, Brazil and India). Similarly, some North African countries (Algeria, Egypt and Morocco) are among the top-five exporters of cement and

[29] A Pirlot, 'Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?' (2022) 34(1) J. Environ. Law 28-9.
[30] ETS Directive (n 16) art 10(a); and Commission Delegated Decision (EU) 2019/708 of 15 February 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council concerning the determination of sectors and subsectors deemed at risk of carbon leakage for the period 2021 to 2030 [2019] OJ L 120/2.
[31] CBAM Proposal (n 3), Preamble, recital 10-11 and arts 1(3) and 31. For discussion, see K Kulovesi, 'EU Emissions Trading Scheme: Preventing Carbon Leakage Before and After the Paris Agreement' in R Leal-Arcas and J Wouters (eds), *Research Handbook on EU Energy Law and Policy* (Edward Elgar 2017).
[32] CBAM Proposal (n 3) art 1(3).
[33] Ibid, Preamble, recital 55; and CBAM Impact Assessment (n 26) 14-15. This incentivising effect will likely vary across countries, depending on a number of factors including producers' willingness to accept lower profits, their export reliance on the EU market and diversification opportunities.
[34] CBAM Proposal (n 3) art 2(5).
[35] Ibid, arts 3(24) and 9.

fertilisers.[36] Least-developed countries (LDCs)[37] and Small Island Developing States (SIDS)[38] generally account for only a small share of EU imports of the targeted products. But the impact of CBAM on these countries is estimated to be considerable given the relative importance of such exports for their economies. For instance, Mozambique is the sixth largest exporter of aluminium to the EU which, in turn, accounted for nearly seven per cent of the country's gross domestic product (GDP) in 2020. Trinidad and Tobago is the fourth largest exporter of fertilisers to the EU, and while Senegal has a much smaller share, exports of fertilisers to the EU represented about five per cent of its GDP. The other nine LDCs affected by the CBAM are per sector: cement (Cambodia, Chad, Guinea, Haiti and Uganda), fertilisers (Afghanistan, Ethiopia and Madagascar), iron and steel (Myanmar, Niger and Sierra Leone).[39] The Commission further acknowledges that compliance costs are likely to be higher in these countries when compared to other trading partners, given their lower capacity to both decarbonise production processes as well as to measure and verify the carbon intensity of products exported to the EU.[40] There are no signs in the CBAM proposal, however, that special treatment will be granted to these countries, even if the EP had called for it in March 2021.[41]

III. CBAMs AND THE INTERNATIONAL CLIMATE REGIME

A. Unilateral Trade Measures under the UNFCCC

Before considering the compatibility of CBAMs with the CBDRRC principle, it seems appropriate to clarify whether the international climate regime contemplates the use of trade measures to address climate change in the first place. The key provision in this regard is Article 3.5 UNFCCC, which provides: '[m]easures taken to combat climate change, including *unilateral* ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'.[42]

It has been suggested that the effect of this provision is neutral, neither allowing nor forbidding the adoption of trade measures (including unilateral ones) to tackle climate change.[43] It is true that Article 3.5 UNFCCC cannot itself create rights or obligations since its function, as a principle, is to 'guide' Parties' actions in achieving the objectives of the Convention and implementing its provisions. However, it can be argued that by setting out explicit conditions on the use of trade-related climate measures, the UNFCCC implicitly recognises (or takes for granted) that Parties may resort to such measures, even unilaterally. It certainly does not prohibit these measures outright, and accepts their use may be permissible provided they do not amount to 'arbitrary and unjustifiable discrimination' or a 'disguised restriction on international trade'. These terms are not defined in the UNFCCC and it is uncertain whether they should be interpreted in line with WTO jurisprudence on similar language in the chapeau of Article XX GATT. However, it is worth noting that the wording of

[36] CBAM Impact Assessment (n 26) Annex 10, 100-1.
[37] There are currently 46 countries classified as LDCs by the UN: <https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html>.
[38] This is a group of 38 States, recognised by the UN to face unique social, economic and environmental vulnerabilities: <https://www.un.org/ohrlls/content/about-small-island-developing-states>.
[39] CBAM Impact Assessment (n 26) Annex 3, 20.
[40] Ibid 21. With a focus on African countries, see also E Gergondet, 'The European Union's Proposed Carbon Border Adjustment Mechanism and its Impact on Trade with Africa' (2021) 16(11) Glob. Trade Cust. J. 567-70.
[41] EP, 'Resolution of 10 March 2021 towards a WTO-compatible EU Carbon Border Adjustment Mechanism' (P9 TA(2021)0071) para 8.
[42] Emphasis added.
[43] D Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 Yale J. Int'l L. 505.

these provisions is not identical, as the chapeau of Article XX GATT has an additional element in that it only prohibits arbitrary and unjustifiable discrimination 'between countries where the same conditions prevail' –and the significance of this will be explored in Section IV.

B. CBDRRC Principle: Content and Status

The CBDDRC principle is enshrined in Article 3.1 UNFCCC, which reads: '[t]he Parties *should* protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their *common but differentiated responsibilities and respective capabilities*. Accordingly, the *developed country Parties should take the lead* in combating climate change and the adverse effects thereof'.[44] While this principle has underpinned global efforts to fight climate change from the very start, it legal status and core content remain deeply contested.

With regards to the former, most scholars agree that the CBDRRC principle has not attained the status of customary international law and is devoid of general applicability outside the confines of the treaty instrument in which it finds expression.[45] In the international climate regime, the principle is expressed in several operational provisions of its legally-binding treaties but, as can be seen in Article 3.1 UNFCCC above, it is framed in best-endeavour rather than obligatory language. Strictly speaking, one may thus question whether the EU is legally bound as matter of treaty law to respect the principle when adopting trade measures to tackle climate change. At the same time, the CBDDRC principle is considered a key pillar of the international climate architecture, which provided the bedrock of the burden-sharing arrangements initially crafted in the UNFCCC with regards to climate change mitigation, adaptation, financial assistance and technology transfer, and has guided their subsequent elaboration in the Kyoto Protocol and Paris Agreement.[46] As such, there are strong normative expectations that the EU should take this overarching principle into consideration and give it proper weight when designing the CBAM. In fact, the EU does not contest this proposition and, moreover, maintains that the CBAM respects the CBDRRC principle.[47] Whether this is actually the case will be discussed below but, at this stage, the key point is that the EU accepts the relevance of the principle for the CBAM notwithstanding broader debates over its legal status.

But even if we accept that the CBDRRC principle should be taken into account when adopting CBAMs, what exactly does this mean in concrete practical terms? This is a highly complex question, given the enduring disagreement over the core content of the principle and what it entails in terms of a fair distribution of the climate change mitigation burden across countries. Looking at the content in broad terms, the 'common' element of the principle is generally understood as a recognition that climate change is a matter of 'common concern' of humankind, which requires the widest possible cooperation by all States.[48] However, the exact meaning of the reminder of the principle has generated much contention over the years. In particular, the term 'differentiated' indicates the need for differential treatment between

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[44] Emphasis added.

[45] See e.g., A Gourgourinis, 'Common but Differentiated Responsibilities in Transnational Climate Change Governance and the WTO: A Tale of Two 'Interconnected Worlds' or a Tale of Two 'Crossing Swords'? in P. Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016) 36; Ladly (n 8) 69-71.

[46] L Rajamani, 'Common But Differentiated Responsibilities' in L Kämer and E Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018) 298.

[47] CBAM Proposal (n 3), Explanatory Memorandum, 1; CBAM Impact Assessment (n 26) 8.

[48] UNFCCC, Preamble, recital 1; and J Brunnée, 'Common Areas, Common Heritage and Common Concern' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 564-8.

countries, but the basis for such a differentiation is left ambiguous. On a plain reading of Article 3.1 UNFCCC, differentiation is to be determined based on two factors –i.e., responsibility for causing climate change and capability to address it. Yet, it does not specify how these differentiation markers should be measured and the extent to which they may be linked. Nonetheless, the expectation in that same provision that 'developed countries should take the lead' implies that responsibility was primarily conceived in terms of varying historical contributions to climate change which, in turn, gives industrialised countries a greater capacity to tackle this problem.[49] In other words, the UNFCCC approaches responsibility and capability as intrinsically linked rather than distinct factors, with enhanced capability being the direct result of industrialisation and historical responsibility for GHG emissions.[50]

However, there is a growing consensus that the understanding of the CBDRRC principle has markedly evolved from the UNFCCC to the Paris Agreement, both in its articulation as well as in its operationalisation in the substantive commitments of the agreement, and most notably those on climate change mitigation.[51] Article 2(2) PA reaffirms that the agreement 'will be implemented to respect' the CBDRRC principle, but this reference is qualified by 'in light of different national circumstances'. Arguably, this so-called Lima qualifier of 'national circumstances' introduces a dynamic and flexible element to interpreting both responsibilities and capabilities and, thereby, broadens the parameters for differentiation between countries which is no longer premised on their historical contributions alone.[52] Instead, it allows for a more nuanced approach to differentiation, taking into account a wider array of criteria in assessing 'differentiated responsibilities' (i.e., not only past but also current and projected future GHG emissions) and 'respective capabilities' (e.g., financial and technical capabilities, human capacity and other factors).[53] At the same time, this amalgamation of country-specific responsibilities and capabilities makes it increasingly complex to determine which countries may be deemed to have a 'high' responsibility/capability and which instead a 'low' responsibility/capability in the global fight against climate change.

That being said, there is no doubt that the EU itself falls within the high responsibility/capability category and should therefore assume a leadership role in global efforts to address climate change. But this does not help us answering the vexing question of how differentiation should be integrated into CBAMs and which are the low responsibility/capability countries entitled to it. In fact, this question cannot be answered solely on the basis of a reading of the CBDRRC principle as articulated in Article 3.1 UNFCCC and Article 2.2 PA. This is because principles are inherently abstract legal rules, which embody general standards against which to evaluate governmental decision-making but which leave considerable room for interpretation. Otherwise said, the CBDRRC principle is open-ended: while it may sway decision-makers in a particular direction, it does not specify particular actions.[54]

Scholars recognise this limitation, but have tended to sidestep the issue. For instance, Venzke and Vidigal argue in favour of adjusting the EU's CBAM in line with the CBDRRC principle, but posit that: '[this] requires an *objectively justifiable basis* [and] this is a challenge

[49] This reading is also supported by Principle 7 of the 'Rio Declaration on Environment and Development' (12 August 1992) UN Doc A/CONF.151/26 (Vol 1).
[50] Rajamani, 'Common But Differentiated Responsibilities' (n 46) 295.
[51] J Peel, 'Re-evaluating the Principle of Common But Differentiated Responsibilities in Transnational Climate Change Law' (2016) 5(2) Transnatl. Environ. Law 248-9. For a critique of this evolution, see A Rosencranz and K Jamwal, 'Common But Differentiated Responsibilities and Respective Capabilities: Did this Principle Ever Exist?' (2020) 50 Environ. Policy Law.
[52] Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement' (n 11) 507-8.
[53] C Voigt and F Ferreira, 'Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnatl. Environ. Law 294.
[54] Rajamani, 'Common But Differentiated Responsibilities' (n 46) 293.

insofar as the scope of the principle is in dispute … An exact formula would be less important than an articulation of principles and reasoned policy decisions as well as reviewable individual determinations'.[55] It is submitted that finding an 'objectively justifiable basis' for differentiation in CBAMs is, in fact, the most critical aspect of ensuring their compatibility with the CBDRRC principle, and this issue cannot simply be avoided by deferring to EU decision-making. Instead, such a basis for differentiation in CBAMs needs to be firmly grounded in the CBDRRC principle as operationalised in the mitigation provisions of the Paris Agreement. With this in mind, the next section proceeds to unpack the practical significance of the CBDRRC principle for the EU's CBAM and appraises the European Commission's stance on the compatibility issue.

C. Does the Proposed EU CBAM Respect the CBDRRC Principle?

While the CBDRRC principle receives marginal attention in the Commission's proposal, a number of arguments are put forward as to why the proposed CBAM is deemed to be consistent with that principle. First, the Commission posits the CBAM as an 'essential element' for the EU to live up to its leadership role in global climate governance, by 'addressing the risks of carbon leakage as a result of the increased Union climate ambition'.[56] To the extent that the prospect of carbon leakage is genuine,[57] it is true that the CBDRRC principle places the EU in a dilemma. On the one hand, the EU is called upon to increase its own mitigation efforts (*in casu*, by phasing-out ETS free allowances), but it is hard to see why and how the EU should lead in this manner if it would simply result in a shifting of carbon emissions abroad. This would not only compromise the effectiveness of the EU's mitigation policies, but may also jeopardise the achievement of the multilaterally-agreed temperature targets set in the Paris Agreement.[58] On the other hand, the EU should respect that not all countries are to contribute in equal measure to the common goal of mitigating climate change, in view of their differentiated responsibilities/capabilities.

In the Commission's view, this can be ensured *without* any form of differentiation in the CBAM since it has been 'designed in such a manner that it does not directly depend on the *overall level* of ambition of a country'.[59] This is partly correct, if we consider emission reduction targets as the most obvious quantitative indicator of each Party's overall level of climate ambition under the Paris Agreement. In this regard, the EU's emission reduction target is economy-wide,[60] whereas its CBAM would only apply to selected sectors and only insofar as the foreign products are exported to the EU.[61] Hence, it is inaccurate to claim that the CBAM would harmonise emission reduction targets between the EU and the exporting countries through the backdoor.[62] But this should not mask the fact that, for *particular* sectors/products, the CBAM does seek to incentivise a reduction of carbon emissions in exporting countries, even if not in equal degree as the EU. Indeed, the Commission's Impact Assessment estimates 'a 1.0% emissions reduction in the EU and a 0.4% in the rest of the world in CBAM sectors by

[55] Venzke and Vidigal (n 10) 24.
[56] CBAM Proposal (n 3), Preamble, recital 9; CBAM Impact Assessment (n 26) 3-4.
[57] See further discussion on this point in section IV.B below.
[58] Art 2(1)(a) PA.
[59] CBAM Impact Assessment (n 26) 8 (emphasis added).
[60] See 'Update of the NDC for the European Union and its Member States' (17 December 2020) 7, available at: <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>.
[61] Note that, in these sectors, the ETS applies instead to all domestic production (whether domestically consumed or exported) and emissions also subject to an EU-wide cap that decreases every year through a linear reduction factor: ETS Directive (n 16) art 9.
[62] O'Brien (n 8) 1108; Eckersley (n 8) 377.

2030',[63] albeit it does not specify the impact on individual third countries.[64] So, the question is whether this emission-reduction effect of CBAMs erodes the burden-sharing arrangements established in the international climate change regime.

It certainly appears to be in tension with the CBDRRC principle as operationalised in the UNFCCC and its Kyoto Protocol.[65] Based on an understanding of the principle that relied almost exclusively on historical and then (in 1997) current responsibility, the Kyoto Protocol adopted a stringent 'binary' or 'bifurcated' approach to differentiation in mitigation efforts. In essence, it established legally-binding, quantified and economy-wide emission reduction targets for each developed country (i.e., those listed in Annex I UNFCCC),[66] while fully exempting developing countries (i.e., non-Annex I countries) from emission reduction obligations.[67] As per the UNFCCC preamble, this was in recognition that 'per capita emissions in developing countries are still relatively low', back in 1992, and that 'the share of global emissions originating in developing countries will grow to meet their social and development needs'.[68] In this normative context, the adoption of CBAMs would have clearly defied the Kyoto differentiation balance by encouraging developing countries to reduce (rather than increase) carbon emissions. As such, an exemption for developing countries was objectively justifiable to preserve their unrestricted right to use the remaining atmospheric space (or carbon budget) for their socio-economic development.

However, it is far from obvious that a blank CBAM-exemption for developing countries (or non-Annex I countries) can be equally reconciled with the CBDRRC principle as operationalised in the Paris Agreement, which no longer allocates an exclusive responsibility for reducing GHG emissions to developed countries (or Annex I countries). Instead, the Paris Agreement embraces a bounded self-differentiation model to mitigation commitments,[69] shifting away from the strict annex-based division of responsibilities/capabilities that underlined the Kyoto Protocol.[70] It imposes a binding obligation of conduct on each Party to 'prepare, communicate and maintain nationally determined contributions (NDCs) that it intends to achieve', coupled with a good-faith expectation that domestic measures will be implemented to achieve the objectives of such NDCs.[71] Insofar as each Party chooses its own contribution, it differentiates itself from every other country, leading to a spectrum of self-differentiated mitigation targets and implementation measures. But this self-differentiation is disciplined by strong normative expectations –albeit, not mandatory obligations– on

[63] CBAM Impact Assessment (n 26) Annex 3, 22.

[64] For estimation of emission-reduction effects on specific countries, see UNCTAD, 'A European Union Carbon Border Adjustment Mechanism: Implications for Developing Countries' (2021), 27-28, albeit this model assumes a greater product coverage and also an LDCs/SIDS exemption.

[65] For earlier contributions criticising this tension, see Eckersley (n 8) 380-2; Hertel (n 8) 668-9.

[66] Kyoto Protocol (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162, art 3 and Annex B. These are the members, as of 1992, of the Organization of Economic Co-operation and Development (OECD) and 'economies in transition', a total of 37 countries as the US did not ratify the Protocol and Canada withdrew in 2012.

[67] However, the non-Annex I bloc of over 150 States is extraordinarily diverse in terms of economic development, GHG emissions, technological and administrative capacity and vulnerability to climate change. This approach has proven excessively rigid as the Annexes have not been updated since 1992.

[68] UNFCCC, Preamble, recital 6.

[69] Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement' (n 11) 509, rightly noting that the 'Paris Agreement operationalises the CBDRRC principle not by tailoring commitments to categories of Parties as the UNFCCC and the Kyoto Protocol do, but by tailoring differentiation to the specificities of each of the Durban pillars—mitigation, adaptation, finance, technology, capacity-building and transparency'.

[70] This 'bifurcated' differentiation model became increasingly controversial over the years, see Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement' (n 11) 506-9; Voigt and Ferreira (n 53) 291-293.

[71] Paris Agreement, art 4(2) reads: 'Parties shall pursue domestic mitigation measures, *with the aim of achieving* the objectives of such contributions'. This does not amount to an obligation of result: see Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement' (n 11) 497-8.

'progression' and 'highest possible ambition' for each successive NDC, 'in light of different national circumstances'. While each Party is left to determine how its NDC reflects 'highest possible ambition', it is clear that all Parties are expected to undertake more ambitious mitigation action over time.[72]

Within this global mitigation trajectory, the Paris Agreement still assigns a leadership role to developed countries by undertaking economy-wide absolute reduction targets, but 'developing countries should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.'[73] In fact, this expectation has been met in practice with several developing countries committing to economy-wide reduction or limitation targets, including the BASIC countries.[74] This direction of travel towards more ambitious climate action by all Parties reflects the nature of climate change as 'common concern' problem, requiring effective participation by all major contributors.[75] At present, and departing from the assumption underlying the Kyoto burden-sharing arrangements, non-Annex I countries include some of the world's largest carbon emitters even in per capita terms.[76] For this reason, in order to achieve the temperature goals set out in the Paris Agreement,[77] all Parties are committed to contribute to the global peaking of GHG emissions 'as soon as possible' and to undertake rapid reductions thereafter, so as to achieve a balance of GHG emissions by sources and removals by sinks by 2050.[78] In this regard, the latest IPCC Sixth Assessment Report warns that the aggregate emission reductions implied by NDCs to 2030 are far behind what is necessary to meet the 1.5°C, or even 2°C, temperature goals and that 'limiting warming to either level implies *accelerated mitigation actions at all scales'*.[79] This applies, in particular, to G20 countries (including some developing countries affected by the EU's CBAM), since they are collectively responsible for more than three-quarters of global GHG emissions.[80]

It is hard to see how in this Paris legal framework, which sets firm expectations on all Parties to ratchet up mitigation action and move towards low-emission production strategies,[81] one could still justify exempting *all* non-Annex I countries from CBAMs based on CBDRRC grounds. Put simply, we are no longer in the Kyoto scenario were CBAMs are out of step with the CBDRRC principle because developing countries should not be expected to reduce GHG emissions at all.

There is, however, an important qualification to this argument and this concerns the specific situation of LDCs and SIDS, which is acknowledged in the mitigation and other

[72] See further, Voigt and Ferreira (n 53) 295-297; Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement' (n 11) 500-1.
[73] Art 4.3 PA.
[74] For instance, in its second update NDC (April 2022), Brazil commits to an absolute economy-wide reduction in emissions by 37 per cent below 2005 levels in 2025, and by 50 per cent below 2005 levels in 2030. China, in its first updated NDC (October 2021), commits to emission-peaking before 2030, an emission-reduction target of 65 per cent below 2005 levels by 2030 and achieving carbon neutrality before 2060. India, in its first NDC (October 2016, not updated), commits reduce the emission intensity of its GDP by 33 to 35 per cent from 2005 levels by 2030. South Africa, in its updated NDC (September 2021), commits to economy-wide emission limitation targets for 2025 and 2030. All NDCs are available at: <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>.
[75] Voigt and Ferreira (n 53) 287.
[76] Our World in Data, 'Where in the world do people emit the most CO2' (4 October 2019) <https://ourworldindata.org/per-capita-co2>.
[77] Art 2 PA.
[78] Art 4.1 PA.
[79] IPCC Report 2022 (n 2) chapter 1, 4.
[80] UNDP, 'The State of Climate Ambition – Global Outlook Report 2021' (October 2021) 14 [UNDP Report 2021]; see also L Rajamani et al, 'National Fair Shares in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law' (2021) 21(8) Clim. Policy 999.
[81] Art 4.19 PA.

provisions of the Paris Agreement.[82] Of most relevance is Article 4.6 PA, which provides that these countries '*may* prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances'.[83] This provision follows those applicable to all Parties seen above, and its permissive character is clearly significant. It differentiates LDCs/SIDS from all other Parties (including other developing countries), in that these countries can –but should *not* be expected to– undertake emission-reduction action. This special treatment of LDCs/SIDs reflects the fact that they bear the least (historical and current) responsibility for the climate emergency (i.e., presently accounting for only seven per cent of global GHG emissions) and have the least capacity to adapt to new climate conditions,[84] thus being the most vulnerable countries to the adverse effects of climate change.[85] Insofar as the EU's CBAM would encourage (or arguably, pressure) producers in LDCs/SIDS to lower carbon emissions, it is not in line with the CBRDDC principle as operationalised in Article 4.6 PA. Therefore, this provision is a solid basis for justifying an LDCs/SIDS exemption from the CBAM, as has been called for by the UN Conference on Trade and Development (UNCTAD) and other commentators.[86]

The Commission, however, has dismissed from the start the possibility of an LDCs/SIDS exemption on grounds that it would run counter the overarching objective of the CBAM by encouraging a growth of emissions in these countries and be counterproductive in potentially locking them into high-carbon development paths.[87] The first concern is an overstatement, given that the risk of carbon leakage associated with LDCs/SIDS has been estimated to be negligible,[88] while the second argument is not entirely misplaced. However, as seen above, the Paris differentiation balance does give LDCs/SIDS full discretion ('may') as to whether they embrace the decarbonisation of energy-intensive industries in light of their special circumstances –and ultimately, this national choice ought to be respected by the EU when designing the CBAM in spirit with the CBDRRC principle.

A second argument advanced by the Commission as to the CBAM's compatibility with the CBDRRC principle is that 'it does not directly depend … on the policy choices made by a country'.[89] This statement is simply incorrect given that, as we have seen, the CBAM takes into consideration 'explicit' carbon pricing policies in trading partners, through either an exemption for those countries joining the 'EU-led carbon club' or a 'CBAM discount' for any carbon price paid in the country of production.[90] By contrast, it fails to account for the 'implicit' carbon prices associated with non-price regulatory approaches to reducing carbon emissions (e.g., energy efficiency or emission performance standards) adopted in trading partners, whose exports of targeted products would be subject to the full ETS-determined carbon price. In any event, the key point is that the proposed CBAM would effectively equalise the *costs* (rather than overall levels) of lowering GHG emissions between EU and foreign producers through the imposition of an EU-equivalent carbon price on the products concerned. In other words, one thing is to expect developing countries to reduce carbon emissions (which is Paris-compatible), and another to expect them to bear equivalent carbon costs as the EU. This

[82] See also arts 9(4), 9(9), 11(1) and 13(3) PA.
[83] Emphasis added.
[84] UNDP Report 2021 (n 80) 13.
[85] This situation has been criticized by the UN Special Rapporteur on Extreme Poverty and Human Rights as amounting to a 'climate apartheid': https://www.ohchr.org/en/press-releases/2019/06/un-expert-condemns-failure-address-impact-climate-change-poverty?LangID=E&NewsID=24735.
[86] See Mehling et al (n 1) 472 and 475; UNCTAD (n 64) 7 and 9; S Lowe, 'The EU's Carbon Border Adjustment Mechanism: How to Make It Work for Developing Countries?' (April 2021).
[87] CBAM Impact Assessment (n 26) 30.
[88] Mehling et al (n 1) 475; UNCTAD (n 64) 18.
[89] CBAM Impact Assessment (n 26) 8.
[90] See Section II.

undercuts the substantial flexibility provided in the Paris Agreement with regards to the choice of means to pursue decarbonisation, whereby Parties are free to adopt (or not) carbon pricing instruments when implementing their NDCs. Most importantly, heterogeneity in carbon prices and other mitigation policies across jurisdictions remains acceptable so as long as it reflects each Party's 'highest level of ambition' in light of its national circumstances.[91] Ultimately, this is a matter of national determination,[92] as the key oversight mechanism established under the Paris Agreement (the so-called 'Global Stocktake') is only authorised to assess collective progress towards meeting the global warming targets, thereby insulating individual Parties from any assessment as to the adequacy of their mitigation action under NDCs.[93]

But even if we accept the Commission's position that a uniform carbon price is necessary to enable the EU to increase its own climate ambition and avoid carbon leakage, [94] the EU should support developing countries in meeting the burden of complying with the CBAM for their exports of the targeted products, both in terms of administrative requirements and increasing carbon prices.[95] The Commission itself acknowledges that 'in the absence of compensating mechanisms, LDCs could argue that the introduction of a CBAM will be a disproportionate burden for them and […] conflict with the [CBDRRC] principle'.[96] This is a pertinent observation, but there is no obvious reason why it is should only apply to LDCs. It can be argued that the CBAM would equally impose a disproportionate burden also on SIDS and other developing countries, insofar as it is designed to equalise carbon prices to an EU-equivalent level for the products concerned. In this regard, Article 4.5 PA clearly requires ('shall') developed countries to provide financial support to developing countries to assist their mitigation efforts, 'recognizing that *enhanced support* for developing country Parties will allow for *higher ambition in their actions*'.[97] The Paris differentiation balance thus reflects a critical understanding of the relationship between greater overall ambition with developing countries assuming responsibility for lowering carbon emissions, on the one hand, and increased financial resources by developed countries to support such mitigation efforts, on the other hand.[98]

From this perspective, the Commission's CBAM proposal is deeply disappointing. It contains only a preambular provision declaring that the EU 'stands ready to work with low and middle-income countries towards the decarbonisation of their manufacturing industries [and] should support less developed countries with the necessary *technical* assistance in order to facilitate their adaptation to the new [CBAM] obligations',[99] without any firm commitment on financial assistance. Furthermore, the proposed regulation is strikingly silent on the use of revenue generated through the sale of CBAM certificates, which is estimated to reach above EUR 2.1 billion by 2030.[100] The Explanatory Memorandum indicates that the plan is to allocate most of these additional resources to the Union budget, including to finance its COVID-recovery instrument 'Next Generation EU'.[101] The suggestion that revenue earned from pricing

[91] Arts 4(2)-(3) PA; Pirlot (n 29) 33.
[92] It thus practically unfeasible to apply this criterion as a basis for CBAM differentiation, as suggested by Pirlot (n 29) 45.
[93] Art 14 PA. This is complemented by a transparency framework (art 13) and a compliance mechanism that is facilitative, non-adversarial and non-punitive in character (art 15). For an overview of this oversight system, see Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement' (n 11) 502-5.
[94] CBAM Proposal (n 3), Preamble, recital 13.
[95] The EU's carbon price was about €80 per tonne of CO2 in December 2021 and is expected to rise sharply under the revised ETS.
[96] CBAM Impact Assessment (n 26) 30.
[97] Art 4.5 PA, read in conjunction with art 9 PA.
[98] Rajamani 'Ambition and Differentiation in the 2015 Paris Agreement' (n 11) 494.
[99] CBAM Proposal (n 3), Preamble, recital 55.
[100] Ibid 47.
[101] CBAM Proposal (n 3), Explanatory Memorandum, 10-11.

emissions produced in developing countries would be used to subsidise a 'greener' recovery plan in the EU fundamentally subverts the Paris burden-sharing arrangements and ought to be seriously reconsidered. Instead, such revenue should be recycled back to the developing countries concerned to support their own decarbonisation efforts.[102] The EP has gone some way in this direction by proposing a new article on the use of CBAM-generated revenue. It provides for increased EU funding to support climate mitigation efforts in LDCs through the Neighbourhood, Development and International Cooperation (NDIC) Instrument,[103] in an amount that 'should correspond at least to the level of revenues generated by the sale of CBAM certificates'.[104] However, the EP fails to explain why such EU support should be limited to LDCs and not extended to other developing countries. For the reasons previously mentioned, this would not respect the Paris differentiation balance as reflected in Article 4.5 PA.

To sum up, contrary to what the Commission claims, the EU's CBAM as presently designed is *not* compatible with the CBDRRC principle as given effect in the mitigation provisions of the Paris Agreement. To be brought in spirit with this principle, two adjustments need to be made: (i) an LDCs/SIDS exemption (based on Article 4.6 PA) and a revenue-recycling provision applicable to imports originating in developing countries (based on Article 4.5 PA).

IV. CBDRRC-ADJUSTED CBAM AND WTO LAW

A. CBDRRC-based Differentiation and MFN Treatment Obligation

In considering the WTO-compatibility of the EU's CBAM, a threshold question is how this measure should be properly characterised under WTO law, which is essential to determine the applicable GATT obligations. Scholars have extensively discussed whether CBAMs should be viewed as a 'border' or 'internal' measure, but it is not the place here to contribute to this academic debate, nor to offer a comprehensive analysis of the WTO-consistency of the EU's CBAM.[105] Rather, this article is confined to assessing whether the two forms of country differentiation that are necessary to bring the CBAM in spirit with the CBDRRC principle, as exposed in the previous section, are permissible under WTO law. For this purpose, the key provision is Article I GATT laying down the MFN treatment obligation, which is deemed a pillar of the multilateral trading system[106] and applies to both border and internal measures affecting international trade in goods –and hence, to the CBAM no matter how it is characterised. Conversely, it is less likely that the provision of climate finance to developing countries through the NDIC Instrument would itself fall within the scope of Article I GATT, even if part of this financial support comes from CBAM-generated revenue.[107]

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[102] For a similar view, see Mehling et al (n 1) 478-479; Pirlot (n 29) 45; UNCTAD (n 64) 24.

[103] Regulation EU 2021/947 of the European Parliament and of Council establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe [2021] L209/1, whereby climate finance may be challenged through geographic programmes or the 'Global Challenges' thematic programme (with an indicative allocation of €793 million to climate change and other environmental matters for the 2021-2027 period).

[104] EP CBAM Position (n 4) 56-57 (article 24(a)). The EU Council has not yet taken a position on the use of CBAM-generated revenue.

[105] For a more detailed analysis, see academic contributions cited in n 7.

[106] Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted on 20 April 2004, para 101 [*EC – Tariff Preferences (2004)*].

[107] Article I GATT covers customs duties and charges imposed on or in connection with importation or exportation, the method of levying such duties and charges, all rules and formalities in connection with importation and exportation, internal taxation and regulations. While there is no case law on the matter, it would seem a stretch to interpret climate-related financial assistance as a 'rule or formality in connection with importation', even if such support may contribute to less carbon-intensive imports from beneficiary countries into the EU.

Essentially, Article I GATT prohibits discrimination between WTO members by requiring that any trade advantage that is accorded to any product from any country (or destined for any country) is also accorded immediately and unconditionally to like (or competitive) products from (or destined for) all WTO Members. There is no doubt that inserting an LDCs/SIDS exemption into the EU's CBAM will come in direct tension with this core GATT obligation. That is, it would offer a trade advantage (i.e., exempted from the obligation to purchase CBAM certificates/pay an EU-equivalent carbon price) to products originating from LDCs/SIDS (say, aluminium from Mozambique) that is not accorded immediately and unconditionally to like products originating in other WTO members (say, aluminium from Russia or China). In fact, it would be a clear case of *de jure* discrimination in contravention of Article I GATT. This result is not surprising given the fundamental purpose of the MFN obligation is to preserve the equality of competitive opportunities for like products imported from all WTO members,[108] regardless of the different conditions that may prevail in these countries. Hence, for the purpose of the MFN clause, the only basis for comparing WTO members and determining they should receive the same trade advantage is the 'likeness' of their products – in our case, whether they export CBAM-covered goods that are in a competitive relationship in the EU market.[109] In this respect, it is remarkably distinct from the non-discrimination obligation in the chapeau of Article XX GATT which, as discussed below, requires equal treatment of countries in like conditions.[110]

But the same reasoning applies to the EU-led carbon club exemption, which already exists in the EU's CBAM.[111] Furthermore, most commentators have argued that, even leaving aside origin-based exemptions, the measure is likely to run afoul of Articles I (and possibly III) GATT on *de facto* discrimination grounds.[112] Hence, with or without the LDCs/SIDS exemption, the EU's CBAM is most certainly in need of justification under the GATT general exceptions clause, to which the next section turns.

B. Is CBDRRC-based Differentiation Permissible under Article XX GATT?

1. Provisional Justification under Article XX(g) GATT

As it is well settled in WTO case law, Article XX GATT lays down a conditional exception for a measure that is found inconsistent with the substantive obligations established in the GATT, provided that: (i) it is provisionally justified under one of the policy grounds listed in paragraphs (a) to (j); and (ii) it meets the requirements of the chapeau.[113] With regards to the first step, Article XX(g) GATT is the most promising course of action given that it is most often invoked to justify trade-related environmental measures.[114] This provision requires that

[108] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, adopted 18 June 2014, paras 5.82 and 5.87 [*EC – Seal Products (2014)*].
[109] On this market-based interpretation of likeness, see P van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (5th edn, CUP 2022) 345-9, 392-400 and 420-428.
[110] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 29 April 1996, 23 [*(US – Gasoline (1996)*]; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, WT/DS58/AB/R, adopted 6 November 1998, para 150 [*(US – Shrimp (1998)*]; *EC – Seal Products (2014)* (n 107) para 5.298; and Section IV.B.2.a.
[111] CBAM Impact Assessment (n 26), Annex 10, 100-101 indicating that Norway and Switzerland (and to a lesser extent Iceland) are among the main exporters to the EU in CBAM-covered sectors.
[112] Dias, Seeuws and Nosowicz (n 7) 16-19; Venzke and Vidigal (n 10) 9-19; Sato (n 7) 393-9.
[113] Appellate Body Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, adopted 22 November 2017, paras 5.94-5.97 [*Indonesia – Import Licensing Regimes (2017)*].
[114] Alternatively, XX(b) on measures 'necessary to protect human, animal or plant life and health' could also be applicable, but this is subject to a stricter necessity test.

the measure at issue be 'related to the conservation of exhaustible natural resources' and is 'made effective in conjunction with restrictions on domestic production and consumption'. With regards to the latter, the EU's CBAM is likely to meet this even-handedness requirement,[115] given that it operates together with the EU's ETS and other restrictions on domestic carbon-intensive production.[116]

As to the first condition, it is highly plausible that a stable climate (i.e., a global atmosphere with a safe level of GHG concentrations)[117] is deemed an 'exhaustible natural resource' within the meaning of Article XX(g) GATT, based on the dynamic and flexible interpretation of this term in WTO jurisprudence. Notably, in *US – Gasoline (1996)*, clean air was found to be an exhaustible natural resource and, in *US—Shrimp (1998)*, the Appellate Body (AB) emphasised the importance of interpreting this concept in an evolutionary manner, 'in light of the contemporary concerns of the community of nations about the protection and conservation of the environment', with reference to relevant international instruments.[118] Following the wealth of scientific evidence that has emerged over the past decades on the urgency of tackling the climate crisis, and its political endorsement within UNFCCC processes and other multilateral fora, it seems difficult to dispute that a stable climate falls within the purview of Article XX(g) GATT. While the question of whether this provision is subject to an implicit jurisdictional limitation remains unsettled,[119] it is unlikely to arise in the case of CBAMs. This is because 'the change in the Earth's climate and its adverse effects' is explicitly recognised as a 'common concern of humankind' in the UNFCCC,[120] with which all WTO members can claim to have a 'sufficient nexus'.[121]

Therefore, the key issue under the Article XX(g) GATT analysis is the extent to which the EU's CBAM is 'closely and genuinely related to'[122] the conservation of a global atmosphere with low GHG density. This requirement is not very demanding and, unlike the necessity test under other subparagraphs of Article XX GATT, does not require the CBAM to be scrutinised for the extent to which it contributes to the climate conservation objective, nor to be balanced against less trade-restrictive alternative measures.[123] It just needs to be shown that the CBAM is not 'disproportionally wide in reach and scope' in relation to the climate conservation objective, and that the means-to-end relationship is a 'close and real one'.[124] This may raise questions about how real the risk of carbon leakage, which the CBAM aims to address, actually is in the first place. In this regard, the Commission's Impact Assessment acknowledges that '[t]he evidence of the existence of carbon leakage is not always conclusive

[115] *US – Gasoline (1996)* (n 110) 21, whereby even-handedness does not require imported and domestic products to be subject to identical treatment. See also, Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/DS432/DS433/AB/R, adopted 26 March 2014, paras 5.132 and 5.316 [*China – Rare Earths (2014)*].

[116] Until ETS free allowances are fully phased out, the number of CBAM certificates to be bought by importers would need to be adjusted to reflect any free allocation of emission permits to domestic producers under the ETS: CBAM Proposal (n 3) art 31.

[117] UNFCCC, art 2.

[118] *US – Shrimp (1998)* (n 110) paras 129-132; and for further examination, G. Marín Durán, 'Exhaustible Natural Resources and Article XX(g)' in P Delimatsis and L Reins (eds), *Trade and Environmental Law* (Edward Elgar 2021).

[119] For a recent contribution on this point, see N Dobson, 'The EU's Conditioning of the "Extraterritorial" Carbon Footprint: A Call for an Integrated Approach in the Trade Law Discourse' (2018) 27(1) RECIEL 78–88.

[120] UNFCCC, Preamble, recital 1.

[121] *US – Shrimp (1998)* (n 110) para 133, where the AB implied a 'sufficient nexus' was needed between the regulating State and the targeted resources for that State to exercise jurisdiction (*in casu*, the endangered sea turtles being highly migratory and known to pass in and out of US waters), albeit limiting this finding to the specific circumstances of this case.

[122] Ibid, para 136.

[123] On the necessity test under Article XX(b) GATT, see van den Bossche and Zdouc (n 108) 608-13.

[124] *US – Shrimp (1998)* (n 110) para 141; *China – Rare Earths (2014)* (n 115) para 5.90.

or suggests that it is difficult to isolate carbon leakage as a single factor in [firms'] relocation decisions'.[125] In fact, it is mainly *ex-ante* theoretical analyses that point to a substantial risk of carbon leakage in the absence of protection mechanisms (such as ETS free allowances), particularly for emission-intensive and trade-exposed sectors, whereas *ex-post* studies often find that carbon leakage is occurring at a much lower rate. This matter has also received considerable attention in the recent IPCC Sixth Assessment Report, which confirms the need for further research on the 'existence and extent of carbon leakage' and on the implications of the CBAMs and other instruments designed to address it.[126]

While shedding further light on these issues is certainly important, it does not have a direct bearing on whether a CBDRRC-adjusted CBAM can be WTO-compatible, which is the main concern here.[127] Thus, assuming that the EU's CBAM can meet the thresholds of Article XX(g) GATT, the next section turns to the chapeau which is of most relevance for appraising the permissibility of CBDRRC-based differentiation under WTO law.

2. CBDRRC Differentiation and Article XX-chapeau

a) Discrimination between countries in same conditions

The introductory clause of Article XX GATT sets out a number of horizontal requirements for measures provisionally justified under one of its paragraphs. By its express terms, the chapeau only prohibits discrimination between countries 'where the same conditions prevail' that is 'arbitrary or unjustifiable'.[128] As a matter of logic, the first step of the analysis should be to determine whether the differential treatment at issue occurs between countries in the same conditions, and only where this is the case, whether the resulting discrimination is arbitrary and unjustifiable.[129] While the AB confirmed this reading of the chapeau in *EC – Seal Products (2014)*,[130] WTO judicial bodies have often skipped the first step and focused on the arbitrary/unjustifiable discrimination test. In doing so, they have simply equated any form of differential treatment between countries with discrimination under the chapeau, without an appropriate enquiry into whether the countries concerned were in fact in the same conditions. This interpretative approach cannot be right, because it contradicts the very text of Article XX GATT and overlooks the fact that treating countries in dissimilar conditions differently is *not* discriminatory under the chapeau –and hence, it is permissible without need for further justification. In such cases of different conditions, the arbitrary/unjustifiable discrimination limb of the chapeau would not be applicable.[131] For this reason, a principled approach is necessary to decide the threshold issue of *which* conditions are relevant to the comparison of countries under the chapeau and *when* they can be considered to be the same or sufficiently different.[132]

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[125] CBAM Impact Assessment (n 26) 7 and Annex 11.
[126] IPCC Report 2022 (n 2) chapter 13, 84.
[127] For further discussion, see amongst others, Kulovesi (n 31) 420-1; Mehling et al (n 1) 444-6; Sato (n 7) 386-390.
[128] The text of the chapeau includes an additional condition, 'disguised restriction on international trade', but this has received little attention in WTO case law to date and it is not relevant to the present analysis: for a discussion, see L Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109(1) AJIL 123-5.
[129] This order of analysis is followed under Article 2.3 of the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures, which contains nearly identical language: Appellate Body Report, *India – Measures Concerning Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015, para 5.261.
[130] *EC – Seal Products (2014)* (n 107) para 5.303.
[131] Bartels (n 128) 92 and 112.
[132] S Gaines, 'The WTO's Reading of GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures' (2001) 22(4) U. Pa. J. Int'l Econ. L. 779.

And yet, these questions remain largely unexplored in WTO jurisprudence and, to some extent, also in the scholarship.[133] In two landmark trade-and-environment disputes, the AB simply assumed that the prevailing conditions were the same in *US – Gasoline (1996)*,[134] while in *US – Shrimp (1998)* that these may instead be different,[135] without explaining in either case the rationale behind such assumptions. The latter concerned an import prohibition on shrimp products from non-certified countries because they had not used a certain fishing net prescribed by the US (i.e., approved Turtle Excluder Devices (TEDs)) when catching shrimp. The US successfully argued that this GATT Article XI-inconsistent import ban was provisionally justified under Article XX(g) GATT as related to the conservation of sea turtles, all species of which were listed as threatened with extinction in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[136] Under the chapeau, however, the AB faulted the measure for discriminating unjustifiably because it conditioned market access on the adoption of 'essentially the same regulatory programme' by exporting countries as that applied to US shrimp trawl vessels, based on a 'single, rigid and unbending' standard (i.e., use of TEDs), without allowing for 'any enquiry into the appropriateness of the regulatory programme for the conditions prevailing in those countries'.[137]

This statement could be open to various interpretations but,[138] in the subsequent compliance proceedings *US – Shrimp (2001)*, the AB clarified that the US was only required to recognise third-country regulatory programmes that are 'comparable in effectiveness' –*in casu*, TED-comparable measures for the conservation of the endangered sea turtles. This would provide sufficient latitude to exporting countries in designing regulatory programmes that are suitable to their specific conditions in order to achieve the level of environmental protection sought by the importing country.[139] Therefore, this regulatory flexibility standard does not demand the regulating WTO member to compromise the achievement of its environmental objective to any extent in order to accommodate prevailing conditions in different countries.[140] It is just about allowing flexibility in terms of the means to achieve the same environmental outcome (*in casu*, no killing or harming of endangered sea turtles).

As an effect-based equivalence requirement, it could be relied upon to challenge the EU-led carbon club exemption currently found in the CBAM, whereby the EU could be seen as using its market power to compel other WTO members into adopting essentially the same carbon pricing policies. Even if there are important differences between the two cases, including in terms of the coercive effect of the measures at issue,[141] it could still be argued that

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[133] Among the few academic contributions, see E Lydgate, 'Do the Same Conditions Ever Prevail? Globalising National Regulation for International Trade' (2016) 50(6) JWT; and J Qin, 'Defining Nondiscrimination under the Law of the World Trade Organization' (2005) 23(2) BU Int'l LJ.

[134] *US – Gasoline (1996)* (n 110) 29; for discussion, see Qin (n 133) 253-255.

[135] *US – Shrimp (1998)* (n 110) paras 164-5.

[136] Ibid, para 132.

[137] Ibid, paras 163-5 and 177.

[138] Some scholars have argued that the AB implied the chapeau prohibits discrimination even when the conditions prevailing in different countries are *not* the same. In cases of dissimilar conditions between countries, the chapeau calls for differential treatment: see e.g., Hertel (n 8) 676; Low, Marceau and Reinaud (n 28) 515; Venzke and Vidigal (n 10) 26. However, this interpretation cannot be valid as it violates the text of the chapeau: Bartels (n 128) 115. It is more appropriate to read the chapeau as permitting (rather than mandating) differential treatment when the countries being compare are differently-situated.

[139] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5 – Malaysia)*, WT/DS58/AB/RW, adopted 21 November 2001, paras 144-8 [*US – Shrimp (2001)*].

[140] R Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 Columbia J. Environ. Law 509-510.

[141] The CBAM is not as trade-restrictive as the US import ban: see *US – Shrimp (1998)* (n 110) para 164, referring to the US measure as an 'economic embargo'.

the EU should consider non-price regulatory instruments that may be comparable in environmental effectiveness to its ETS as a basis for exempting third countries from the CBAM. In this scenario, the CBAM would not serve its environmental purpose since the risk of carbon leakage would hardly materialised in countries whose emission-reduction policies are as stringent as the EU. Recognising equivalence of non-price climate regulations would further support the bottom-up approach to implementation under the Paris Agreement discussed earlier, which gives Parties ample flexibility with regards to the mitigation measures they adopt to meet their NDCs.[142] However, it also raises the complex question of how to compare different emission-reduction policies and who should ultimately determine their effect-based equivalence. As the IPCC has recently noted, 'comparing the stringency of [mitigation] policies over time or across jurisdictions is very challenging and there is no single widely accepted metric or methodology'.[143] In fact, this comparability assessment is likely to be more complex in the climate change context when compared to *US – Shrimp (1998)*, where the possibility of comparing sea turtle conservation programmes was envisaged in the challenged US scheme but inflexibly applied.[144] But the possibility cannot be foreclosed and, as suggested by the EP, the CBAM proposal should be amended for the EU to engage with trading partners on comparability assessments of price and non-price regulatory approaches.[145]

That being said, the regulatory flexibility standard as applied in *US – Shrimp (2001)* is not very helpful to CBDRRC-based differentiation in the CBAM for two reasons. First, the two underlying multilateral environmental agreements (MEAs) significantly differ in relation to the CBDRRC principle. In fact, the CITES at issue in the *US – Shrimp* cases does not incorporate this principle and imposes the same obligations on all Parties to protect endangered species (including all recognized species of sea turtles), with no differentiation in light of varying responsibilities/capabilities.[146] By contrast, as we have seen, the Paris Agreement does not expect certain countries to make comparable efforts in reducing carbon emissions, and notably LDCs and SIDS, while it entitles other developing countries to be supported in their mitigation action. This demands differential treatment of the countries concerned in the design of the CBAM, and not simply an evaluation of policy equivalence in reducing GHG emissions. Second, in the *US – Shrimp* cases, the AB never specified what conditions prevailing in the US and complainant countries were considered to be different.[147]

In *EC – Seal Products (2014)*, the AB offered some more guidance on how to identify the conditions that are relevant to the comparison of countries under the chapeau, which may be relied upon by future disputing parties. Drawing from dictionary definitions, it first stated that the term conditions has a number of meanings and encompasses a number of circumstances facing a country.[148] This does not help much and it needs to be circumscribed. Otherwise, the vast array of differences in socio-economic, environmental and other circumstances across WTO members could open the floodgates to claims that conditions are not same and the arbitrary/unjustifiable discrimination limb of the chapeau is not applicable. The AB somewhat

[142] See Section 3.C.
[143] IPCC report 2022 (n 2) chapter 13, 40. See also, Low, Marceau and Reinaud (n 28) 504-6; G Leonelli, 'Carbon Border Measures, Environmental Effectiveness and WTO Compatibility: Is There a Way Forward for the Steel and Aluminium Carbon Club?' (2022) WTR 4-6 and 8-10.
[144] *US – Shrimp (1998)* (n 110) paras 161-3.
[145] EP CBAM Position (n 4) 20-1 (amendment 39).
[146] See in particular, CITES (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243, articles II-V; and *US – Shrimp (1998)* (n 110) paras 25 and 132.
[147] Ibid, para 164; *US – Shrimp (2001)* (n 139) paras 145-8, where the particular conditions of relevance seemed to be shrimp fishing practices and prevalence of endangered sea turtles in countries' waters. See further Lydgate (n 133) 979-981; Qin (n 133) 259-262.
[148] *EC – Seal Products (2014)* (n 107) para 5.299; reaffirmed in *Indonesia – Import Licensing Regimes (2017)* (n 113) para 5.99.

delimited the range of prevailing conditions that are relevant under the chapeau analysis by referring to 'the subparagraphs of Article XX, and in particular [that] under which the measure has been provisionally justified, [as providing] pertinent context.'[149] In other words, the relevant conditions for the purpose of the chapeau are the ones that 'relate to the particular policy objective of the measure under the applicable subparagraph of Article XX' and, as such, will vary on a case-by-case basis. If the respondent considers such conditions are not 'relevantly the same' between the countries concerned in a particular case, it has the burden of proving that claim.[150]

This approach makes good sense as there would be no point to compare countries on the basis of factors that have nothing to do with the policy objective for which the challenged trade measure was instituted.[151] In the CBAM context, similarities or differences in conditions between the countries involved should therefore be directly related to the goal of conserving a stable climate, and it is irrelevant whether such countries differ in terms of other factors (e.g., moral or religious values). It seems clear that countries' respective responsibilities/capabilities for climate change mitigation are related to the CBAM's conservation objective, and it would be odd to suggest otherwise when the CBDRRC principle has underpinned the UNFCCC regime from the very start. The AB did not predetermine a set of all permissible conditions under the chapeau discrimination analysis as this would be unfeasible, and indeed undesirable, given the broad range of policy objectives (and hence, potentially relevant conditions) reflected in the subparagraphs of Article XX GATT.[152] Accordingly, it did not exclude the possibility that differentiated responsibilities/capabilities towards global environmental challenges could be a relevant condition for comparing countries under the chapeau, provided a relationship to the measure's objective can be shown. Contextual support for this stance is found in the preamble of the WTO Agreement,[153] which provides that members should seek 'to protect and preserve the environment … in a manner consistent with their respective needs and concerns at different levels of economic development'.

But even if differentiated responsibilities/capabilities for climate conservation can be accepted as a relevant condition in the case of CBAMs, the assessment of whether these are sufficiently similar or different across countries needs to be based on objective criteria, rather than a mere assertion to that effect by the regulating WTO member. In fact, the AB took a similar position in the *EC – Tariff Preferences (2004)* case, which concerned the distinction between discrimination and lawful differentiation in the granting of tariff preferences under the GATT Enabling Clause.[154] It held that differential treatment was permissible insofar as it responds to the special needs of particular developing countries whose existence is based on an 'objective standard', including 'broad-based recognition set out in the WTO Agreement or in international instruments adopted by international organisations'.[155] It is also noteworthy that, in *US – Shrimp (1998)*, the AB showed willingness to use MEAs as factual evidence in

[149] *EC – Seal Products (2014)* (n 107) para 5.300.
[150] Ibid, para 5.301. This may be a procedural reason why the 'same conditions' limb of the chapeau has received limited attention in WTO case law to date: see Qin (n 133) 259-260.
[151] Gaines (n 132) 779-781.
[152] Qin (n 133) 235. In this sense, Article XX GATT differs from the narrower Article 2.3 SPS Agreement, where 'conditions' are usually understood in terms of the SPS risks that the measure is designed to address (e.g., country disease status, geographical/environmental conditions, effectiveness of sanitary controls).
[153] *US – Shrimp (1998)* (n 110) paras 153-5.
[154] GATT Contracting Parties, 'Decision of 28 November of 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (L/4903). It is unlikely to be applicable to CBAMs, since they do not qualify as 'instruments multilaterally negotiated under the auspices of the GATT' (paragraph b).
[155] *EC – Tariff Preferences (2004)* (n 105) para 163.

the application of the chapeau requirements.[156]

Applying this approach to the CBAM, it is evident that the CBDRRC principle as given effect in the Paris mitigation provisions is the most broadly-recognised basis to establish whether the countries involved are similarly-situated in terms of their responsibilities/capabilities for climate conservation. A concern here is that relying on the Paris Agreement is unworkable as it may open the way to claims that such conditions are *never* the same, and hence that any form of differentiation for whichever country in the CBAM is permissible under the chapeau. As we have seen, it is true that the Paris differentiation model embraces the idea that each country's responsibility/capability is unique and different from every other country. But such claims can be restrained because what matters under the chapeau is the *similarity* of conditions, and not whether these are identical between any two countries since the latter would render the test largely ineffective in practice.[157]

From this standpoint, Article 4.6 PA gives the EU a firm basis to argue that responsibility/capability conditions in LDCs and SIDS are relevantly different when compared to other countries affected by the CBAM, and hence that the LDCs/SIDS exemption is permissible under the chapeau. To recall, LDCs/SIDS are the only group of countries not expected to undertake emission reduction commitments under the Paris Agreement, and no other country can claim to be similarly-situated in this regard. As to differentiation in favour of other developing countries in the form of EU financial assistance, this may be challenged under the chapeau even if not previously found inconsistent with the MFN treatment obligation.[158] If it is, a similar line of defence would be available to the EU by relying on Article 4.5 PA, which only entitles developing countries to be financially supported in their mitigation efforts, and it would be unfounded to claim that developed countries affected by the CBAM are in this same condition.

To recap, introducing the two forms of differentiation in a CBDRRC-adjusted CBAM recommended in Section III.C should be permissible under WTO law, as these do *not* amount to discrimination between countries that are similarly-situated in terms of their responsibilities/capabilities for climate conservation. Importantly, this assessment of similarity in responsibility/capability conditions should be based on the CBDRRC principle as operationalised in the Paris mitigation provisions, rather than generic references to that principle or the principle of special and differential (S&D) treatment under WTO law.[159] These principles do not serve the same purpose and, as such, follow distinct differentiation markers and country categories.[160] In particular, pursuant to the CBDRRC principle, LDCs and SIDS are granted the same differential treatment in the Paris mitigation provisions, while the two country categories are not placed on equal footing under the WTO principle of S&D treatment.[161] This is not a minor difference between the two regimes, given that only 7 out of

[156] *US – Shrimp (1998)* (n 110) paras 132 and 170-1; *US – Shrimp (2001)* (n 139) paras 130-3.

[157] Agreeing with this view, see Gaines (n 132) 779; Qin (n 133) 218 and 221-3. Contextual support for this approach is found in other WTO provisions, notably the parallel exceptions clause in the General Agreement on Trade in Services, Article XIV (referring to 'like conditions') and Article 2.3 SPS Agreement (referring to 'identical or similar conditions').

[158] When comparing treatment of shrimp exporting countries in *US – Shrimp (1998)*, the AB considered factors that are arguably beyond the reach of the MFN treatment obligation: AB, *US – Shrimp (1998)* (n 110) paras 171-2 (on efforts to engage in negotiations) and paras 175-6 (on technology transfer). For discussion, see Qin (n 133) 256-8.

[159] See e.g., Venzke and Vidigal (n 10) 26-30.

[160] In broad terms, the CBDRRC principle aims at promoting 'fairness' within the UNFCCC regime, whereas the S&D principle seeks to ensure that 'developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development' (WTO Agreement, Preamble, recital 2).

[161] Generally speaking, three categories of countries are recognised under WTO law (i.e., developed countries, developing countries and LDCs), although there has been tendency towards greater country differentiation in

38 countries falling in the SIDS category are also recognised as LDCs by the UN.[162]

b) Arbitrary and Unjustifiable Discrimination

To further support the argument made in the previous section, it is useful to think about what would happen if it was not followed and we simply assume that prevailing conditions are the same for all countries affected by the CBAM. In this scenario, CBDRRC-based differentiation is likely to be condemned as unjustifiable discrimination under the chapeau, creating an unnecessary friction between the multilateral climate and trade regimes. This stems from the so-called rational connection (or regulatory rationality) standard, which was formulated in *Brazil – Retreaded Tyres (2007)* and reaffirmed in subsequent cases 'as one of the most important factors' in the assessment of unjustifiable discrimination,[163] and which focuses 'on the cause of the discrimination, or the rationale put forward for its existence'[164] by the regulating WTO member. More specifically, discrimination between countries in same conditions would be unjustifiable 'when the reasons given for this discrimination bear *no rational connection to the objective* falling within the purview of a paragraph of Article XX, or *would go against that objective ... to however small degree*'.[165]

In *Brazil – Retreaded Tyres (2007)*,[166] the AB appeared to elevate the question of whether the reasons for the discrimination can be reconciled with the objective of the measure to some sort of litmus test: that is, any degree of contradiction will be in itself dispositive for a finding of unjustifiable discrimination under GATT Article XX-chapeau.[167] It displayed some more caution in *EC – Seal Products (2014)*, where the discrimination at issue resulted from an exception from a sales ban for seal-containing products derived from hunts traditionally conducted by Inuit and other indigenous communities.[168] But even in this case, the AB remained ambivalent as to whether it was willing to accept that discrimination under the chapeau can be justified by legitimate reasons (*in casu*, protection of indigenous communities) other than the other than the primary objective of the measure (*in casu*, seal welfare).[169] An unidimensional test, whereby one single purpose is the metric for justifying discrimination under the chapeau, is excessively rigid. It renders particularly difficult the justification of discrimination that is caused by an exception, whereas real-life policymaking often needs to strike a balance between competing legitimate objectives.[170] This is because the rationale for an exception will not only differ from, but often contradict, the objective underlying the general

some WTO instruments. For a comparative analysis, see J Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes' (2013) 22(1) RECIEL.

[162] See n 37-38.

[163] *EC – Seal Products (2014)* (n 107) para 5.318.

[164] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para 226 [*Brazil – Retreaded Tyres (2007*)]; *EC – Seal Products (2014)* (n 107) paras 5.303 and 5.306; *Indonesia – Import Licensing Regimes (2017)* (n 113) para 5.98; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Article 21.5)*, WT/DS381/AB/RW2, adopted 11 January 2019, para 6.271.

[165] *Brazil – Retreaded Tyres (2007)* (n 164) paras 227-8.

[166] Ibid, paras 134 and 212, where the discrimination at issue resulted from an exception for MERCOSUR countries from the general import prohibition on retreaded tyres adopted by Brazil for public health purposes.

[167] Ibid, paras 229-230, rejecting the Panel's finding that discrimination would be unjustifiable only if imports into Brazil of retreaded tyres from exempted MERCOSUR countries 'were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined'.

[168] *EC – Seal Products (2014)* (n 107) para 5.316.

[169] Ibid, paras 5.318, 5.320 and 5.338.

[170] Venzke and Vidigal (n 10) 23.

(trade-restrictive) rule.[171] As has been argued elsewhere, this rigidity proved problematic in *EC – Seal Products (2014)*, and to a lesser extent, in *Brazil – Retreated Tyres (2007)*.[172]

Applying the rational connection standard to CBDRRC-based differentiation in the CBAM, it is clear that the LDCs/SIDS exemption is particularly vulnerable to challenge. Its rationale (i.e., respecting the CBDRRC principle) is not related to the measure's overarching objective of preventing carbon leakage in order to combat global warming. Instead, it compromises the achievement of that objective by promoting the growth of carbon-intensive production in these countries,[173] even if just to a small degree in quantitative terms. Given the nature of climate change as a stock problem that results from the overall accumulation of GHG emissions in the atmosphere, emissions by any State regardless of location contribute to the problem and affect all other States.[174] As we have seen, the granting of special treatment to LDCs/SIDS in Article 4.6 PA is not motivated by the goal of mitigating climate change *per se*, but rather by fairness considerations stemming from the CBDRRC principle.[175] However, this apparent tension between Paris-based differentiation and WTO law can –and should be– easily avoided through a proper application of the first ('same conditions') limb of Article XX-chapeau, as previously exposed.

V. CONCLUSIONS

In aligning with its long-standing ambition to play a leadership role in the global battle against climate change, the EU may soon become the first jurisdiction in the world to price emissions embedded in its imports of carbon-intensive commodities. In doing so, it is showing courage in experimenting with climate policies that are yet to be tried elsewhere and which may have the potential of incentivising urgently needed global action to fight climate change. However, the EU is also testing the boundaries of permissible unilateral action at the interface of pre-existing multilateral legal regimes. Before the it sees the light of the day, the proposed CBAM ought to be made compatible not only with WTO law, but also with the UNFCCC framework without which the pursuit of global climate targets would ultimately be in vain.

In this article, it was argued that the EU's CBAM as currently designed does not respect the CBDRRC principle as operationalised in the Paris mitigation provisions. To be brought in line with this principle, it needs to be adjusted through two forms of differential treatment: a full LDCs/SIDS exemption (based on Article 4.6 PA) and a revenue-recycling provision to support decarbonisation efforts in other affected developing countries (based on Article 4.5 PA). It was further submitted that this CBDRRC-grounded differentiation is permissible under WTO law. This differential treatment should not be deemed discriminatory within the meaning of the chapeau of Article XX GATT since the countries concerned are not similarly-situated in terms of their responsibilities/capabilities for climate conservation. Admittedly, the proposition that countries' differentiated responsibilities/capabilities are a relevant condition for the purpose of the chapeau's discrimination analysis is yet to be tested in WTO dispute settlement. But it is critically important in avoiding a potential and undesirable clash between WTO law

[171] For further discussion, see Bartels (n 128) 116-118; and G Marín Durán, 'Measures with Multiple Competing Products after *EC – Seal Products*: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement' (2016) 19(2) JIEL 474-482.

[172] Arguably, in *Brazil – Retreaded Tyres (2007)*, the declared compliance purpose underlying the MERCOSUR exemption could not be considered a valid legitimate rationale, because it was questionable whether Brazil had an actual obligation under MERCOSUR law to exempt its regional partners from the import ban: *Brazil – Retreaded Tyres (2007)* (n 164) paras 232 and 234.

[173] See CBAM Impact Assessment (n 26) 30, where the Commission (implicitly) notes this tension as a reason for rejecting an exemption for LDCs.

[174] Voigt and Ferreira (n 53) 287.

[175] See Section 3.C.

and the UNFCCC regime. Indeed, it has broader significance for a mutually supportive relationship between WTO law and other MEAs which equally demand CBDRRC-based country differentiation in the protection of global natural resources, such as the Convention on Biological Diversity.[176]

[176] A relevant example is the proposed EU regulation on forest-risk commodities: see, G. Marín Durán and J. Scott: 'Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union' (2022) 34(2) J. Environ. Law.