14

The European Union's Carbon Border Adjustment Mechanism as a (Generally Lawful) Countermeasure

OTTAVIO QUIRICO

14.1 Introduction

In order to implement the European Green Deal, in 2019 the European Union (EU) foresaw the adoption of carbon border adjustment measures (CBAMs) as a key instrument to level differences with carbon pricing schemes other than the EU Emission Trading System (ETS).[1] These are now becoming a reality via legislative measures included in the 'Fit for 55' package.[2]

The lawfulness and impact of CBAMs is debated and, despite a delayed application, just foreshadowing their adoption has triggered doctrinal confrontation.[3] CBAMs are usually seen as 'corrective mechanisms', essentially as a means to level the cross-border playing field for trade and prevent carbon leakage.[4] Taking into account the distinction between 'primary' and 'secondary' norms,[5] CBAMs are usually considered within the framework of primary rules under international law, even though their 'defensive' and 'punitive' purpose is sometimes mentioned.[6] This contribution proposes the alternative view that CBAMs should rather be construed through the lens of secondary international norms. More precisely, the idea is that CBAMs could be framed as international countermeasures taken in response to the breach of a primary obligation, with specific regard to environmental duties, and should thus be justified in derogation from the obligation to ensure free trade (and investment). This approach helps to assess the relationship between economic and environmental regulation under the concept of sustainable

[1] For an overview of different carbon pricing schemes, see A. Sapir, The European Union's Carbon Border Mechanism and the WTO (2021). www.bruegel.org/blog-post/european-unions-carbon-border-mechanism-and-wto.

[2] Proposal for a regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism, COM(2021) 564 final, 2021/0214 (COD) (14 July 2021); Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism, OJ L 130/52, 16 May 2023.

[3] For an overview of problems of legality raised by CBAMs, see J. Bacchus, Legal Issues with the European Carbon Border Adjustment Mechanism. CATO Briefing Paper, 2021; M. S. Andersen, Border adjustment with taxes or allowances to level the price of carbon, in H. Ashiabor, J. E. Milne, M. Hymel, L. Kreiser (eds.), *Innovation Addressing Climate Change Challenges* (EE, 2018), pp. 29–30.

[4] See A. Pirlot, Carbon border adjustment measures: a straightforward multi-purpose climate change instrument? *Journal of Environmental Law* 2022, 34(1): 25–52; G. C. Leonelli, Practical obstacles and structural legal constraints in the adoption of 'defensive' policies: comparing the EU carbon border adjustment mechanism and the US proposal for a border carbon adjustment. *Legal Studies* 2022, 42(4): 696–714, at p. 697.

[5] Accoring to Hans Kelsen (*General Theory of Norms*, trans. M. Hartney (Clarendon Press, 1991), p. 142), primary norms create obligations, while secondary norms regulate infringements and sanctions.

[6] Leonelli, Practical obstacles and structural legal constraints, pp. 697–698.

development. Arguably, seeing CBAMs as countermeasures provides a lens to assess their viability with respect to the international trade regime, with particular regard to international economic agreements.

The analysis proceeds in two parts. The first part of the contribution presents CBAMs, notably as envisaged by the EU in the European Green Deal and the Fit for 55 Package. This part of the chapter further illustrates problems of consistency raised by CBAMs with respect to general international economic law, on the one hand, and the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), on the other, via the national treatment principle as a test case. The second part of the contribution assesses CBAMs from the perspective of countermeasures under international law. In the light of this premise, the research considers whether obligations under the United Nations Framework Convention on Climate Change (UNFCCC) can be universalised beyond the relative effectiveness of treaties, and consequently whether States and international organisations can apply CBAMs on an *erga omnes contractantes* scale under the GATT and the GATS.

14.2 The Debate on the International Legality of Carbon Border Adjustment Measures

14.2.1 Carbon Border Adjustment Measures in the European Green Deal, the Fit for 55 Package and Other Carbon Border Adjustments

As announced in the European Green Deal, in March 2021 the European Parliament passed a resolution invoking the introduction of a CBAM compliant with World Trade Organisation stipulations and EU free trade agreement (FTA) norms, paralleling the EU ETS, in order to implement UFCCC obligations.[7] According to the European Commission, the EU CBAM would apply to the power sector and energy-intensive industrial sectors to reduce the risk of carbon leakage, ensuring that the price of imports reflects accurately their carbon content.[8] The measure needs to comply with WTO rules and EU FTAs.[9]

On 14 July 2021, the EU adopted the 'Fit for 55 Package', aiming to curb greenhouse gas emissions by 55% by 2030, through a mix of instruments, including the ETS, renewable energy, energy taxation, land use, emissions from aviation, cars and ships, and the CBAM.[10] Within the context of the revision of relevant policy instruments in the EU under the package, the CBAM is essential to meeting the objective of climate neutrality by 2050, in line with the Paris Agreement. It intends to level divergences with carbon pricing schemes and climate policies in third-party countries: when foreign policies do not include measures equivalent to the EU ETS, an EU importer is compelled to buy CBAM certificates to cover green differences in production costs.[11] The measure is grounded in article 192(1) of the

[7] European Parliament, A WTO-Compatible EU Carbon Border Adjustment Mechanism, Doc. A9-0019/2021 (10 March 2021).
[8] Ibid. at para. 12. [9] Ibid. at para. 7.
[10] European Council, Fit for 55: How the EU Will Turn Climate Goals into Law. 2024. www.consilium.europa.eu/en/infographics/fit-for-55-how-the-eu-will-turn-climate-goals-into-law.
[11] European Council, Fit for 55: How Does the EU Intend to Address the Emissions outside of the EU? 2024. www.consilium.europa.eu/en/infographics/fit-for-55-cbam-carbon-border-adjustment-mechanism.

Treaty on the Functioning of the European Union (TFEU), which provides that, in consultation with the Economic and Social Committee and the Committee of the Regions, the European Parliament and the Council may decide on action to implement the objectives under TEFU article 191, aiming to preserve, protect and improve the quality of the environment, and promoting international measures to combat climate change. The CBAM indeed aims to level the economic field for carbon pricing in the EU internal market as compared to imported products. Building on Regulation 2018/1999,[12] which establishes that EU Member States adopt national measures within the context of a national energy and climate plan (article 3) and report on implementation to the European Commission every two years (article 17), EU organs have now outlined the details of the CBAM mechanism via the Proposal for Regulation 2021/0214,[13] on which the Council and the Parliament reached a political agreement on 12 December 2022, leading to the adoption of Regulation 2023/956 on the implementation of CBAMs.[14]

Concerning the scope of application of the CBAM, Regulation 2023/956 applies to energy-intensive products at risk of carbon leakage, including imports of electricity, cement, aluminium, fertiliser, as well as iron and steel products – that is, sectors that are at high risk of carbon leakage (recitals 31–40). Reportedly, Russia is the largest exporter of CBAM products to the EU, followed by Turkey, the United Kingdom (UK) and the People's Republic of China (PRC).[15] See Figure 14.1.

Under article 3, Regulation 2023/956 is only concerned with direct greenhouse gas emissions, that is, essentially emissions of carbon dioxide (CO_2), nitrous oxide (N_2O) and perfluorocarbons (PFCs), arising from the production processes of goods directly controlled by the producer. The proposal does not encompass indirect emissions, that is, emissions arising from the production of electricity, heating and cooling consumed during processes towards the production of goods. The production process encompasses chemical and physical activities from the time of production in an installation to that of import into the territory of the Union (article 3 and recital 19). According to article 36, the CBAM will be implemented in 2026 and, in line with recital 57, free allowances will be phased out between 2026 and 2035, following a transition period of three years, starting on 1 October 2023, which is only concerned with data collection. While this is the scope of the measure currently envisaged by the EU, the Commission has the power to extend it so as to encompass, for instance, indirect future greenhouse gas emissions (article 30).

From the standpoint of the procedure, in principle, EU importers of non-EU products must pay a levy, with the exception of markets linked to the EU, particularly the members of the European Free Trade Association (EFTA). According to article 5, prior to importing energy-intensive goods, any importer shall apply to the competent authorities designated by

[12] Regulation (EU) 2018/1999 of the European Parliament and of the Council on the Governance of the Energy Union and Climate Action (11 December 2018).

[13] See P. Lamy, G. Pons, P. Leturcq, A European border carbon adjustment proposal. *Renewable Energy Law & Policy Review* 2020, 10(1): 21–30; G. M. Durán, EU carbon border adjustment mechanism: key issues going forward. *European Foreign Affairs Review* 2021, 26(4): 499–506, at pp. 500–502; Pirlot, Carbon border adjustment measures, p. 38.

[14] European Commission, Carbon Border Adjustment Mechanism. 2024. https://taxation-customs.ec.europa.eu/green-taxation-0/carbon-border-adjustment-mechanism_en.

[15] A. Dumitru, B. Kölbl, M. Wijffelaars, The carbon border adjustment mechanism explained. 16 July 2021. https://economics.rabobank.com/publications/2021/july/cbam-carbon-border-adjustment-mechanism-eu-explained.

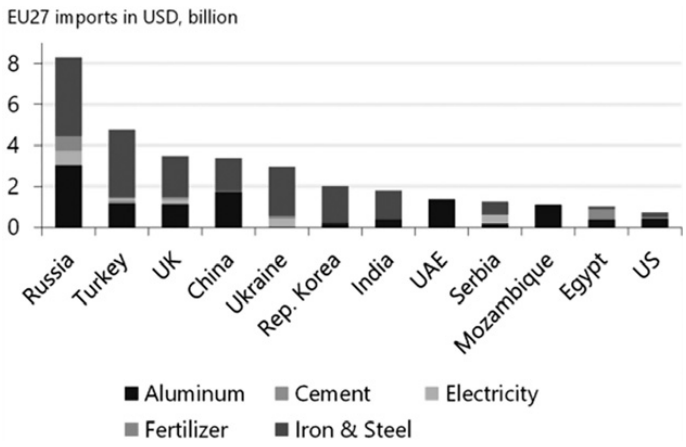

Figure 14.1 Exporters of CBAM products to the EU (*source*: A Dumitru, B Kölb, M. Wiffelaars, The Carbon Border Adjustment Mechanism Explained. www.rabobank.com/knowledge/d011297275-the-carbon-border-adjustment-mechanism-explained).

Member States (article 11) for an authorisation to introduce goods into the customs territory of the Union. Furthermore, under article 6, any authorised importer shall submit a yearly CBAM declaration specifying the quantity of imported goods, embedded emissions and the corresponding CBAM certificates to be submitted. Embedded emissions are calculated based on procedures to be spelled out in annex III (article 7) and verified by an accredited organisation (article 8), withholding carbon price paid in the country of origin. Under articles 18–21, the competent authority sells CBAM certificates based on the price of ETS allowances and may review a CBAM declaration within four years, following the year when the declaration is, or should have been, submitted. The importer must surrender to the competent authority a number of CBAM certificates corresponding to declared emissions (article 22). Enforcement takes place via customs authorities, which cannot allow the importation of goods that are not authorised by the competent authority (article 25). The emission declaration and verification process provides that national authorities verify allowances surrendered by companies and apply a levy in case there is a difference between the foreign and domestic allowances surrendered. The European Commission oversees the implementation of the CBAM mechanism, including products that do not have 'sufficient due cause' or 'economic justification' other than avoiding obligations under Regulation 2023/956 (article 27).

The EU is not the only sovereign entity that is working on carbon border adjustments. A similar mechanism is already in place, for instance, in the electricity market in California.[16] Furthermore, Canada, Japan and the United States are considering the possibility of adopting equivalent measures.[17] Although they are inspired by the same aim of

[16] See A. Marcu, D. Dybka, Status of the Border Carbon Adjustments' International Developments. European Roundtable on Climate Change and Sustainable Transition, 2021; M. A. Mehling, H. van Asselt, K. Das, S. Droege, C. Verkuijl, Designing border carbon adjustments for enhanced climate action. *American Journal of International Law* 2019, 113(3): 433–481, at p. 456.

[17] N. S. Ghaleigh, D. Rossati, The spectre of carbon border-adjustment measures. *Climate Law* 2011, 2(1): 63–84, at pp. 76 ff.; Mehling et al., Designing border carbon adjustments for enhanced climate action, p. 448.

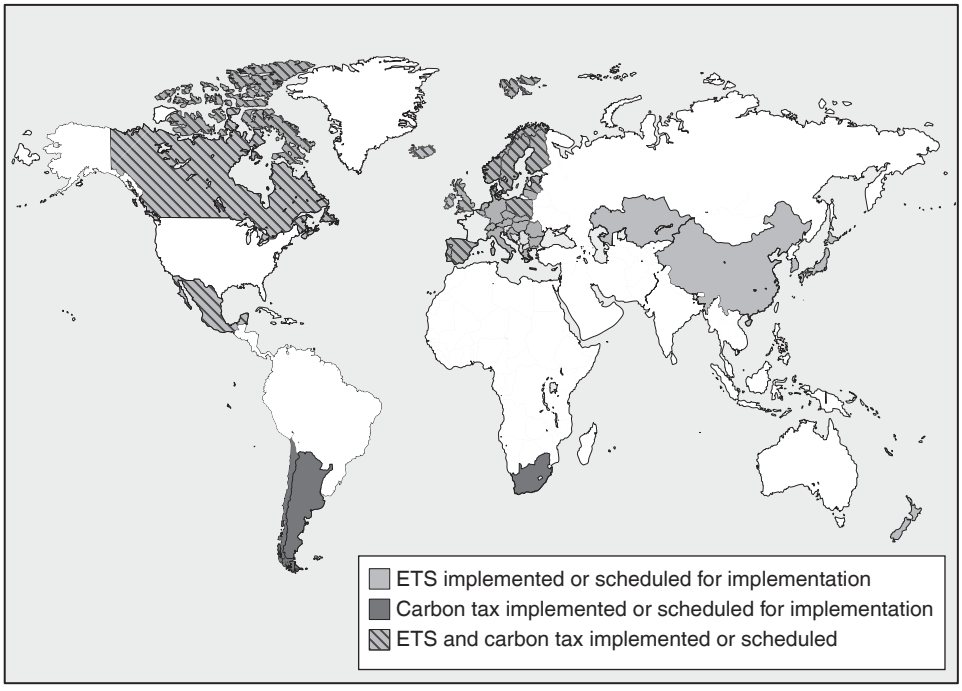

Figure 14.2 Summary map of regional, national, and subnational carbon pricing initiatives. *Source*: Figure reproduced from Bruegel's blog post written by André Sapir, www.bruegel.org/blog-post/european-unions-carbon-border-mechanism-and-wto.

levelling the international economic playing field, carbon adjustment mechanisms are not identically designed (see Figure 14.2). For instance, under the so-called Coons–Peter Bill,[18] like the EU CBAM the U.S. Border Carbon Adjustment (BCA) covers steel, aluminium, cement and iron. However, unlike the EU CBAM, the U.S. BCA does not cover fertiliser, includes 'fuel' in the notion of a 'good' and encompasses any relevant product identified by the Secretary of the Treasury and any product which has a composition greater than 8.5% consisting of steel, aluminium, cement or iron (article 9901, subsections (7) and (15)). For the purpose of the BCA, the cost of greenhouse gas emissions is calculated based on the average sector cost incurred by companies in the United States (article 9902). The implementing procedure is also only generally defined by providing that, in consultation with the Administrator of the Environmental Protection Agency, the United States Trade Representative and the Secretary of Homeland Security, the Secretary of the Treasury is able to prescribe regulations and guidance to implement BCAs (article 9905(a)). Scholars consider that, while the EU CBAM is mostly grounded in an economic rationale, the U.S. BCA is mostly underpinned by an environmental objective.[19] The U.S. BCA is based on the green standard

[18] *A Bill to Amend the Internal Revenue Code of 1986 to Establish a Border Carbon Adjustment for the Importation of Certain Goods*, H.R. 4535.
[19] Leonelli, Practical obstacles and structural legal constraints, pp. 5–6.

of State environmental policies, which entails improved environmental aims but whose determination entails a margin of discretion and arbitrariness.[20] The EU CBAM is based on the green standard of single products, which is theoretically more precise, but becomes in practice complex, inter alia, in the light of the number of steps involved in the production chain.[21]

14.2.2 Carbon Border Adjustment Measures, General International Law and the World Trade Organisation Framework: Particularly the National Treatment Principle

International economic law stands on the tenet of non-discrimination, which provides a basis for the most-favoured-nation (MFN) treatment and national treatment principles.[22] This is confirmed in article 3(5) of the UNFCCC, on 'Principles', which provides that the parties should 'cooperate to promote an enabling and open international economic system that will facilitate sustainable economic growth and development', with 'measures taken to combat climate change, including unilateral measures . . . not [to] be used as a means of arbitrary or unjustified discrimination or covert restrictions on international trade'. Within this framework, the CBAM is a duty on imports that aims to level the cross-border economic field with respect to internal duties imposed on domestic products,[23] and thus arguably the most relevant regulation is the national treatment principle. Indeed, this principle establishes that domestic and imported products cannot be subject to different internal taxes. In the light of article 38 of the Statute of the International Court of Justice (ICJ), the international lawfulness of CBAMs must be assessed, on the one hand, under general international law, and, on the other, under international economic agreements.

As concerns general international law, it is understood that customary economic law only embeds a few fundamental principles, including State immunity, 'minimum standards' for the treatment of foreign nationals and diplomatic protection.[24] General principles of economic law are limited to obligations such as the duty to make reparations for injury and State succession to credits and debts.[25] As such, fundamental tenets that are relevant to the lawfulness of CBAMs, particularly the national treatment principle, do not form part of general international obligations.[26] On this basis, as there is no specific general duty for States to guarantee an economic playing field, it can be concluded that CBAMs are lawful from the standpoint of primary and general international obligations.

International economic agreements, spanning WTO treaties, regional economic agreements, such as the Treaty on European Union and the TFEU, and bilateral agreements such as the EU–Australia FTA, embed key principles of international economic law, particularly the MFN treatment principle and the national treatment principle. Within the framework of

[20] Ibid. at p. 8; T. Oates, Carbon border adjustment methods. *Frontiers in Ecology and the Environment* 2022, 20(4): 206.
[21] M. S. Andersen, Border adjustment with taxes or allowances to level the price of carbon, p. 24; Leonelli, Practical obstacles and structural legal constraints, p. 9; Pirlot, Carbon border adjustment measures, p. 39.
[22] A. D. Mitchell, E. Sheargold, *Principles of International Trade and Investment Law* (EE, 2022), p. 127.
[23] Mehling et al., Designing border carbon adjustments, p. 441; M. Keen, I. Parry, J. Roaf, Border Carbon Adjustments: Rationale, Design and Impact. IMF Working Paper, 2021, pp. 6–7; V. Doix, Border tax adjustments: qualification and interactions with the international trade system. *Revue internationale de droit économique* 2020, 3: 319–342.
[24] M. Herdegen, *Principles of International Economic Law*, 2nd ed. (OUP, 2016), p. 57. [25] Ibid. [26] Ibid.

the WTO, the lawfulness of CBAMs is particularly relevant to the GATT.[27] Indeed, CBAMs apply to imports of goods and the GATT is the most general agreement governing the matter. In this regard, scholars underscore that the lawfulness of CBAMs is problematic in several respects. For instance, it has been noted that, by determining the extent and quality of the climate policy of other WTO Members and choosing which imported products are subject to emission certificates and to what extent, the EU would discriminate between 'like' products, in breach of the MFN principle under GATT article I.[28] For the purpose of the present analysis, it is sufficient to consider as a test case that, as they are levies on imports, CBAMs are particularly relevant to the basic tenet of the national treatment principle under GATT article III.[29]

The CBAM requirement to annually purchase and surrender certificates is a normative measure that affects the internal sale of imported products and matches the obligation of EU companies to purchase greenhouse gas allowances under the EU ETS. As such, while a case-by-case assessment must be carried out to determine the lawfulness of a CBAM, the measure is in principle allowed, to the extent that it fulfils a genuine non-protectionist purpose with respect to the national treatment principle (GATT article III(1)). This requirement seems to be particularly fulfilled in the light of the environmental aim of CBAMs pursued by the EU under the UNFCCC regime. Indeed, derogations from the principle of free trade may be permitted for environmental purposes as general exceptions under GATT article XX, based on the jurisprudence of the WTO.[30] The WTO dispute settlement bodies have in fact interpreted extensively the possibility of adopting derogatory measures to protect 'human, animal or plant life or health' (article XX(g)) or relating to 'the conservation of exhaustible natural resources' (article XX(g)).[31]

Notably, in *U.S. – Shrimp*, the WTO's judicial organs did not absolutely exclude the possibility of an exception to free trade based on the environment under GATT Article XX(g), subject to engagement in negotiations to achieve an environmental agreement.[32] On this basis, in *U.S. – Taxes on Automobiles*, a WTO Panel did not in principle exclude that environmental protection under GATT article XX(g) might justify a different calculation of average fuel economy for imported and manufactured cars.[33] In *U.S. – Standards for Reformulated and Conventional Gasoline*, the WTO Appellate Body considered the U.S. *Clean Air Act Amendments* of 1990,[34] requiring different specifications for domestically produced and imported gasoline, covered by environmental exceptions under GATT article

[27] This remains true regardless of developments in the reform of the WTO, which mostly concerns negotiation and dispute settlement procedures as well as the integration of sustainability and the status of developing countries (see WTO, WTO Reforms: An Overview, MC12 Briefing Note, www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm).

[28] J. Bacchus, Legal Issues with the European Carbon Border Adjustment Mechanism. CATO Briefing Paper 125/2021, p. 3.

[29] Ibid.; Leonelli, Practical obstacles and structural legal constraints, p. 12.

[30] G. Mörsdorf, A simple fix for carbon leakage? Assessing the environmental effectiveness of the EU carbon border adjustment. *Energy Policy* 2022 (161): 112596.

[31] Bacchus, Legal issues, at pp. 3–5.

[32] US – Import Prohibition of Certain Shrimp and Shrimp Products. Appellate Body Report, WT/ DS58/AB/R, 12 October 1998, at paras. 164 and 177. On the importance of multilateralism in the adoption of CBAMs, see J. Delbeke, A Way Forward for a Carbon Border Adjustment Mechanism by the EU. STG Policy Brief, 2020. https://cadmus.eui.eu/handle/1814/69155.

[33] US – Taxes on Automobiles. Panel Report, DS 31/ R, 11 October 1994, at paras. 5.39 ff.

[34] Pub L. 101–549, 104 Stat 2468.

XX(g).[35] In *Brazil – Tyres*, the WTO Appellate Body confirmed the viability of environmental exceptions under GATT article XX.[36]

Furthermore, a charge is allowed on 'like' products, provided it is not 'disproportionate' (GATT article III(2)). The requisite of proportionality seems to be fulfilled by CBAMs in the light of the calculations envisaged under article 7 and verified in accordance with article 8 of Regulation 2023/956. This should also ensure that imported products be accorded treatment no less favourable than that accorded to like products of national origin with respect to laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use, according to GATT article III(5). As concerns the notion of 'likeness', it is fundamentally considered that products are 'like' when they satisfy the same aims from the standpoint of the consumer, that is, when they are 'directly competitive or substitutable'.[37] It is clear that Regulation 2023/956 seeks to fulfil the requirement of 'likeness', as underscored in recital 27, particularly as CBAMs apply to goods listed under specific annexes, consistent with article 6.[38] However, scholars have underscored that the EU CBAM might be inconsistent with the principle of 'likeness', as, under the 'disparate impact' test, it would affect the ratio of imported goods more than domestic goods.[39]

For a proper implementation of CBAMs, it is also important to consider whether energy, particularly electricity mentioned in recital 40 of the Regulation 2023/956, qualifies as a good or a service. In *Re Erving Industries*, the U.S. District Court for Massachusetts held that electricity is measurable and identifiable, as it passes through a customer's meter, and is thus a 'good'.[40] Conversely, in *PMC Marketing Corporation*, the U.S. District Court for Puerto Rico considered that electricity is a movable and identifiable 'service' provided by a business company affording a public utility.[41] If so, import of electricity into the EU should be governed by the GATS, rather than the GATT. In this case, the national treatment principle applies under article XVII, which provides that, with regard to all measures affecting service supply, the EU and its Member States should accord to services and service suppliers from any other GATS Member treatment no less favourable than that they accord to their own like services and service suppliers. However, exceptions to free trade in services are allowed under article XIV for scheduled sectors and under conditions defined by States via specific schedules according to article XVI(1).

[35] United States – Standards for Reformulated and Conventional Gasoline: Request for Consultations under Article XXII:1 of GATT 1994 by Venezuela. Appellate Body Report, WT/ DS2/ AB/ R (29 April 1996).
[36] Brazil – Measures Affecting Imports of Re-treaded Tyres. WT/DS332/AB/R, 3 December 2007.
[37] Japan – Alcoholic Beverages II. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, at 21 and 25.
[38] Scholars have discussed the question whether highly polluting products are 'like' green products (see Leonelli, Practical obstacles and structural legal constraints, p. 12); however, if 'green' and 'non-green' products were to be deemed 'unlike' products, CBAMs would not be justified to level differences in pollution, and thus, for the purpose of our analysis, we consider that greening is the rationale of CBAMs rather than an element of the product itself.
[39] Leonelli, Practical obstacles and structural legal constraints, p. 12.
[40] Case No. 09–30623, 7 April 2010.
[41] Case No. 09–02048, 1 October 2013. See also B. Nathan, E. Chafetz, Electricity as a good or a service: some shocking developments. Business Credit, 2013.

14.3 Carbon Border Adjustment Measures as Countermeasures

14.3.1 Countermeasures and Carbon Border Adjustment Measures as a Response to a Breach of the Obligation to Stabilise Greenhouse Gas Emissions under International Economic Agreements, Particularly the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services

CBAMs have been dealt with in the literature as 'adjustment mechanisms'.[42] While reference is usually not made to CBAMs as 'countermeasures', some scholars have approached the question as to whether CBAMs may attract retaliation from foreign countries.[43] Others have referred to climate 'countermeasures' as a general set of policy measures, not as a specific mechanism of reaction to the breach of a primary obligation under international law.[44] It is therefore interesting to consider whether CBAMs can, or should, be considered countermeasures under international law and whether their legality can be understood within this context.

The Draft Articles on State Responsibility (DASR) and the Draft Articles on the Responsibility of International Organisations (DARIO) define countermeasures under multiple provisions in part 1 (on the 'Internationally Wrongful Act of a State'), chapter 5 (on 'Circumstance Precluding Wrongfulness') and in part 3, chapter II (on 'Countermeasures'). In part 1, article 22 (on 'Countermeasures in respect of an Internationally Wrongful Act') establishes that 'the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part 3'. As acting in countermeasure is a 'circumstance precluding wrongfulness' (part 1, chapter V), conduct (positive or negative) that is not in conformity with a primary international obligation becomes lawful if it is taken in response to the breach of a primary obligation.

According to DASR and DARIO article 49 (on the 'Object and Limits of Countermeasures'), '[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act' to 'induce that State to comply' with its primary obligations. In order to be permissible, countermeasures must 'be limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State' (article 49(2)). Furthermore, countermeasures 'shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations breached' (article 45(3)).

As there is no specific obligation of non-discrimination under general international economic law, CBAMs should be allowed on a general scale, outside the framework of specific economic agreements. In this context, they do not specifically qualify as 'countermeasures', as they are not taken in response to the breach of a primary obligation. They can, for instance,

[42] See, for instance, J. Suh, Carbon border adjustment: a unilateral solution to the multilateral problem? *International Environmental Agreements: Politics, Law and Economics*, 2022, 715–733; A. Arko, A Canadian border carbon adjustment? GATT compliance and underexplored exceptions. *Global Trade & Customs Journal* 2021, 16(9): 446–458.

[43] T. Kuusi, M. Björklund, V. Kaitala, et al., Carbon Border Adjustment Mechanisms and Their Economic Impact on Finland and the EU. Prime Minister's Office, Helsinki (2020), p. 45.

[44] H. Wang, X. Huang, X, Zhao, J. He, Key global climate governance problems and Chinese countermeasures. *Chinese Journal of Population, Resources and Environment* 2021, 19(2): 125–132.

be lawfully taken against those States that are not parties to the WTO for protectionist purposes. If they are adopted as a measure to compel green conduct, they must be considered unfriendly retaliatory measures. Naturally, the adoption of CBAMs remains subject to the respect of existing international conventions, particularly the UNFCCC. Thus, a State party to the convention should undertake dispute settlement procedures, starting with negotiations, under the UNFCCC, notably, under article 14, prior to adopting CBAMs.

Within the context of international economic agreements, particularly the GATT and GATS, CBAMs are measures that derogate from the fundamental obligation to ensure free trade. Even when they are in principle justified under GATT article XX and GATS article XVII, CBAMs run the risk of breaching a complex regulatory framework, starting with the problem of their precise definition.[45] As we have seen,[46] while the EU is definitely doing its best to shape CBAMs so as to respect WTO norms, the complexity of the regulation and practical factors such as production processes make it extremely difficult to shape CBAMs that are perfectly compliant with the national treatment principle in all its aspects.[47] This is particularly demonstrated by the interpretation of the concept of 'likeness' in the light of the 'disparate impact' test. The complexity is such that, rather than thinking about designing a WTO-compatible CBAM, some scholars reverse the approach and support a reform of the WTO system including environmental and climatic sustainability, envisaging the possibility of CBAMs and BCAs.[48] However, under the current system, as the rationale for CBAMs is remedying a competitive distortion created by States that do not adopt adequate carbon pricing schemes, they may fall under DASR and DARIO article 49 as countermeasures taken against a State which is responsible for an internationally wrongful act' to 'induce that State to comply' with its primary obligations. In other words, if GATT or GATS State α does not comply with its primary obligation to curb greenhouse gas emissions, GATT or GATS State β should be allowed to adopt CBAMs in countermeasure, even in breach of the national treatment principle as a primary obligation: the breach of the national treatment duty would be legalised by the fact that CBAMs are adopted as countermeasures in response to the breach of the duty to curb greenhouse gas emissions.

Primary obligations breached are in this case asymmetric, as, while State α is in breach of an environmental obligation, the CBAM adopted by State β is in breach of the duty of non-discrimination in economic relations embedded in the national treatment principle, which is why it is particularly difficult to calibrate CBAMs in terms of proportionality with respect, for instance, to the 'disparate impact' test. Certainly, once it is established that CBAMs are lawful as countermeasures, they could still be contested (by State α) as concerns their

[45] C. E. McLure, Jr., The GATT – Legality of border adjustments for carbon taxes and the cost of emissions permits: a riddle, wrapped in a mystery, inside an enigma. *Florida Tax Review* 2011, 11(4): 221–294; Ghaleigh and Rossati, The spectre of carbon border adjustment measures, p. 82; C. Bellora, L. Fontagné, Possible Carbon Adjustment Policies: An Overview, Report to the European Parliament. 2020, p. 11; J. Englisch, T. Falcão, EU carbon border adjustments and WTO law, part one. *Environmental Law Reporter* 2021, 51(10): 10857; J. Englisch, T. Falcão, EU carbon border adjustment and WTO law: part two. *Environmental Law Reporter: News & Analysis* 2021, 51(11): 10935.

[46] See Section 14.2.2.

[47] This is without considering issues such as common but differentiated responsibility, which must naturally be taken into account, and which increase the asymmetries of CBAMs and the difficulty of designing them as lawful mechanisms (see I. Ozai, Designing an equitable border carbon adjustment mechanism. *Canadian Tax Journal* 2022, 70(1): 1–33).

[48] S. Robert, Un mécanisme d'ajustement carbone aux frontières compatible avec le droit de l'OMC: une gageure. *European Papers* 2022, 7(1): 239–252. Along these lines, see also European Commission, Reforming the WTO: Towards a sustainable and effective multilateral trading system (2021).

necessity and proportionality. However, the burden of proof would shift from State β – that is, the EU and its Member States as those adopting the CBAM – to State α as the State not adequately implementing carbon pricing and greenhouse gas targets. If State α was able to demonstrate that the CBAM were not necessary and proportionate, it could claim compensation to recalibrate economic relations. However, this would not be an easy task and would not fundamentally exclude the lawfulness of CBAMs per se, which would remain legal.

The question is therefore identifying the primary obligation, or obligations, breached by States that do not adopt climate measures comparable with those adopted, notably, by the EU and its Member States. According to the principle of systemic integration between different international regulatory regimes, under article 31 of the Vienna Convention on the Law of Treaties (VCLT) and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLTIO),[49] relevant primary obligations should be found in the UNFCCC regime. In particular, UNFCCC article 4 establishes for States an obligation to stabilise greenhouse gas emissions in the atmosphere at a level that would prevent dangerous interference with the climate system. Article 2 of the Paris Agreement further spells out the duty as an obligation to contain temperature increase within 2°C, and possibly 1.5°C. The binding nature of these obligations has been discussed, in the light of the terminology of such norms and the difficulty of defining precise standards of conduct.[50] In principle, however, there is enough consensus that the UNFCCC and the Paris Agreement establish at least a duty to make all available efforts to prevent carbon emissions.[51] It could therefore be argued that the EU can impose CBAMs on States that do not implement all possible efforts to adopt adequate carbon reduction measures, and are thus in breach of their duty to prevent carbon emissions under the UNFCCC system.

14.3.2 Stabilising Greenhouse Gas Emissions: An Obligation of Conduct or Result?

When can CBAMs be adopted? The time for the adoption of CBAMs depends largely on their nature as obligations of conduct or result. It is, indeed, unclear whether UNFCCC article 4(2), which regulates mitigation policies, establishes a duty of conduct or one of result. While obligations of conduct only require best efforts to achieve the objective, those of result necessitate the achievement of a specific objective, that is, a maximum increase in average temperature of 2°C or 1.5°C. Naturally, if the obligation to curb greenhouse gas emissions is one of result, the fact that a State does not adopt climate policies and carbon pricing schemes adequate to achieve the objective would allow another State to adopt proportionate CBAMs in countermeasure as a reaction based on measurable data.

[49] M. Koskenniemi, Report on the Fragmentation of International Law. UN Doc. A/CN.4/L.682, 2006.
[50] See, for instance, M. Fitzmaurice, Responsibility and climate change. *German Yearbook of International Law* 2010, 53: 89–138.
[51] D. Bodansky, The legal character of the Paris Agreement. *Review of European, Comparative and International Environmental Law* 2016, 25(2): 142–150, at p. 146; B. Mayer, Obligations of conduct in the international law on climate change: a defence. *Review of European, Comparative and International Environmental Law* 2018, 27: 130–140, at p. 135; *Stichting Urgenda v. The State of The Netherlands (Ministry of Economic Affairs and Climate Policy)*, Hague District Court, Case C/09/456689/HA ZA 13–1396, Judgment, 24 June 2015, para. 4.42.

Guideline 3 of the International Law Commission's Draft Articles on the Protection of the Atmosphere provides that the State obligation not to cause transboundary pollution is an obligation of due diligence in taking appropriate measures.[52] It has therefore been noted that the obligation does not establish clear parameters for compliance.[53] Along these lines, as concerns the obligation to curb greenhouse gas emissions, it is considered that the UNFCCC and the Paris Agreement establish an open-ended obligation of conduct, which can be subsequently specified by the Parties via nationally determined contributions (NDCs) as an obligation of result.[54] In the light of the categorisation developed by Wolfrum, the obligation to curb greenhouse gas emissions could be classified as a goal-oriented duty to achieve Paris Agreement targets in a distant future.[55] Indeed, article 2 of the Paris Agreement establishes as its 'ultimate objective' the stabilisation of greenhouse gases at a level that prevents dangerous interference with the climate system.[56] Furthermore, UNFCCC article 4(2)(a) requires the parties to that convention to adopt adequate policies for 'longer-term trends in anthropogenic emissions', consistent with the objective of sustainability.[57]

In any case, even assuming that the obligation to curb greenhouse gas emissions is one of conduct, scholars underscore that such an obligation remains all the same quite effective and can be even more compelling when followed by adequate sanctions, via the effective monitoring of available means of compliance.[58] Thus, the fact that a State does not adopt adequate mitigation measures and carbon pricing schemes would in any case be measurable against Paris Agreement targets based on available means – while the assessment would be more complex, it would remain possible, triggering CBAMs in countermeasure.

14.3.3 Relative or General Environmental Obligations: Carbon Border Adjustment Measures as General Agreement on Tariffs and Trade and General Agreement on Trade in Services Erga Omnes Contractantes *Countermeasures*

Obligations to address climate change arise from treaties. The reference is currently provided by the UNFCCC and the Paris Agreement, particularly articles 4 and 2, respectively. According to a relativist approach, the duty to curb carbon emissions remains a specific obligation within the context of interstate conventional obligations, as codified in VCLT and VCLTIO article 34. Within this paradigm, the EU could adopt CBAMs *vis-à-vis* other States and international organisations that are parties not only to the GATT and GATS, but also to the UNFCCC and the Paris Agreement. As these have quasi-universal application, essentially, this means that the EU and its Member States may adopt CBAMs *vis-à-vis* all GATT and

[52] ILC, Report on the Work of Its Seventieth Session, Guidelines on the Protection of the Atmosphere. UN Doc. A/73/10 159 (2018), 174–176.
[53] UNEP, Comments on the ILC's Draft Guidelines on the Protection of the Atmosphere (2020). p. 4. https://legal.un.org/docs/?path=../ilc/sessions/72/pdfs/english/poa_unep.pdf&lang=E.
[54] Bodansky, The legal character of the Paris Agreement, p. 146; Mayer, Obligations of conduct, p. 134; B. Mayer, Temperature targets and state obligations on the mitigation of climate change. *Journal of Environmental Law* 2021, 33(3): 585–610, at pp. 600–601.
[55] R. Wolfrum, Obligations of result versus obligations of conduct: some thoughts about the implementation of international obligations, in M. H. Arsanjani, J. K. Cogan, R. D. Sloane, S. Wiessner (eds.), *Looking to the Future* (Brill, 2010), pp. 363–383, at pp. 366–367.
[56] Emphasis added. [57] Wolfrum, Obligations of result versus obligations of conduct, pp. 368 and 373.
[58] Mayer, Obligations of conduct, pp. 132 and 137–138.

GATS (*erga omnes contractantes*) States that are not in compliance with the obligation to curb carbon emissions. However, there have been States that have at times withdrawn from the UNFCCC Protocols, such the United States under the Trump administration. With regard to such a case, that is, that of a State party to the GATT and GATTS, but not to the UNFCCC Protocols, the EU could not adopt CBAMs in countermeasure, save entering negotiations and outlining an agreed greenhouse gas reduction standard. Alternatively, based on quasi-universal participation in the UNFCCC and the Paris Agreement and support by civil society,[59] the obligation to curb carbon emissions could be approached as a universal one under general international law. Within this framework, the obligation could be further seen as an *erga omnes* duty and even a peremptory norm.[60] This would entail that the EU and its Member States may adopt CBAMs *vis-à-vis* all GATT and GATS States that are not in compliance with the obligation to curb carbon emissions. If the EU and its Member States intend to further impose a standard for climate policies and carbon pricing that is higher than the standard established under the UNFCCC regime, they should enter into negotiations with the concerned State or States bilaterally or multilaterally.

By broadening the analysis to other environmental obligations, a State party to the GATT and GATS could adopt CBAMs *vis-à-vis* all other GATT and GATS States, that is, *erga omnes contractantes*, by invoking the no-harm rule and sustainable development as an essential component. The 'no harm' rule was first outlined in the *Trail Smelter* arbitration as an obligation to compensate for transboundary harm.[61] It has been subsequently confirmed in cases such as *Lac Lanoux*,[62] and is codified in articles 3–4 of the International Law Commission's 2001 Draft Articles on Transboundary Harm from Hazardous Activities,[63] as well as in principle 21 of the 1972 Stockholm Declaration on the Human Environment.[64] The no-harm rule is currently considered a customary norm under general international law. Indeed, in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ determined that there is a 'general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control', which 'is now part of the corpus of international law relating to the environment'.[65] Arguably, it is also the case that the principle of sustainable development, as part of the no-harm rule, constitutes a general obligation under international law.[66] Inadequate climate policies and carbon pricing schemes could therefore be invoked by the EU and its Members States as a breach of the no-harm rule to adopt CBAMs *erga omnes contractantes* within the WTO, particularly under the GATT and GATS (Figure 14.3).

[59] Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Seventy-Third Session on The Work of the ILC of its Seventieth Session (2018). UN Doc. A/CN.4/724 (2019), at 21, para. 107.
[60] See Peremptory Norms of General International Law (Jus Cogens), Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading. UN Doc. A/CN.4/L.936, at 1, Draft Conclusion, 2[3(1)], Definition of a Peremptory Norm of General International Law (Jus Cogens); D. Tladi, Fourth Report to the International Law Commission on Peremptory Norms of General International Law (Jus Cogens). UN Doc. A/CN.4/727 (2019), at pp. 61–62, para. 136.
[61] *Trail Smelter (US v. Canada)*, 16 April 1938 and 11 March 1941, 3 RIAA 1907, 1965.
[62] *Lac Lanoux (France v. Spain)*, Award (1957) 12 RIAA 281.
[63] ILC, Report on the Work of Its Fifty-Sixth Session. UN Doc. A/56/10, 2001, at p. 148.
[64] UN Conference on the Human Environment. Report. UN Doc. A/CONF/48/14.REV.1, 16 June 1972.
[65] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 241–242, para. 29.
[66] Ghaleigh and Rossati, The spectre of carbon border-adjustment measures, p. 66.

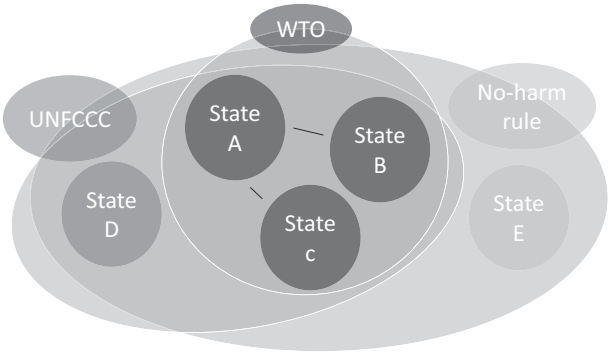

Figure 14.3 WTO, obligation to curb GHG emissions and carbon border adjustment measures.

14.4 Conclusion

The EU's attempt to establish its CBAM to level differences between carbon pricing schemes and to implement adequate climate policies has raised a debate on the lawfulness of such mechanisms under international economic law. Under general international law, there is no obligation of non-discrimination in economic relations, and thus the national treatment and MFN principles do not apply. The EU and its Member States are therefore free to adopt CBAMs *vis-à-vis* third-party countries that are not parties to the WTO or other international economic agreements grounded in the principle of non-discrimination. Within this framework, CBAMs can be adopted for any purpose, be it economic protectionism rather than environmental protection, in which case they will qualify as retaliatory measures. Naturally, CBAMs must be adopted within the limits of existing treaty obligations (*lex specialis derogat legi generali*).

Under particular economic agreements, seeing CBAMs as countermeasures allows decisive insights to demonstrate their lawfulness. Considering the key example of the national treatment principle under the GATT and the GATS, arguably the EU and its Member States are currently allowed to adopt CBAMs in breach of the national treatment principle as a secondary lawful response to the breach of the primary obligation by a third-party State to curb greenhouse gas emissions. This establishes the fundamental lawfulness of CBAMs and shifts the burden of proving the absence of necessity and proportionality to the third-party State, overcoming the difficulty of shaping a perfect CBAM respectful of complex rules such as the 'likeness' requirement interpreted in the light of the 'disparate impact' test. *Vis-à-vis* third-party States that are members of the GATT, GATS and parties to the UNFCCC regime, the EU and its Member States can invoke the breach of the primary obligation to curb greenhouse gas emissions. As regards third-party GATT and GATS States that might not be parties to the UNFCCC regime, the EU and its Member States can invoke the no-harm rule as a general obligation, that is, an *erga omnes* right and duty, under customary international law.