Volatility of EU's Carbon Border Adjustment Mechanism (CBAM) under WTO Agreements —The Significance of Leveling the Playing Field and Dispute Avoidance in Global Warming Measures

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Abstract

The EU's Carbon Border Adjustment Mechanism (CBAM) regulation, which entered into force on 17 May 2023, establishes a system that requires the surrender of CBAM certificates corresponding to the amount of embedded CO_2 emissions of import goods produced outside the EU. The aim is to curb carbon leakage, which has become a concern with the abolition of free allocations in emissions trading within the EU region. As such a system has the effect of restricting trade, there is a need to ensure that it is consistent with World Trade Organization (WTO) agreements. On the other hand, if the WTO were to strongly deny such a system for violation of its agreements, it risks being perceived as sending out the wrong message that it is an organization that hinders proactive efforts to address global warming. Therefore, this paper analyzes how the CBAM is appraised under WTO agreements and explores how it should ideally be dealt with. The results of the analysis in this paper conclude that under the existing legal system, there is a possibility that CBAM regulation may be found to be in violation of WTO agreements. As such, it is necessary to consider resolving the issue by means other than referring it to the WTO's dispute settlement procedures, and specifically, to consider the utilization of means such as WTO's Committee on Trade and Environment (CTE).

Keywords: Carbon Border Adjustment Mechanism (CBAM), Trade and environment, World Trade Organization (WTO), WTO Committee on Trade and Environment (CTE)

JEL Classification: F18, K33, Q54

I. Introduction

The European Union has introduced the emissions trading system (EUETS) in 2005. From its inception, there was a concern regarding carbon leakage, the phenomenon that the global carbon emission increases due to the drain of EU sectors from the internal market. To tackle this issue, under the EUETS, allowances were freely allocated to certain sectors affected by the EUETS and compensation was provided to alleviate the impact of increase in price

of electricity (i.e., EU state aid rules will not be applied to those compensations). However, these alleviations were also a concern as they will become an obstacle to achieving the goal of reducing 55% of emissions by 2030, compared to those in 1990.[1] Therefore, the European Commission proposed the regulation introducing the carbon border adjustment mechanism (CBAM) in 17 July 2021,[2] and the regulation (the CBAM Regulation) finally came into effect on 17 May 2023.[3] The transition period of the Regulation initiated on 1 October 2023, and it is expected that the Regulation will be fully applied from the beginning of 2026.

The CBAM Regulation requires surrender of certification corresponding to the amount of "embedded emission," which will be counted on the base of product's emissions during its production. This imposes a huge burden for imported products, spurring backlash from exporting countries.[4] At the same time, the CBAM system has a risk to be evaluated as infringing World Trade Organization (WTO) rules. In fact, it was reported that India was considering bringing the case to the WTO in May 2023.[5] Although the EU itself presumes that the CBAM system does not infringe the WTO rules,[6] and such presumption might be supported depending on the actual operation of the system, there is no guarantee that the system can apparently pass the scrutiny under the WTO rules if a dispute is actually raised. The fear is, if the system is evaluated as infringing WTO rules, it would provide an erroneous message that the WTO is unfriendly to policies aiming to improve the environment. The negative decision by the WTO dispute settlement mechanism may provoke strong resistance from EU firms and environmental Non-governmental Organizations (NGOs), eventually creating the atmosphere that see the WTO as enemy.[7] Therefore, cautious, or in some cases restrained, operation of CBAM system is required.[8]

Within these situations in mind, this paper will assess the CBAM Regulation in light of WTO rules. Section II will take a brief tour of the CBAM Regulation. Sections III and IV analyzes the compatibility of CBAM Regulation with the WTO agreements, in particular non-discrimination and exception clauses, respectively. Section V deals with the arrangement of carbon price, a mechanism to reduce the burden of CBAM when carbon pricing policies

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[1] European Commission (2021a).

[2] European Commission (2021b).

[3] 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, 16.5.2023, pp. 52-104.

[4] Hufbauer (2021).

[5] Kumar and Arora (2023).

[6] European Commission (2023), p. 1.

[7] There is an argument that WTO rules would hamper the aggressive climate measures. E.g., Tucker and Meyer (2021), p. 15.

[8] After the publishment of proposal of regulation in the EU, there was also a motion for carbon adjustment mechanism in the US (Coons-Peters bill), although it did not evolve into a legislation. On the other hand, the US is starting to grant a great deal of subsidies under the Inflation Reduction Act of 2022 (IRA), and the effect of which to the future of carbon pricing policy remains to be seen. Currently, there is a negotiation framework among the EU and the US regarding steel and aluminium, i.e., the Global Arrangement on Sustainable Steel and Aluminium, but it has not yet achieved any tangible outcomes.

are introduced in exporting countries, which is expected to be a focal matter under the actual operation of the CBAM system. Rather than focusing on the relationship between countries with and without strong climate policies this paper will discuss the relationships between countries with relatively intensive climate policies and those with relatively moderate climate policies. Finally, the last section explores the resolution that does not rely on the WTO dispute settlement mechanism.

II. CBAM Regulation

II-1. The Purpose and Subject matters

The purpose of the CBAM Regulation is to create an adjustment mechanism for greenhouse gas emissions embedded in particular goods in order to prevent the occurrence of carbon leakage, and hence achieving the eventual reduction of carbon emissions worldwide.[9] The goods that are the subject to the Regulation are cement, electricity, fertilizers, iron and steel, aluminum, and chemicals (hydrogen).[10]

II-2. Conditions for Import and Surrender of Certification

The goods that are subject to the CBAM Regulation can only be imported through an authorized CBAM declarant.[11] The importers need to seek declarant status before the importation of goods.[12] The national competent authority will grant the status of authorized CBAM declarant provided that the applicant has not been involved in a serious infringement or in repeated infringements of customs legislation or other related rules, and the applicant's financial and operational capacity fulfil its obligations under the Regulation.[13] No goods are allowed to be imported except by an authorized CBAM declarant.[14]

By 31 May, each authorized declarant needs to submit a CBAM declaration[15] containing (a) the total quantity of each type of goods imported during the preceding calendar year, (b)

[9] Article 1(1) CBAM Regulation.
[10] Article 2(1) and Annex I CBAM Regulation.
[11] Article 4 CBAM Regulation.
[12] Article 5(1) CBAM Regulation.
[13] Articles 17(1) and (2) CBAM Regulation.
[14] Article 25(1) CBAM Regulation.
[15] The CBAM declaration will be submitted via the CBAM registry.

the total embedded emissions in the goods imported,[16] (c) the total number of CBAM certificates to be surrendered corresponding to the total embedded emissions, and (d) copies of verification reports, issued by accredited verifiers.[17] The total embedded emissions declared in the CBAM declaration will be verified by a verifier accredited pursuant to the Regulation.[18]

The EU Member States will sell CBAM certificates on a common central platform.[19] The price of CBAM certificates will be calculated by the European Commission based on the average of the closing prices of EUETS allowances on the auction platform for each calendar week.[20]

The authorized CBAM declarant, by 31 May of each year, shall surrender via the CBAM registry a number of CBAM certificates that corresponds to the embedded emissions declared for the calendar year preceding the surrender. Technically, this means that the Commission removes surrendered CBAM certificates from the CBAM registry.[21] The authorized CBAM declarant shall ensure that the number of CBAM certificates on its account in the CBAM registry at the end of each quarter corresponds to at least 80 % of the embedded emissions in all goods it has imported since the beginning of the calendar year.[22] If such 80% requirement is not satisfied, the Commission requires the authorized CBAM declarant, via the competent authority of the Member State, to ensure a sufficient number of CBAM certificates in its account within one month.[23] In the case where there exists a surplus in the number of CBAM certificate, the Member State repurchases the excess CBAM certificates, to the extent not exceeding one third of the total number of CBAM certificates purchased by the authorized CBAM declarant during the previous calendar year, in the same price with that paid by the authorized CBAM declarant when it purchased the certificate.[24]

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[16] "Embedded carbon emissions" is defined as "direct emissions released during the production of goods and indirect emissions from the production of electricity that is consumed during the production processes," and it will be calculated in accordance with the methods set out in Annex IV and implementing acts (Articles 3(22) and 7(1)). It is determined based on the formula that divides actual emissions of imported products by the quantity of goods. In the case of Complex goods, the input materials of which also emit carbon during the production process, carbon emissions of inputs need to be added to such formula. Where the actual emissions cannot be adequately determined, the embedded emissions shall be determined by reference to default values on the basis of the average emission intensity of each exporting country and for each of the goods. When reliable data for the exporting country cannot be applied for a type of goods, the default values shall be based on the average emission intensity of the X% worst performing EUETS installations (X% will be decided in implementing acts) for that type of goods (Article 7(2) and Annex IV).

[17] Articles 6(1) and 6(2) CBAM Regulation.

[18] Article 8(1) CBAM Regulation.

[19] Article 20(1) CBAM Regulation.

[20] Article 21(1) CBAM Regulation. CBAM certificates can principally be purchased at any time.

[21] Article 22(1) CBAM Regulation.

[22] Article 22(2) CBAM Regulation.

[23] Article 22(3) CBAM Regulation.

[24] Article 23 CBAM Regulation.

II-3. Reduction and Abolition of Free Allocation and CBAM

It is imperative that the introduction of CBAM is connected to the reduction of free allocations. The coexistence of free allowances and the cost adjustment to the imported goods would grant excessive advantages to EU industries and make them competitively favorable against the imported goods (not realizing a level-playing-field). The reduction of free allocation is planned gradually from 2026 to 2033 and is anticipated that it will be finished (no free allocation) in 2034.[25] The actual amount of CBAM certificates that must be surrendered will be adjusted as a result of this treatment.[26]

The usage of revenue from the sale of CBAM certificates by the EU would become an issue. So far, 50% of the revenues from the auctioning of allowances under the EUETS were required to be used for climate or energy policy.[27] This rule is enhanced under the amendment of EUETS Directive, which was pursued in parallel with the introduction of CBAM, to use all of the revenues, except for those allocated to compensate the increased indirect carbon costs, for those policies.[28] Therefore, in order to make the situation symmetric between imported and internal goods, revenues of CBAM certificates need to be used for the same or similar purpose. At this stage, there are no formal instructions for the usage of CBAM certificates revenues.[29]

II-4. Carbon Price Paid in the Country of Origin

Under the CBAM Regulation, when the carbon pricing policy is introduced and the payment is effectively implemented in the country of origin, that fact would be taken into account (i.e., the number would be reduced) when surrendering the CBAM certificates.[30] However, the specific method for such reduction was not indicated in the Regulation. The detail would be prescribed in the Commission's implementing act.[31]

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[25] Article 1(13) of the Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 Amending Directive 2003/87/EC Establishing a System for Greenhouse Gas Emission Allowance Trading within the Union, Decision (EU) 2015/1814 Concerning the Establishment and Operation of a Market Stability Reserve for the Union Greenhouse Gas Emission Trading System, OJ L 130, 16.5.2023.

[26] Article 31(1) CBAM Regulation. In phase 3 of the EUETS 43% of the total volume allowances were freely allocated. European Commission (2021c), p. 10.

[27] The old Article 10(3) of the Directive 2003/87/EC. For instance, it is reported that 76% of the auction revenues in 2021 was spent for climate- and energy-related projects. European Commission (2022), p. 13.

[28] Article 1(12) of the Directive 2023/959.

[29] However, the recital 74 of the Regulation implies that the EU is projecting to use the revenues generated by the sale of CBAM certificates to support low and middle-income third countries toward the decarbonization of their manufacturing industries. The revenue of CBAM is expected to generate 2.1 billion EUR in 2030. European Commission (2021b), pp. 47 and 58.

[30] Article 9(1) of the Directive 2003/87/EC.

[31] Article 9(4) CBAM Regulation. The implementing act is expected to be enacted before the end of the transition period in 2025. The Regulation (Article 2(12)) allows to conclude agreements with third countries with a view to taking into account carbon pricing mechanisms in such countries for the purposes of the application of Article 9.

II-5. Enforcement

An authorized CBAM declarant who failed to surrender the number of CBAM certificates corresponding to the emissions embedded in goods imported during the preceding calendar year by 31 May of each year is held liable for the payment of a penalty that is identical to the excess emissions penalty set out in Directive 2003/87/EC[32] adjusted under the relevant provisions.[33] A person other than a declarant who introduces goods into the EU territory without complying with the obligations under the Regulation is also the subject to the penalty, but the amount of such increases three to five times from the regular penalty.[34] The payment of penalty does not release the declarant from the obligation to surrender the outstanding number of CBAM certificates in a given year.[35] Where the penalty has not been paid by the due date, the competent authority shall secure payment of that penalty under the national law of the Member State concerned.[36] As can be discerned from this structure, the only sanction for the failure of surrendering CBAM certificates is the payment of penalty, meaning that other means such as import bans are not contemplated.

III. Evaluation under the WTO Agreement: Non-Discrimination and Quantitative Restriction

One of the interests for countries exporting the goods that are subjects to the CBAM Regulation the EU is whether such regulatory framework breaches the obligations under WTO agreements as it entails apparent trade restrictive effects. This Section analyzes the consistency of the CBAM measure with provisions regarding non-discrimination and quantitative restrictions, and the next Section examines whether the measure can be justified under Article XX of the General Agreement on Tariffs and Trade (GATT).

III-1. National Treatment

III-1-1. Article III:2 GATT

When considering the compatibility of the CBAM measure with the non-discrimination

[32] Article 16(3) of the Directive 2003/87/EC.
[33] Article 26(1) CBAM Regulation.
[34] Article 26(2) CBAM Regulation.
[35] Article 26(3) CBAM Regulation.
[36] Article 26(5) CBAM Regulation.

principle under WTO rules, the first provision to be examined is Article III:2 GATT.[37] The provision prohibits imposing "internal taxes or other internal charges" of any kind in excess of those applied to like domestic products. When the burden that imported goods must pay for surrendering CBAM certificates becomes larger than those domestic goods incurred under the EUETS, such situation might be assessed as infringing Article III:2 GATT.

To begin with, a fundamental issue must be addressed, that is, whether Article III:2 GATT can be applied to the CBAM measure. Article III:2 deals with internal taxes and hence, this provision cannot be applied when the measure is assumed as a border measure. Such measure will fall under the scope of Article II GATT. The decisive factor for the determination of applicable provision is the interpretation of "all other duties or charges of any kind imposed on or in connection with the importation" in the second sentence of Article II:1(b). As the purchase of CBAM certificate is not required at the point of import, it could not be deemed as a border measure.[38] However, given the fact that the amount of the CBAM certificate will be decided on the volume of imports (more precisely, amount of carbon embedded in imported goods), there is space to assume the measure is charged "in connection with the importation." The panel's finding implying that the scope of the second sentence of Article II:1(b) GATT is broad further makes difficult to deny the applicability of such provision to the CBAM measure.[39] However, even if Article II:1(b) is applicable, subparagraph 2(a) of the same provision permits the imposition of "a charge equivalent to an internal tax" at the time of importation.[40] The fact that CBAM is connected to EUETS, a domestic measure, gives leeway to assume CBAM as "a charge equivalent to an internal tax."[41] At the same time, the provision applies to charge in respect of the like domestic product "or in respect of an article from which the imported product has been manufactured or produced in whole or in part." This invites another possibility that this provision will not be applied to the CBAM measure, because the measure is based on the fact that the charge will be applied to carbon emissions (or consumption of energies) which does not constitute the "part" of products.[42] If the conclusion is that Article II:2(a) cannot be applied to the CBAM measure, application of Article XX needs to be pursued in order to justify the infringement of Article II:1(b).

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[37] The discussion regarding national treatment in this section is based on the premise that free allocation of allowance is eliminated. When free allocation remains to internal entities, the CBAM measure makes excessive burden to imported products, apparently infringing Article III GATT.

[38] This nature of the measure signifies that it is not a "border" measure, but the EU itself is using this terminology.

[39] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, paras. 7.113-114.

[40] If a charge satisfies the conditions of Article II:2(a), it will not violate Article II:1(b). Appellate Body Report, *India – Additional Import Duties*, WT/DS360/AB/R, adopted 17 November 2008, para. 153.

[41] Abe (2010), p. 40. As the CBAM Regulation requires importers to purchase CBAM certificates, it could be deemed as "charge." Rather, the issue is whether the EUETS fits to the term "internal tax." This will be discussed later. For the position that admits expansive interpretation of "internal tax," e.g., Englisch and Falcão (2021a), p. 10867.

[42] Sekine (2007), p. 16. Alternatively, it is possible to recognize imported iron and steel and domestic products as "like products" and, on the basis of the term "consistently with the provisions of paragraph 2 of Article III", make the examination equivalent to Article III:2.

Assume that Article III:2 GATT will be applied to the CBAM measure, which seems to be reasonable, the next controversial issue is whether an emission trading system can be presumed to be "internal taxes or other internal charges of any kind" for the purpose of the provision. The EUETS, in spite the fact that under the system the products are compelled to indirectly bear certain amount of charge, is not a quintessential internal taxes or charges. Neither it is a charge system targeting products (rather it is toward producers) nor a system that necessarily entail the transfer of capital to governments.[43] Nevertheless, there is an Appellate Body decision which states that "not only disciplining internal taxes that directly affect products but also internal taxes that indirectly affect products" would be included in the scope of the first sentence of Article III:2.[44] This decision will open up the potential for the EUETS to be included as an "internal tax" within the meaning of Article III:2. Furthermore, there may be an argument that EUETS can be categorized as an "internal charge" rather than "internal taxes" due to the understanding that the purpose of juxtaposition of internal charge is to capture the charge system that is not a quintessential tax system but has a similar effect.[45]

The third issue is whether the CBAM measure will be applied "in excess of" internal taxes or charges applied to like domestic products. It seems to be clear that the CBAM measure incurs the burden that surpasses the amount that domestic products bears. The financial burden of CBAM certificates will be decided through the multiplication of the price of CBAM certificates, which will be calculated based on the average of the closing prices of EUETS allowances on the auction platform for each calendar week, with the total quantities of imports. While there exists a possibility that the burden becomes the same between domestic and imported products due to the similarity in embedded emissions, it is expected that the amount of carbon emitted during the production process of imported products is usually larger than those of EU products, making imported products likely to be exposed to heavier burden. However, the abstruseness of this issue is that the burden of imported products could become lighter when the embedded emissions of the product are smaller compared with domestic products. Therefore, it becomes necessary to examine how this fact that the burden of imported products could both be heavier and lighter depending on the underlying conditions can evaluated under Article III GATT.

The Appellate Body decided that even the smallest amount of "excess" can fulfill the requirement of "in excess of."[46] This implies that the measure that renders the burden of imported products both larger and smaller, depending on the factual background, can be evaluated

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[43] Sekine (2007), p. 27.

[44] Appellate Body Report, *Brazil - Taxation*, WT/DS472/AB/R, WT/DS497/AB/R, adopted 11 January 2019. para. 5.15.

[45] Abe (2010), p. 43.

[46] Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 23.

as infringing Article III:2 due to the possible occurrence of situation under which the burden of imported products is larger than domestic products. Indeed, the Panel in *Argentina – Hides and Leather* revealed sympathetic attitude to this position.[47] In this case, the tax rate for domestic products was either 2 or 4%, but the tax rate for imported products under the same tax system was fixed at 3%. As there was a situation that tax rate for imported products exceeds that for domestic products (3%>2%), it was decided as inconsistent with Article III.[48] The situation in that case is slightly different from the situation discussing here (namely, applied tax rate is same between imported and domestic products, but the actual amount is different due to the difference in underlying facts, i.e., differences in carbon emissions), making it difficult to extract apparent conclusion from the case.[49] However, it seems pertinent to assume that the decision in *Argentina – Hides and Leather* implies that the CBAM measure may constitute an infringement of Article III:2.

Another issue is the identification of likeness between imported and domestic products. A profound question is whether two products that are physically identical can be presumed as "unlike" on the ground of differences in amount of carbon emissions during the process of production. This is a discussion of so-called non-product-related process and production method (PPM). Under the traditional interpretation of "like products," when the difference in production process does not affect the final *products*, the likeness of two products would not be overturned.[50] Given that this interpretation remains effective, as the carbon emission in the process of production does not affect the physical and functional nature of final products, different treatment of domestic and imported products cannot be supported under Article III GATT.[51]

In this regard, the Appellate Body in *Philippines – Taxes on Distilled Spirits* set forth that "products that have very similar physical characteristics may not be 'like,' within the meaning of Article III:2, if their competitiveness or substitutability is low."[52] This implies that even though two products can share physical similarity, the difference in the production process or raw materials might create a circumstance that the "competitiveness or substitutability [between two products] is low," thereby excluding the applicability of Article III:2 GATT. How-

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[47] Panel Report, *Argentina – Hides and Leather*, WT/DS155/R, adopted 16 February 2001, para. 11.259.

[48] On the other hand, with regard to the situation of 3%<4%, the Panel decided that "[i]t does not permit Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances." *Ibid*., para. 11.260.

[49] In *Argentina – Hides and Leather*, the Panel abstractly delivered that "even where imported and like domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products." *Ibid*, para. 11.183.

[50] GATT Panel Report, *US – Tuna (Mexico)*, DS21/R, circulated 3 September 1991, unadopted, BISD 39S/155, paras. 5.12 and 15.

[51] On the other hand, as suggested by the Appellate Body in *EC – Asbestos*, likeness of products may be rejected when the non-physical difference in two products has significant impact on consumers' tastes and habits. Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, paras. 109-126.

[52] Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R, WT/DS403/AB/R, adopted 20 January 2012, para. 120.

ever, there is a caveat in *Philippines – Taxes on Distilled Spirits* in that its factual background was different from what is discussed here. The issue of likeness in that case was between the imported goods produced from non-designated raw materials and domestic goods that are produced from different designated raw materials, and the purpose of using designated raw materials was to render goods using those designated raw materials similar to the imported goods.[53] Therefore, the focus of discussion in this case was whether two products with different ingredients can still be assumed as *like* products. This does not necessarily bring the conclusion regarding the opposite situation, namely, the answer to the following question: Under what conditions will two products with similar physics but with different production processes make "their competitiveness or substitutability is low" and hence, not constituting like products?[54] Nevertheless, as a practical matter, it seems that this requirement of "their competitiveness or substitutability being low" could be a high hurdle to overcome if domestic and imported products at issue are physically similar.

Beside these discussions, the relationship between domestic and imported goods can be considered as "a directly competitive or substitutable product," under which the second sentence of Article III:2 will be applied.[55] When imported goods are assumed as directly competitive to domestic products, importing country needs to avoid creating the situation of "not similarly taxed." This requirement is distinguished from "in excess of" under the first sentence of Article III:2, signifying that the amount of differential taxation should be more than *de minimis*.[56] Hence, so long as the difference in the burden of imported and domestic products remains within the scope of *de minimis*, the CBAM measure can be assessed as consistent with the second sentence of Article III:2. Nevertheless, it must be noted that the Appellate Body is maintaining the position that some less favorable treatment for imported goods cannot be offset by more favorable treatment to other imported goods,[57] as shown in the panel's decision in *Argentina – Hides and Leather*.[58]

Even the burden of directly competitive or substitutable imported goods exceeds the degree of *de minimis*, it would not infringe the second sentence of Article III:2 if the measure is

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[53] *Ibid*., paras. 126-128.

[54] At the same time, the Appellate Body in *Philippines – Taxes on Distilled Spirits* delivered that "in spite of differences in the raw materials used to make the products, if these differences do not affect the final products, these products can still be found to be "like" within the meaning of Article III:2 [GATT]". This remark implies that it is difficult to overturn the likeness when the (physical) similarity in final product is observed.

[55] The discussion in this section presumes that the CBAM measure fall under the second sentence of Article III:2. If the applicable condition of the second sentence is a discrimination between "two products that are physically not like, but competitive relationship is discernible," the discussion in the present part entails the (peculiar) situation that the products which are subject to the CBAM measure or EUETS (e.g., imported and domestic steels) are deemed as not "like" from the physical point, but they are "like products" because they have competitive relationship.

[56] Appellate Body Report, *Japan – Alcoholic Beverages II, supra* note 46, p. 27.

[57] Appellate Body Report, *Canada – Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, p. 29. The Appellate Body revealed this position by referring to the Panel's decision in *US – Section 337*.

[58] Panel Report, *Argentina – Hides and Leather, supra* note 47, para. 11.260.

not applied "so as to afford protection to domestic production."[59] The Appellate Body in *Chile – Alcoholic Beverages* discussed the meaning of this requirement. In this case, the Appellate Body found that the measure is applied so as to protect domestic production as the tax system at issue, under which the tax rate increases according to the alcohol content, was applied in a way that 75% of domestic products were subject to lower tax rate, and 95% of imported products (directly competitive or substitutable products) were subject to higher tax rate.[60] In light of this, the CBAM measure may also be concluded as it is applied so as to protect domestic products. This is because imported products may generally incur larger financial burden to surrender CBAM certificates due to its larger embedded carbon emissions, although there remains some possibility that the burden becomes smaller when embedded carbon emissions are smaller than domestic products.

III-1-2. Article III:4 GATT

Article III:4 GATT will be applied to "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." While there seems less controversy in assuming that the CBAM measure falls under this sentence, as the importers (CBAM declarants) are required to regularly surrender CBAM certificates in order to import and sale foreign products,[61] some aspects of the measure may categorize the CBAM measure as *de facto* quantitative restriction to trade, and hence, necessitates to consider the applicability of Article XI GATT. This is particularly true when the measure creates strong disincentive to import products in order to escape the burden of surrendering CBAM certificates (chilling effect). In this respect, the Appellate Body in *China – Auto Parts* indicated a guidance, although it was shown in the context of relationship between Articles II:1(b) and III:2, that the application of provision should be decided based on the element that constitutes center of gravity for characterizing the measure.[62] Given the fact that the CBAM measure does not necessarily have a prohibitive nature, the center of gravity of the CBAM measure seems to be on the restriction of sale in the imported country,[63] and therefore, the main provi-

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[59] Appellate Body Report, *Japan – Alcoholic Beverages II, supra* note 46, p. 27.

[60] Appellate Body Report, *Chile – Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 67. The respondent in this case argued that a major part of products that are subject to higher tax rate is domestic products. The Appellate Body disregarded this argument and rather emphasized the fact that lower tax rate applies to the most of domestic products (domestic products with higher tax rate were relatively minor).

[61] The word "affecting" in Article III:4 is grasped as having a broad scope of application. Appellate Body Report, *US-FSC (Article 21.5 – EC)*, WT/DS108/AB/RW, adopted 29 January 2002, para. 210. As discussed elsewhere, there remains an old decision specifying that Article III only convers regulation relating to "products." However, it is unpredictable that the EUETS (and the CBAM measure) would be assessed as a regulation not relating to products (hence Article III is not applicable) on the basis of such an old decision.

[62] Appellate Body Report, *China – Auto Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para. 171.

[63] As the CBAM Regulation requires the surrender of CBAM certificates after the importation of goods, it would exclude the application of *Ad* Note to Article III which deals with a regulation that applies "at the time or point of importation."

sion to be applied would be recognized as Article III:4 (the potential application of Article XI and its relationship with Article III will be discussed in Section III-2 below).[64]

The same issue, namely, whether the difference in embedded carbon emission warrants denial of "like products" between domestic and imported products, also becomes relevant in the interpretation of Article III:4 GATT. However, the "like products" requirement in Article III:4 is understood with slightly different meaning from that under Article III:2, since Article III:4 is not composed of two concepts, i.e., "like products" and "a directly competitive or substitutable product." With this in mind, the Appellate Body explained that "like products" in Article III:4 entails both meaning of "like products" and "a directly competitive or substitutable product."[65]

The result of such is that "like products" in Article III:4 GATT will be interpreted with more emphasis on competitive relationship.[66] If this understanding is correct, likeness of products can be denied when two products are not in the competitive relationship, even they are physically identical. In the context of climate policy, if the amount of embedded carbon emissions can constitute an element to defy likeness of two products, distinction in treatment between domestic and imported products can be accepted.

Nevertheless, even competition relationship would be the crucial element under Article III:4, the physical nature of products is not negligible. To distinguish two physically identical products on the ground of the element that do not directly affect the physical nature of products, including carbon emissions during the process of producing goods, such element should have decisive impact on competition conditions.[67] Although it is apparent that carbon emissions are major interest for EU citizens, it still remains to be seen whether such interest can be assumed as a significant factor that can deny the physical similarity (and substitutability) of domestic and imported products.

Next to the issue of likeness is whether there exists "no less favorable" treatment between domestic products that are the subject to EUETS and imported products under CBAM measure. In this respect, the GATT Panel in *US – Section 337* decided as "any notion of balancing more favorable treatment of some imported products against less favorable treatment of other

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[64] However, as the payment of penalty does not release the declarant from the obligation to surrender the outstanding number of CBAM certificates in a given year, the total burden of importers may become enormous. Such a large financial burden may serve as *de facto* import ban.

[65] Appellate Body Report, *EC – Asbestos, supra* note 51, paras. 96 and 99.

[66] *Ibid*., para. 99. Nevertheless, as the interpretation of "like products" under Article III:2 also pays due regard to competitive relationship (see the discussion in the case listed in note 53), the demarcation of "like products" and "a directly competitive or substitutable product" is becoming more blurry.

[67] The Appellate Body in *EC –Asbestos* observed that the party claiming the likeness between the products that are physically quite different bears a higher burden to establish that there is a competitive relationship between the products. Ibid., para. 118. The opposite seems to be true as well.

imported products" should be rejected.[68] This decision implicates that the CBAM measure, under which imported products may incur both the heavier and lighter burden depending on the level of embedded carbon emissions, could be considered as according less favorable treatment so long as the measure possesses a possibility that imported products bear heavier burden.

On the other hand, the Appellate Body in *EC – Asbestos* also delivered that, in order for imported products to be found as treated less favorably, "[a] complaining Member must still establish that the measure accords to the group of 'like' *imported* products 'less favorable treatment' than it accords to the group of 'like' *domestic* products."[69] The usage of the term "group of" by the Appellate Body may connote that imported products as a whole must be treated less favorably than domestic products, opening up the way for the measure containing only few instances of less favorable treatment to be determined as consistent with Article III:4. This decision may be grasped as overturning the decision in *US – Section 337*.[70] Nonetheless, it is premature to say that the CBAM measure could be understood in the analogous fashion and evaluated as WTO consistent, as the decision of Appellate Body remains ambiguous. This Appellate Body's decision will be elaborated at great length below.

After *EC – Asbestos*, the discussion regarding "no less favorable" treatment shows progress but to the different direction.[71] The trigger was when the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* revealed the view that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case."[72] This finding can be understood in a way that the measure can be consistent with Article III:4 if the cause of less favorable treatment is stemming from the factor unrelated to the origin of products. Therefore, the following discussion revolved around on the precise meaning of this finding.

However, the Appellate Body itself, subsequently, exhibits the position that may modify its previous findings in *Dominican Republic – Import and Sale of Cigarettes*. At the outset, in *US – Clove Cigarettes*, the Appellate Body, although admitting that its statement in *Dominican Republic – Import and Sale of Cigarettes*, "when read in isolation, could be viewed as suggesting that further inquiry into the rationale for the detrimental impact is necessary,"

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[68] Panel Report, *US – Section 337*, L/6439, adopted 7 November 1989, BISD 36S/345, para. 5.14. See also, Panel Report, *US – Gasoline*, WT/DS2/R, adopted 20 May 1996, para. 6.14.

[69] Appellate Body Report, *EC – Asbestos, supra* note 51, para. 100. However, this part of the Appellate Body's remark is regarded as *obiter dicta*.

[70] Kawase (2015), p. 7.

[71] Mavroidis (2016), pp. 385-398.

[72] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para. 96.

delivered that the context of such statement does not support the view that "panels should inquire further whether 'the detrimental effect is unrelated to the foreign origin of the product.'"[73]

Clearer position was expressed in *EC – Seal Products*. In this case, the EU argued that the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* found that "a detrimental effect on imports alone does not indicate that a measure accords *de facto* 'less favorable treatment' to imports under Article III:4," necessitating the panel to conduct an additional inquiry into whether such detrimental effect is stemming from a legitimate regulatory distinction.[74] The Appellate Body replied as it "explicitly rejected the notion that … under Article III:4, panels should conduct an inquiry into whether the detrimental impact of a measure on imports is unrelated to the foreign origin of the imported products"[75] and hold the position that "treatment no less favorable" should be assessed in the light of whether "the conditions of competition in the marketplace [is modified] to the detriment of the group of imported products vis-à-vis the group of like domestic products."[76] In other words, it is not to "to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction."[77]

These findings, which appeared in several Appellate Body reports, are abstract discussions on whether elements other than origin of products can be considered, apart from the examination of modification in competition conditions, in determining the treatment of imported products is less favorable or not. Unfortunately, they are different from the focus of discussion in this section, namely whether less favorable treatment can be confirmed even when the imported products may either become disadvantageous or advantageous depending on the circumstances. After all, the fact that any Appellate Body decisions after *EC – Asbestos* has not elaborated the meaning of "group of" indicated in that case—although following reports often referred the finding[78]—leaves the precise meaning of such term ambiguous.

Ehring comprehends the expression of "group of" in *EC – Asbestos* as indicating that "less favorable" requirement can be fulfilled when a distinction between like products only places the entire group of imports at a disadvantage, meaning that worse treatment of *some* like imported products is not sufficient.[79] This proposition can be contrasted with the decision in *US – Section 337*. In this case, the Panel rejected the idea that balances less favorable treatment

[73] Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, fn. 372.
[74] Appellate Body Report, *EC – Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014, paras. 5.100 and 103.
[75] *Ibid*., para. 5.104.
[76] *Ibid*., para. 5.117.
[77] *Ibid*.
[78] *Ibid*. para. 5.115.
[79] Ehring (2002), p. 943. See also Vranes (2009), p. 238. Ehring uses the terms "diagonal test" and "asymmetric impact test" to express related analytical method.

of some imported products against more favorable treatment of other imported products.[80] This implies that less favorable treatment, for instance, in 40% of imported products, cannot be tolerated due to the fact that the remaining 60% of imported products receives advantageous treatment. In contrast to this, the decision in *EC – Asbestos*, along with Ehring's understanding, implicates that less favorable treatment in 40% of imported products may not be assessed as less favorable when domestic products are receiving the detrimental impacts in the same rate (40% of domestic products are adversely affected).[81] However, no definite conclusion can be drawn at this stage as the Appellate Body has not elucidated the detail of its decision.

Although the meaning of "group of" under Article III:4 GATT remains obscure, the interpretation of "no less favorable" made progress under Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement). The Appellate Body in *US – Clove Cigarettes*, the first case that the Appellate Body interpreted "no less favorable" under Article 2.1 TBT Agreement, found as, despite the differences in the specific context of individual provisions, "[s]imilarly to Article III:4 [GATT], Article 2.1 of the *TBT Agreement* requires WTO Members to accord to the group of imported products treatment no less favorable than that accorded to the group of like domestic products."[82] This interpretative guidance is followed by the subsequent cases relating to Article 2.1 TBT Agreement.[83]

The Appellate Body's decision in *US – Tuna II (Article 21.5 - Mexico)* is most notable in that it provided clear guidance on the meaning of "group of products." The Appellate Body criticized the decision of the Panel which examined whether the products imported from Mexico suffered detrimental impacts from the US' labelling policy for tuna products only in light of individual conditions (segmented analysis) and not from those conditions altogether (holistic assessment).[84] It emphasized that it is unacceptable to draw conclusion from the analysis that only compared the subset of the product groups that have been found to be "like."[85] The most significant proposition of the Appellate Body seems to be reflected in the expression that "[t]he Panel did not explain why an analysis of the treatment that the amended tuna measure accords to [a certain] category of tuna products had explanatory force for, and could properly support, a finding that the group of Mexican tuna products is detrimen-

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[80] Panel Report, *US – Section 337, supra* note 68, para. 5.14.

[81] Imported products in this context connotes no discrimination among imported products. The Panel delivered that "it would entitle a contracting party to derogate from the no less favourable treatment obligation in *one … contracting party …* on the ground that it accords more favourable treatment … to *another contracting party*" (emphasis added). *Ibid*., para. 5.14. Even though the favorable treatment to imported products, as a group, outweighs the less favorable treatment, the situation where detrimental impact of measure is concentrated on particular exporting country cannot be accepted, likely to infringe the MFN principle. Conrad (2011), p. 242.

[82] Appellate Body Report, *US – Clove Cigarettes, supra* note 73, para. 180.

[83] Appellate Body Report, *US – Tuna II (Mexico)*, WT/DS381/AB/R, adopted 3 December 2015, para. 215.

[84] Appellate Body Report, *US – Tuna II (Article 21.5 - Mexico)*, WT/DS381/AB/RW, adopted 3 December 2015, paras. 7.61-75.

[85] *Ibid*., para. 7.74.

tally affected by the certification and tracking and verification requirements."[86] As repeatedly explained, the Panel's decision in *US – Section 337* rejects the notion of balancing disadvantages with advantages. This signifies that detection of less favorable treatment in subset of importing products is sufficient to infringe Article III:4, even though the effect of the measure as a whole is positive to imported products. Accordingly, the decision of Appellate Body in *US – Tuna II (Article 21.5 - Mexico)*, which values less in only analyzing a certain category of products in drawing conclusions, can be distinguished from such a precedent.[87] Although it is true that the Appellate Body, through its own analysis, eventually endorsed that the measure modifies the conditions of competition to the detriment of Mexican products,[88] its decision can be captured as, at least under Article 2.1 TBT Agreement, it characterized the meaning of "group of" as to evaluate less favorable treatments through a holistic approach.

Would the decision under Article 2.1 TBT Agreement be transplanted to Article III:4 GATT? First of all, the Appellate Body in *US – Tuna II (Mexico)* expressed negative reaction to the Panel's decision that substantially equalized the contents of Article 2.1 TBT Agreement with that of Article III:4 GATT.[89] However, the Appellate Body under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Article 21.5 procedure in the same dispute revealed the view that both provisions focus on the modification of competition conditions and accordingly, it is not inappropriate to rely on the relevant findings regarding the detrimental impact of measure made under Article 2.1 TBT Agreement.[90] Indeed, the Appellate Body's final decision regarding "less favorable treatment" under Article III:4 relied much on the elements indicated under the analysis of Article 2.1 TBT Agreement.[91] This attitude of the Appellate Body makes it reasonable to assume that "group of products" under Article III:4 GATT carries the meaning that the product as a whole will be considered in the analysis of "no less favorable" treatment. Eventually, this signifies that the measure that makes the burden of imported products both larger and smaller depending on the carbon emissions may still be determined as "no less favorable" even where the burden of a subset of products is large, as far as the burden as a whole is less heavy.

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[86] *Ibid*., para. 7.73. Emphasis original.

[87] The Appellate Body in *US – Clove Cigarettes* likewise delivered that "the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the *group* of imported products is no less favourable than that accorded to the *group* of like domestic products." Appellate Body Report, *US – Clove Cigarettes*, *supra* note 73, para. 193.

[88] Appellate Body Report, *US – Tuna II (Article 21.5 - Mexico)*, *supra* note 84, paras. 7.234-238.

[89] Appellate Body Report, *US – Tuna II (Mexico)*, *supra* note 83, para. 405. This position of the Appellate Body was exhibited in the criticism against the Panel where it avoided providing findings by reason of judicial economy on the assumption that the obligations under Article 2.1 TBT Agreement and Article III:4 GATT are substantially the same.

[90] Appellate Body Report, *US – Tuna II (Article 21.5 - Mexico)*, *supra* note 84, para. 7.278.

[91] *Ibid.* paras. 7.339-340.

Table 1. The relationship between Arts. III:2 and III:4

Art. III:2	Like products	Directly competitive or substitutable products
	In excess of	*De minimis* & so as to afford protection to domestic production
Art. III:4	Like products	
	No less favorable treatment	

* For the sake of simplicity, the figure is described in that the scope of "like products" under Article III:4 is the same with the scope of both "like products" and "directly competitive or substitutable products" under Article III:2. However, the Appellate Body did not find that the scope of both are exactly the same.

At this moment, the meaning of "no less favorable" seems to differ from that of "in excess of" in that the former cannot be immediately satisfied with the situation that only part of imported products is exposed to disadvantageous conditions. On the other hand, there is no explicit decision that supports such a presumption. Furthermore, as described in Table 1, there remains the possibility that vigorous interpretation under Article III:2 applies to Article III:4 when domestic and imported products are physically quite similar (if domestic and imported products locate at the left side of the Figure). In any case, given that the measure that has a necessary consequence of making the burden of imported products heavier in general (namely, causing the situation where imported products as a group being impeded by the measure) cannot be tolerated even under Article III:4,[92] it becomes safer to design the measure in a way that the impact equally distributes among domestic and imported products, even though this entails the restrained operation of the measure against imported products (partial modification of competitive conditions).[93]

III-2. Quantitative Restrictions

As the CBAM measure may cause the chilling effect to importation of subject products, due to the unforeseen expansion of burden to importers, the measure can be also discerned as quantitative restrictions, which Article XI GATT applies. This raises the question of whether the application of, or compatibility with, Article III can exclude the applicability of Article XI. The measure can be readily assessed as inconsistent with the provision if Article XI

[92] In practice, there seems few chances that the regulation discriminating products on the basis of production process can be assessed as consistent with Article III GATT. Sifonios (2018), p. 155.

[93] See also, Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 136.

applied, because this provision only considers the impact on imported products and has no need to compare it with domestic products. Therefore, if Article XI is applied to the CBAM measure in addition to Article III, it may *effectively* dispel the conclusion that the measure is consistent with Article III GATT.

To date, there were few cases where the applicability of both Article III and XI to a single measure became an issue. However, in those cases, the issue was not vexing as two provisions were applicable to different aspects of the same measure.[94] Thus, there is no apparent case that addressed the issue of double application of two provisions to the single aspect of single measure. The Panel in *Indonesia – Chicken* was relevant in this sense, but the Panel decided to examine the applicability of Article III:4 before abstractly considering the relationship between Articles III:4 and XI:1, since this issue only surfaces when the applicability of two provisions is confirmed.[95] Eventually, the Panel did not support the applicability of Article III:4,[96] hence the relationship between Articles III and XI remained vague.

Majority seems to support the view that compatibility of Article III excludes the applicability of Article XI.[97] However, in reality, there still remains uncertainty whether Article III can be applied in the situation where a complainant only invokes Article XI, although it may be theoretically possible to endorse exclusion of Article XI by holding up the priority of Article III based on the Ad Note to Article III. Endorsing the priority of Article III will result in the conclusion that the respondent does not infringe any provision due to insufficiency of argument regarding Article III.[98]

III-3. Most Favored Nation Treatment

The CBAM measure may be inconsistent with a provision regarding most favored nation treatment, i.e., Article I GATT. This provision differs from Article III in that it does not contain "a directly competitive or substitutable product." This makes the term "like product" in the same provision as narrower than that in Article III.[99] Surprisingly, there is neither clear interpretation by panels nor the Appellate Body regarding such words in Article I GATT. If "like product" is interpreted narrowly, physical similarity becomes more decisive. In order to defy the likeness between domestic and imported products that are physically similar, it must

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[94] E.g., Panel Report, *India – Autos*, WT/DS146/R, WT/DS175/R, adopted 5 April 2002, para. 7.296.

[95] Panel Report, *Indonesia – Chicken*, WT/DS484/R, adopted 22 November 2017, paras. 7.185-186.

[96] *Ibid*, paras. 7.185-195.

[97] Pauwelyn (2005), p. 146; Vranes (2009), p. 253.

[98] With regard to the CBAM measure, surrender of CBAM certificates will be conducted after the importation, excluding the applicability of "collected or enforced in the case of the imported product at the time or point of importation" in *Ad Note* to Article III. See also *supra* note 63.

[99] Matsushita et al. (2015), p. 165.

prove that the difference in embedded carbon emissions has significant impact on the consumers' tastes so that it would reject the competitive relationship (i.e., demand elasticity) between those products, which seems to be quite a difficult task.

In addition, it is notable that the Appellate Body referred to the analysis of Article 2.1 of the TBT Agreement when it determined whether "any advantage, favor, privilege or immunity" is "accorded immediately and unconditionally" to like products under Article I:1 GATT. As discussed, the Appellate Body in *US – Tuna II (Article 21.5 - Mexico)* affirmed that Article 2.1 TBT Agreement can be taken into account in applying Article III:4. The Appellate Body took the same position regarding Article I:1. Despite the lack of the term "no less favorable" in Article I:1, the Appellate Body acknowledged the comparability of two provisions (Article I:1 GATT and Article 2.1 TBT Agreement) as they have a commonality in that their focal point is the existence of the modification of competitive conditions.[100] This signifies that development in the interpretation of "no less favorable" under both Article III:4 GATT and Article 2.1 TBT Agreement would also affect the interpretation of Article I:1 GATT. In any rate, even the interpretation of Article I:1 GATT advances in a different way from Article III:4, it is likely that the CBAM measure may become inconsistent with Article I:1 when the measure imposes disproportionate burden on certain exporting countries. Therefore, as a political decision, the effect of measure needs be accommodated so as not to be excessively biased toward the limited number of countries.[101]

IV. Evaluation under the WTO Agreement: General Exceptions

IV-1. Subparagraphs of Article XX GATT

If a measure is decided as inconsistent with either provision regarding national treatment, quantitative restrictions, or most favored nation treatment, the next issue is whether the measure can be justified under Article XX GATT. As to the CBAM measure, subparagraphs (b) and (g) become most relevant. Subparagraph (b) applies to measures to protect human, animal, or plant life or health, and subparagraph (g) applies to measures relating to the conservation of exhaustible natural resources.

While the CBAM measure can be comprehended as a part of climate change policies,

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[100] Appellate Body Report, *US – Tuna II (Article 21.5 - Mexico), supra* note 84, paras. 7.278 and 7.338-340. The Appellate Body implies that expression in Article I:I GATT that requires an obligation to extend any "advantage" granted by a Member to any product originating in or destined for any other country "immediately and unconditionally" to the like product corresponds to the expression of "no less favorable" treatment under Article III.

[101] As with the discussion under Article III, the Panel supported the position that "Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others." Panel Report, *US – MFN Footwear*, DS18/R, adopted 19 June 1992, BISD 39S/128, para. 6.10, Panel Report, *EC –Bananas III*, WT/DS27/R/US, adopted 25 September 1997, para. 7.239.

and hence its eventual purpose would be the protection of human, animal and plant life and health, more direct purpose of the measure could be assumed as protection of "natural resources," namely the favorable condition of climate. In the light that "natural resources" was traditionally interpreted as having a broad meaning, and indeed "clean air" was recognized as a part of "exhaustible natural resources,"[102] there seems no controversy in including favorable climate conditions in the scope of such a term.

Nevertheless, the real aim of the CBAM measure could also be grasped as protecting the firms that are losing international competitiveness owing to the EUETS. Even if this is true, given the fact that the CBAM Regulation clarifies that the goal of the measure is to mitigate climate change by constraining carbon leakage, and given that it is theoretically likely that the carbon adjustment has some effects of restraining carbon emissions,[103] it can be acceptable to discern the purpose of the CBAM measure as "conservation of exhaustible natural resources."[104]

Compared to the "necessary to" requirement under subparagraph (b), "relating to" under Paragraph (g) is easier to satisfy as it does not require the exploration of alternative measures that are less consistent with WTO rules. Subparagraph (g) merely requires "a close and genuine relationship of ends and means."[105] In addition, subparagraph (g) calls for the measure at issue is "made effective in conjunction with restrictions on domestic production or consumption." The Appellate Body interpreted this requirement as "being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources,"[106] and not requiring the measure to be "primarily aimed at rendering effective restrictions on domestic production or consumption."[107] With regard to the CBAM measure, it may fulfil this requirement as it is "brought into effect together with" the pairing measure, i.e., the EUETS.

Beside these, the issue of extraterritoriality emerges in the case of subparagraph (g). The CBAM measure provokes incentives for exporters to reduce embedded carbon emissions *within their country* as the reduction leads to the abatement of financial burden of the measure. On one hand, this is positive in terms of climate change mitigation. On the other hand,

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[102] Panel Report, *US – Gasoline, supra* note 68, para. 6.37.

[103] There are some research outcomes that admire the effectiveness of carbon border adjustment in preventing the risk of carbon leakage. E.g., Yu, et al. (2021), p.8. Requirements of subparagraph (g) would be satisfied if the measure at issue entails some degree of emission reduction effects. While it is a decision under subgraph (b), the Appellate Body did not require the quantitative analysis of contribution of the measure toward its aim when examining the term "necessary to." Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para. 147. The same logic can be applied to subparagraph (g). The contribution of the measure to the conservation of exhaustible natural resources can be proved qualitatively or theoretically.

[104] Englisch and Falcão (2021b), p. 10939; Bacchus (2021).

[105] Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998, para. 136; Appellate Body Report, *China – Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012, para. 355.

[106] Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 20.

[107] Appellate Body Report, *China – Raw Materials, supra* note 105, para. 358.

it deals with the issue that is happening outside the territory of the importing country; embedded carbon emissions, the subject to the CBAM measure, are those released to the atmosphere *during the production in exporting country*. Therefore, the CBAM measure logically implies the *de facto* extraterritorial application of the EU policy. The question is whether it is allowed to interpret subparagraph (g) in a way to admit such an extraterritorial nature of the measure introduced by the importing country.

To date, the Appellate Body has not yet indicated any clear position on this matter. Nevertheless, in *US – Shrimp*, it supported "a sufficient nexus" between the US and sea turtles on ground that sea turtle's highly migratory and endangered nature.[108] In the same vein, climate change is a global-scale issue and there can be "a sufficient nexus" to the EU even though the discretion of climate policy is primarily in the hands of the regulating country. This rationale may make the CBAM measure consistent with subparagraph (g) of Article XX GATT.

If the CBAM can be justified under subparagraph (g), there is no need to consider other paragraphs and it is possible to move on to the examination of the chapeau, but subparagraph (b) is also applicable to the CBAM measure.[109] In the actual dispute, a respondent (in the case of the CBAM measure, the EU) may have an initiative in structuring its rebuttal, so it is not necessary to rely on the provision with a stringent requirement, i.e., subparagraph (b). In particular, the fact that the direct purpose of both EUETS and CBAM is to maintain favorable climate conditions, and the protection of human and plant life or health is rather a more ultimate purpose, makes application of subparagraph (g) more sensible. In light of this, this paper does not delve into the detail of subparagraph (b). It is sufficient to note here that there is a higher risk for the CBAM measure to be decided as inconsistent with the WTO rule under subparagraph (b) as the CBAM measure may not overcome the hurdle of the "necessary to" requirement.

IV-2. Chapeau of Article XX GATT

The chapeau of Article XX GATT will be applied when the measure is provisionally justified under either subparagraph (b) or (g). The first issue under the chapeau is whether discriminative treatment under the measure is "between countries where the same conditions prevail." To date, there exists only few Appellate Body's decisions on this point. In *EC – Seal Products*, the Appellate Body succinctly put that the individual subparagraph under which a measure has been provisionally justified and the type or cause of the violation that has been found to exist, provides useful guidance on the determination of which "conditions" are

[108] Appellate Body Report, *US – Shrimp, supra* note 105, para. 133.

[109] For a decision that endorses the application of subparagraph (b) to the policy that aims to reduce CO_2 emissions, see Panel Report, *Brazil – Taxation (EU)*, WT/DS472/R, WT/DS497/R, adopted 11 January 2019, paras. 7.878-880.

relevant for examining the case.[110] This finding suggests that in the case of violation of subparagraph (g), the "conditions" would be analyzed taking into account the policy objective of preserving "conservation of exhaustible natural resources."

Although decisions regarding the aforementioned words are limited, there is a notable decision in "between Members where identical or similar conditions prevail" under Article 2.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The Appellate Body in *Korea – Radionuclides (Japan)* clarified that ecological or environmental conditions in an exporting Member can be relevant in deciding whether conditions of importing and exporting Members are identical or similar.[111] Based on this, the Appellate Body concluded that the potential effect of Fukushima Dai-ichi Nuclear Power Plant accident is an element that can dismiss the similarity of conditions among importing and exporting Members.[112]

These decisions imply that, in light of recent rise in attention to the climate change issue, two Members may be distinguished based on their activeness in mitigating the issue. An exporting Member with no or weaker carbon pricing policy cannot be assumed as in the same condition with an importing Member introducing strict carbon pricing policy. This understanding leads to the conclusion that the CBAM measure is not necessary to be evaluated under the rest of requirement included in the chapeau of Article XX GATT. However, there is a caveat in that there remains uncertainty in whether the term "between countries where the same conditions prevail" in the chapeau of Article XX can be interpreted in the same manner with the analogic expression in Article 2.3 SPS Agreement.[113] In addition, the difference in factual background behind *Korea – Radionuclides (Japan)* and the current discussion, i.e., the CBAM measure—the former relates to radioactive materials and the latter treats carbon emissions—may make direct comparisons suspicious.

To fulfill the conditions of the chapeau of Article XX GATT, it must satisfy the requirements of "a means of arbitrary or unjustifiable discrimination between countries" and "a disguised restriction on international trade." These requirements are usually "read side-by-side,"[114] therefore they are discussed here together. The term "arbitrary or unjustifiable discrimination" entails the issue of whether the discrimination assessed under non-discrim-

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[110] Appellate Body Report, *EC – Seal Products, supra* note 74, para. 5.300.

[111] Appellate Body Report, *Korea – Radionuclides (Japan)*, WT/DS495/AB/R, adopted 26 April 2019, paras. 5.63-64.

[112] *Ibid*., paras. 5.66-89.

[113] The Appellate Body in *Russia – Railway Equipment* delivered that "in a comparable situation" in Article 5.1.1 TBT Agreement on one hand, and "countries where the same conditions prevail" in the chapeau of Article XX GATT and "Members where identical or similar conditions prevail" in Article 2.3 SPS Agreement on the other, are different in nature as there is a divergence in whether the provision focuses on suppliers or products. While this decision suggests the similarity in the respective requirements between the chapeau of Article XX GATT and Article 2.3 SPS Agreement, the Appellate Body did not comment on the relationship between those two. Appellate Body Report, *Russia – Railway Equipment*, WT/DS499/AB/R, adopted 5 March 2020, para. 5.126.

[114] Appellate Body Report, *US – Gasoline, supra* note 106, p. 25.

ination obligation matters again. As discussed in the context of Article III:2 GATT, "in excess of" in such provision may lead to a conclusion that the CBAM measure infringes the provision when it causes the situation, even slightly, where the financial burden of imported products exceeds that of domestic products. The infringement of Article III:4 can also be discernible, irrespective of how "no less favorable" is interpreted, if the burden of imported products as a whole is apparently heavier. The question is whether "arbitrary or unjustifiable discrimination" under the chapeau of Article XX will be interpreted in the same manner. If this is positive, the measure that violates non-discrimination clauses automatically becomes inconsistent with the chapeau of Article XX.

To begin with, the Appellate Body articulated that the feature of discrimination in the context of the chapeau and that under Articles I and III GATT, which deals with discrimination among products, are different in nature and quality.[115] At the same time, it also explained that the previous decision does not mean that "the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision" such as Articles I and III GATT.[116] Indeed, the Appellate Body, in *EC – Seal Products*, admitted that the causes of discrimination found to exist under Article I:1 are the same as those to be examined under the chapeau of Article XX, and hence those may be taken into account in examining whether the discrimination is "arbitrary or unjustifiable."[117] In sum, the discussions regarding discriminations under Articles III:2 and III:4 may affect the interpretation of the chapeau of Article XX.

Nevertheless, the Appellate Body in *US – Tuna II (Article 21.5 - Mexico)* clarified that "'[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX,"[118] indicating that the goal of the measure affects the assessment of discrimination.[119] This interpretation necessitates the precise recognition of the CBAM measure's policy objective. If the measure's goal is to ensure the effectiveness of the EUETS, and ultimately the reduction of carbon emissions (namely, not the protection of domestic industries who are active in reducing carbon emissions), the discriminatory treatment to imported products with larger embedded emissions through the increase of financial burden to those products may be assumed as reconciled with, or ratio-

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[115] E.g., Appellate Body Report, *US – Shrimp*, *supra* note 105, para. 150.

[116] Appellate Body Report, *EC – Seal Products*, *supra* note 74, para. 5.298.

[117] *Ibid*., para. 5.318.

[118] E.g., Appellate Body Report, *US – Tuna II (Article 21.5 - Mexico)*, *supra* note 84, para. 7.316. However, the Appellate Body clarified that not only the policy objective, but other additional elements will also become relevant in the assessment of arbitrary or unjustifiable discrimination.

[119] The policy objective will be considered as well in analysing the concept of "legitimate regulatory distinction" developed under Article 2.1 TBT Agreement. *Ibid.*, para. 7.92.

nality related to, such policy objective. However, to what extent will the contribution of the measure to such objective be scrutinized—quantitatively or qualitatively—is not clarified by the WTO adjudicators.

In *US – Shrimp*, the Appellate Body criticized the measure's inelasticity in the process of examination of "a means of arbitrary or unjustifiable discrimination." In that case, the US' measure was determined as it is requiring exporting Members to adopt essentially the same regulatory program without paying due diligence to the conditions existing in individual country.[120] In this regard, the CBAM Regulation ensures the certain degree of flexibility by admitting the reduction in the number of CBAM certificates to be surrendered according to the carbon price paid in the country of origin[121] (however, even under this flexible mechanism, it may become inconsistent with the chapeau of Article XX. This point is discussed in Section V).

Regarding the issue of flexibility mechanism, various voices appeared following the publishment of the proposal of the regulation. On one hand, some floated to include emission reduction policy other than carbon pricing as the subject to CBAM certificates reduction, giving way to the US' position, which does not introduce carbon pricing mechanism at the federal level.[122] On the other hand, there remained the opinions that do not give special care to non-pricing policies, namely endorsing the proposal by the European Commission.[123] While both maintain some degree of flexibility as they do not demand the introduction of emission trading system, the latter position (which was eventually adopted) seems to be more liable to be decided as "a means of arbitrary or unjustifiable discrimination," as it may lessen the opportunity for exporting country's policy to be take into account.

Final issue over "a means of arbitrary or unjustifiable discrimination" is the existence of international negotiations. The Appellate Body in *US – Shrimp* cast doubt on the US' posture that it engaged in serious negotiations for the conservation of sea turtles only with limited number of countries before enforcing the comprehensive import prohibition against the shrimp exports, despite that the highly migratory nature of sea turtle necessitates the cooperative efforts among many related countries.[124]

When this logic is applied to the CBAM measure, two movements must be counted. First, as the CBAM measure is receiving high attention from many countries, this measure is on the table of the WTO Committee on Trade and Environment (CTE) dialogues. Can this forum be

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[120] Appellate Body Report, *US – Shrimp, supra* note 105, paras. 161-164.

[121] Article 9(1) CBAM Regulation.

[122] European Parliament (2021), p. 20. However, the proposal to include carbon reduction measures other than carbon pricing was tabled as a part of suggestion to amend Article 2(12) of the draft CBAM Regulation, which deals with the agreements with third parties in the application of Article 9, rather than the amendment of Article 9(1) itself.

[123] Spiegelman (2022).

[124] Appellate Body Report, *US – Shrimp, supra* note 105, paras. 166-172.

regarded as international negotiations which the Appellate Body referred to in *US – Shrimp*? The Appellate Body in that case emphasized the lack of "serious, across-the-board negotiations" by the US.[125] The CTE might be recognized as "across-the-board negotiations," since any WTO Member can join the discussions under this committee. However, all the things that will be done in the committee is simply express the unilateral concern about specific measure, hence it does not guarantee the change in the policy by the Member at issue (even admitted that in some cases, the Member may change the policy succumbed to the pressure). The mere existence of place to express concern may not be sufficient to assume the existence of "serious, across-the-board negotiations."

Second is whether the negotiation with the US, namely the Global Arrangement on Sustainable Steel and Aluminium (GASSA) can be recognized as "serious, across-the-board negotiations." As this negotiation framework is only between the EU and the US, it does not fulfil the "across-the-board" nature, although the framework itself is open to any country.[126] The meaning of such a word implicates the active participation of related countries and simple fact of opening to other countries may not comport with the word's meaning. These would not support, so far, the existence of "serious, across-the-board negotiations" regarding the CBAM issue.

V. Operation of CBAM

So far, this paper conducted the legal assessment of the CBAM measure. This section examines the issues that would emerge when the measure is actually operated.

V-1. Arrangement of CBAM with Carbon Pricing Policy: True "Level-playing-field"?

The CBAM Regulation will be applied to cement, electricity, fertilizers, iron and steel, aluminum, and chemicals (hydrogen). Import values of those products, except for hydrogen, are listed in Table 2.

[125] *Ibid*, para. 166.
[126] White House (2021).

Table 2 Top 10 EU imports of goods subject to the CBAM Regulation (2020)

Country	Import value of CBAM products (dollars in million)
Russia	8,576
China	5,635
Türkiye	5,401
United Kingdom	5,401
Ukraine	3,183
South Korea	2,931
India	2,780
Serbia	1,434
United States	1,394
UAE	1,082

Partly extracted from Hufbauer, et al. (2021), p. 6

Table 2 indicates that Russia will be the most affected country. However, the EU-Russia trade relationship has dramatically changed since 2022,[127] hence China and Türkiye are the countries anticipated to be exposed to significant effect of the CBAM measure. Table 3 shows the situation of domestic climate change policy in ten countries.

[127] EU imports from Russia has sharply declined since the invasion of Ukraine in 2022. See, Eurostat (2023).

Table 3 Climate change policies of major source of EU CBMA goods imports

Country	Current Situation	Supplemental information
Russia	A pilot carbon trading system is projected at Sakhalin, but not in other areas.	
China	2017: publishment of national ETS, commenced operation on 16 July 2021	The ETS applies to power sector. The price of early days was approximately 50 CNY/tCO_2e. It is projected to expand the sectors.
Türkiye	Announced the launch of a pilot ETS in 2024.	Planning to make the ETS aligned with the EU-ETS.
United Kingdom	The original ETS (UKETS) started from January 2021.	The UKETS resembles to the EUETS. The initial price of auction was approximately 44 GBP/ tCO_2e. Considering the introduction of CBAM.
Ukraine	Introduced carbon tax in 2011. ETS is under consideration (delaying).	The rate of carbon tax is 0.33 EUR/ tCO_2e in 2019.
South Korea	Commencement of ETS in January 2015.	The ETS includes sectors such as heat and power, industry, buildings, waste, and transportation. The average auction price in 2023 was 8 USD/tCO_2e.
India	Adoption of a mandatory energy efficiency scheme (PAT).	Construction of a Carbon Credit Trading Scheme (CCTS) is contemplated.
Serbia	Considering the introduction of ETS or carbon tax.	
United States	Introduction of ETS in certain states such as California.	The average auction price of California's cap-and-trade program in 2023 was 32 USD/tCO_2e.
UAE	Not adopting carbon pricing policy while some climate policies are introduced.	

Created based on ICAP (2024) and World Bank (2023)

As illustrated in Table 3, main sources of EU imports of goods that are subject to the CBAM Regulation are adopting, or considering adopting, some form of carbon pricing policy. Therefore, the main focus under the operation of CBAM would be the interpretation and operation of flexible mechanism under Article 9 of the CBAM Regulation, under which the number of CBAM certificates to be surrendered will be adjusted according to the carbon price paid in the country of origin. Under this mechanism, when the carbon price under the EUETS is 60 EUR/tCO_2e,[128] for instance, and domestic carbon price of the exporting country is 20 EUR/tCO_2e, the imported products need to owe the balance, i.e., 40 EUR/tCO_2e.[129]

This result of reduced burden, at first glance, seems to be the privilege of a flexible mechanism in the EU's CBAM measure. However, under the example of 60 EUR/tCO_2e and 20 EUR/tCO_2e, if the price of exporting country's domestic carbon price (i.e., 20 EUR/tCO_2e) is

[128] European Commission (2021c), p. 14.

[129] In this section, for sake of simplicity, it will assume the price of carbon price, auction price, and the price of CBAM certificates are the same. In addition, if discussed precisely, certificate adjustment will not be conducted in the form of price adjustment. Rather, it will be conducted through the reduction of the number of certificates to be surrendered. For instance, assume necessary number of certificates to offset embedded emissions of imported goods is 900 units. If the price of one certificate is 60 EUR, total amount is 54,000 EUR. When carbon price of exporting country is 20 EUR, the number of certificates will be reduced to (54,000-(20*900))/60=600. As the usage of number of certificates makes the comparison difficult, this section simply compares the price of carbon.

effectively reflecting the *appropriate* implementation of domestic policy, it does not necessitate the additional burden of 40 EUR/tCO_2e. The lower carbon price is the part of competitive advantage of exporting country and therefore, it should not be adjusted.[130] This way of thinking casts a doubt on compelling the *carbon price of the EU* to the exporting country.

How this flexible mechanism will be assessed under Article III GATT is uncertain. Fundamentally, as Article III only pays attention to discrimination, it does not constitute the violation of such provision when the burden of imported products does not exceed that of domestic products. However, the subject of comparison becomes the point of contention when certificates are adjusted under the flexible mechanism. In other words, what would be compared with the carbon price of EU domestic products (60 EUR/tCO_2e)? Should it be the difference of prices that would be adjusted (i.e., 40 EUR/tCO_2e), or the entire burden the imported products would incur (i.e., 60 EUR/tCO_2e)? If Article III GATT considers the actual burden *under the EU's measure*, the burden of imported goods becomes lighter in many cases (i.e., 60 EUR/tCO_2e for domestic goods versus 40 EUR/tCO_2e for imported goods).[131]

On the other hand, certificate adjustment mechanism can be addressed under the chapeau when Article XX GATT is applied. Requiring importers to pay additional financial burden up to the corresponding amount of EU carbon price, despite the exporting country adopting an appropriate carbon pricing policy, would amount to not paying due diligence to the domestic situation of exporting country, compelling exporting countries to adopt the essentially the same regulatory program with the EU. Hence, it may fall under "a means of arbitrary or unjustifiable discrimination" in the chapeau of Article XX.[132] The proper adjustment of difference in carbon pricing could only be justified when the carbon pricing in the exporting country does not manifest the *appropriate price in the exporting country*.[133] In other words, the importing country can require imported products to pay an additional carbon price in limited situations where the actual carbon price in exporting country is lower than the ideal price, viewed in light of the circumstance of exporting country, or where the carbon pricing policy is exempted or deducted for exporting products (export rebates).[134]

In addition, the CBAM Regulation defines "carbon price" as "the monetary amount

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[130] Realization of low carbon price (particularly when it is achieved because of low carbon emissions) should be assessed as a competitive advantage (absolute advantage). However, at the same time, it is difficult to find an "appropriate price." Even the carbon price in the EU may not be "appropriate."

[131] The flexible mechanism also infringes the MFN principle (Article I:1 GATT) as it obviously distinguishes the treatment among exporting countries depending on the existence and degree of internal carbon pricing of exporting countries. Leonelli (2022), p. 625.

[132] Appellate Body Report, *US – Shrimp*, *supra* note 105, paras. 161-164.

[133] Some criticize that there is no rationale in using auction price in the EU internal ETS market as standard for carbon adjustment. Sato (2022), p. 393. On the other hand, the EU's auction price may be deemed as appropriate level of protection (ALOP) selected by the importing country, which mirrors the demand of citizens.

[134] Alternative is to use international carbon price. The EU can require the payment, as a carbon border adjustment, of difference between the international price and domestic price of exporting countries, provided that the international price can work as a guiding price.

paid in a third country, under a carbon emissions reduction scheme, in the form of a tax, levy or fee or in the form of emission allowances under a greenhouse gas emissions trading system…"[135] This expression does not contain policies that are not equivalent to carbon tax or ETS. Therefore, for instance, the mandatory energy efficiency scheme (PAT) adopted by India, although it contains trading of energy savings certificates, may not be included as a foundation for CBAM certificate adjustment.[136] If this happens, and if other countries' carbon pricing policies are accepted as a reason for certificate adjustment, the EU's measure becomes more likely to fall under "arbitrary or unjustifiable discrimination."[137]

After all, although the EU's CBAM measure may be theoretically justified as a method to ensure the level-playing-field between countries that are strongly promoting climate change policy and those that are reluctant to adopt those policies, it is open to doubt whether the measure that allows the adjustment of carbon price *in the price adopted in internal market of the EU* should be supported. The internal price of the EU does not correctly reflect the situation of carbon emissions in other countries. At the same time, there remains uncertainty in how such measures of the EU are evaluated under the current WTO agreements. There should be continuous discussion on how to comprehend and realize the concept of "level-playing-field" under climate change policies.

V-2. Export Rebate

Generally, a discussion regarding carbon adjustment mechanism includes the measure for export. In the case of export, an amount corresponding to carbon price will be deducted from the price of exporting goods or refunded at the border (export rebate). As this deduction may correspond to granting subsidies to exporters, it may provoke the argument that this measure is inconsistent with the subsidy rules under WTO agreements.[138] So far, the EU's CBAM measure does not entail export rebate, and therefore, it will not induce resentments from other countries on that aspect.[139] However, with the progress of reduction in free allowances (hence with the increase in the financial burden) of domestic sectors, the demand for the introduction of export rebate may increase. The export adjustment seems to be the long-term challenge for the EU's climate policy.

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[135] Article 3(29) CBAM Regulation.

[136] Indeed, the World Bank' report categorizes India as "ETS or carbon tax under consideration or under development," not as "ETS implemented." World Bank (2024), p.21.

[137] Sato (2022), p. 402.

[138] Sekine (2007).

[139] The priority for introducing export rebates is usually low since it does not contribute to reducing emission reductions. Campbell et al. (2021), p. 3.

VI. Concluding Remarks: To Avoid Disputes

Although the measure is not yet under full-scale operation at the time of writing, and hence it is premature to draw definitive conclusion regarding the EU's CBAM measure, the design of the measure itself suggests that the measure does not comport with the rules under WTO agreements. Admittedly, it is preferable for a certain measure to be scrutinized under the WTO dispute settlement procedure, eventually modified to that consistent with WTO rules. However, as discussed in the introductory section, the conclusion that the CBAM measure is inconsistent with WTO rules may provide the wrong message that the WTO impedes the promotion of climate change policies.

Considering those, it would be better not to bring the CBAM measure to the dispute settlement system in the WTO, as the resolution of dispute is pursued through adversarial process in that system. Rather, arrangement of interests among affected parties should be explored through political dialogue. One platform for such purpose would be the creation of special committee dedicated for discussing the EU's CBAM measure (or carbon adjustment measures in general).

On this account, there is a precedence of dialogue process under the CTE. Charges and taxes for environmental purposes and their relationship with the provisions of the multilateral trading system was included as the third item in 10-point work program, and the carbon border adjustment has been discussed as a part of this item.[140] In 2011, Singapore submitted a proposal that advances the guidelines for pre-empting the abuse of carbon border adjustments,[141] and this sparked up the debate in the committee.[142] Unfortunately, these discussions did not come up with tangible outcomes. Similarly, after the announcement of the EU's CBAM measure, many countries expressed the concern toward the measure in the CTE, and the issue is still remaining on the negotiation table thereafter.[143] The measure is also on the table in the negotiations in the Committee on Market Access.[144]

The carbon adjustment mechanism is also included as a negotiation matters, under the heading of "trade-related climate measures," in the Trade and Environmental Sustainability Structured Discussions (TESSD), launched in 2020.[145] However, this forum, as far as can be seen from published records, does not deal with specific trade concerns stemming from a measure adopted by a certain country.

Currently, the discussions regarding carbon price adjustment measure are ongoing in

[140] Decision on Trade and Environment, MTN.TNC/W/141, 29 March 1994.
[141] WTO (2011), p. 3.
[142] Teehankee (2020), p. 138.
[143] E.g., WTO (2021b), Section 1.3.4.
[144] E.g., WTO (2020b), Section 12.
[145] WTO (2021a), p. 2.

various fora, and they are mostly conducted in one-way form, namely certain interested countries express their view toward participants without any concrete outcomes. Such system can be reformed to an institutional organ that specifically and professionally treats the issue of carbon price adjustment, ultimately providing certain recommendations and solutions to the issues that reflect the views of interested parties (i.e., creating special committees or working groups).[146] If the matter is referred to dispute settlement mechanisms, the solution would be provided only under the existing WTO rules. In contrast to this, the new institutional system can offer proposals that go beyond the current framework, producing soft-law guidelines or compilation of best practices. The CTE is recently moving toward this direction. The EU itself is proposing the enhancement of the deliberation process under the CTE and showing a stance that it may include its measures, such as the CBAM measure, under the process.[147] In addition, China is also submitting an idea that advocates the usage of the CTE as a platform for multilateral dedicated discussion, under which the deep, detailed and constructive exchange of views are encouraged.[148] These proposals seem to be in line with what this paper tries to offer.

The more detailed analysis of possible usage of committees and dialogue process would be the next research topic of the author. In light of the previous arguments that antagonize the addressing of "trade and environment" matters under the dispute settlement procedure in the WTO, as well as the current impasse of those procedures, it is necessary to continuously find a different way to resolve sensitive issues such as the CBAM measure.[149]

References

Abe, Y. (2010), "Trade Regulations by the WTO and the Climate Change Framework Convention: Border Adjustment Measures for Emission Trading Systems and WTO Law", *International Affairs*, No. 592 [in Japanese]

Bacchus, J. (2021), "Legal Issues with the European Carbon Border Adjustment Mechanism", CATO Briefing Paper No. 125

Campbell, E. et al. (2021), "Border Carbon Adjustments 101", Resources for the Future, https://www.rff.org/publications/explainers/border-carbon-adjustments-101/

Conrad, C. R. (2011), *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals*, Cambridge University Press

[146] For somewhat similar proposal, see WTO (2020a), paras. 12-14.

[147] WTO (2023a), para. 18.

[148] WTO (2023b), para. 7.

[149] There is a sceptical view against dealing the carbon adjustment issue under any WTO's framework. Quick (2020), p. 570. The resolution of carbon adjustment may necessitate novel ideas.

Ehring, L. (2002), "De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment – or Equal Treatment?", *Journal of World Trade*, Vol. 36, No. 5, pp. 921-977

Englisch, J. and Falcão, T. (2021a), "EU Carbon Border Adjustments and WTO Law, Part One", *Environmental Law Reporter*, Vol. 51, No. 10

Englisch, J. and Falcão, T. (2021b), "EU Carbon Border Adjustments and WTO Law, Part Two", *Environmental Law Reporter*, Vol. 51, No. 11

European Commission (2021a), "'Fit for 55': Delivering the EU's 2030 Climate Target on the way to Climate Neutrality", COM(2021) 550 final

European Commission (2021b), "Proposal for a Regulation of the European Parliament and of the Council establishing a Carbon Border Adjustment Mechanism", COM(2021) 564 final

European Commission (2021c), "Report from the Commission to the European Parliament and the Council on the Functioning of the European Carbon Market in 2020 Pursuant to Article 10(5) and 21(2) of Directive 2003/87/EC (as Amended by Directive 2009/29/EC and Directive (EU) 2018/410)", COM (2021) 962 final

European Commission (2022), "Report from the Commission to the European Parliament and the Council", COM(2022) 516 final

European Commission (2023), "Questions and Answers: Carbon Border Adjustment Mechanism (CBAM)", https://taxation-customs.ec.europa.eu/system/files/2023-07/20230714%20Q%26A%20CBAM_0.pdf

European Parliament (2021), "Draft Opinion of the Committee on International Trade", 2021/0214(COD), https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/PA/2021/11-29/1242396EN.pdf

Eurostat (2023), "EU trade with Russia - latest developments", https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=558089

Hufbauer, G. C. (2021), "Divergent climate change policies among countries could spark a trade war. The WTO should step in.", Trade and Investment Policy Watch, PIIE, https://www.piie.com/blogs/trade-and-investment-policy-watch/divergent-climate-change-policies-among-countries-could

Hufbauer, G. C., Kim, J., and Schott, J. J. (2021), "Can EU Carbon Border Adjustment Measures Propel WTO Climate Talks", Policy Briefs 21-23, PIIE

ICAP (2024), "Emissions Trading Worldwide, Status Report 2024", International Carbon Action Partnership

Kawase, T. (2015), "Clarification and Transformation of the Principle of Non-Discrimination in WTO Agreements: Recent Developments in Case Law and Implications for Member States' Regulatory Discretion", RIETI Discussion Paper Series 15-J-004 [in Japanese]

Kumar, M. and Arora, N. (2023), "India Plans to Challenge EU Carbon Tax at WTO", *Reuters*, 17 May 2023.

Leonelli, G. C. (2022), "Carbon Border Measures, Environmental Effectiveness and WTO Law Compatibility: Is There a Way Forward for the Steel and Aluminium Climate Club?" *World Trade Review*, Vol. 22, Iss. 5

Matsushita, M. et al. (2015), *The World Trade Organization: Law, Practice, and Policy*, Oxford University Press

Mavroidis, P. C. (2016), *The Regulation of International Trade*, Vol. 1, MIT Press

Pauwelyn, J. (2005), "Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS", *World Trade Review*, Vol. 4, Iss. 2

Quick, R. (2020), "Carbon Border Adjustment: A Dissenting View on its Alleged GATT-Compatibility", *ZEuS 4/2020*

Sato (Yoshida), S. (2022), "EU's Carbon Border Adjustment Mechanism – Will It Achieve Its Objective(s)?", *Journal of World Trade*, Vol. 56, Iss. 3

Sekine, T. (2007), "The Significance of Border Cost Adjustment in Climate Change Mitigation and Its Consistency with WTO Law", *Proceedings of Keio University Graduate School of Law Studies in Law and Politics*, Vol. 48 [in Japanese]

Sifonios, D. (2018), *Environmental Process and Production Methods (PPMs) in WTO Law* (Springer)

Spiegelman, M. (2022), "Lead EU Lawmaker on CBAM Rejects Call to Account for Non-Pricing Carbon Measures", Inside US Trade, 10 January 2022.

Teehankee M. A. J. (2020), *Trade and Environment Governance at the World Trade Organization Committee on Trade and Environment*, (Wolters Kluwer)

Tucker T. N. and Meyer T. (2021), "A Green Steel Deal: Toward Pro-Jobs, Pro-Climate Transatlantic Cooperation on Carbon Border Measures", Roosevelt Institute

Vranes, E. (2009), *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory*, Oxford University Press

World Bank (2023), *State and Trends of Carbon Pricing 2023*, World Bank

World Bank (2024), *State and Trends of Carbon Pricing 2024*, World Bank

White House (2021), "Fact Sheet: The United States and European Union To Negotiate World's First Carbon-Based Sectoral Arrangement on Steel and Aluminum Trade, October 31, 2021", https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/31/fact-sheet-the-united-states-and-european-union-to-negotiate-worlds-first-carbon-based-sectoral-arrangement-on-steel-and-aluminum-trade/

WTO (2011), "Promoting Mutual Supportiveness Between Trade and Climate Change Mitigation Actions: Carbon-Related Border Tax Adjustments: Communication from Singapore", WT/CTE/W/248

WTO (2020a), "Procedural Guidelines for WTO Councils and Committees Addressing Trade Concerns, Draft General Council Decision", WT/GC/W/777/ Rev.5

WTO (2020b), “Minutes of the Committee on Market Access, 8 June 2020” G/MA/M/72
WTO (2021a), “Ministerial Statement on Trade and Environmental Sustainability”, WT/MIN(21)6/Rev.2
WTO (2021b), “Committee on Trade and Environment, Report of the Meeting Held on 16 and 20 November 2020”, WT/CTE/M/70
WTO (2023a), “Reinforcing the Deliberative Function of the WTO to Respond to Global Trade Policy Challenges, Communication from the European Union” WT/GC/W/864
WTO (2023b), “A Proposal for Dedicated Multilateral Discussions on the Trade Aspects and Implications of Certain Environmental Measures, Communication from China”, WT/CTE/W/251
Yu, B., Zhao, Q. and Wei, Y. (2021) “Review of carbon leakage under regionally differentiated climate policies”, *Science of the Total Environment*, Vol. 782

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