

Carbon Border Adjustment

A dissenting view on its alleged GATT-compatibility

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Abstract

The Von der Leyen Commission is determined to achieve climate neutrality by 2050. To that end it has proposed a roadmap of legislative actions which includes a carbon border adjustment mechanism to reduce the risk of carbon leakage. The article discusses the GATT-compatibility of carbon border adjustment. It starts with a conceptual analysis of the differences between border tax adjustment and carbon border adjustment and concludes that the latter is substantially different from the former. The GATT-compatibility of carbon border adjustment requires a creative and far-reaching interpretation which blurs the traditional GATT distinction between nonadjustable ‘direct’ taxes and adjustable ‘indirect’ taxes. As a consequence, by interpreting the GATT provisions in the same creative manner the EU’s trading partners could also adopt new adjustment mechanisms which, so far, have not been considered possible and which potentially could have a trade distorting effect. With the exception of a carbon tax on domestically consumed products all other carbon adjustment mechanisms discussed by the European Commission do not stand the test of GATT- compatibility.

patibility. They all violate basic GATT provisions and cannot be justified by the public policy exception of GATT Article XX. In interpreting the chapeau of GATT Article XX, the article develops a 'Paris-defense' which the signatories of the Paris Agreement complying with its substantive obligations could use to demonstrate the coercive effect and hence the arbitrariness of the EU's measure. As a border measure the mechanism to be adopted by the EU will provoke (violent) reactions by the EU's trading partners. The EU will therefore be well advised to adopt a cooperative approach and negotiate with affected exporting countries a solution before acting. The EU cannot claim to defend the rules-based approach of the WTO and the climate objectives of the Paris Agreement whilst at the same time adopting a unilateral and potentially protectionist measure.

Keywords: Carbon Border Adjustment, Carbon Tax, Carbon Tariff, Extension of ETS to Imports, GATT-Compatibility, Paris Agreement, Unilateralism

A. Introduction

For more than ten years now, each time the leaders of the European Union committed to more ambitious greenhouse gas (GHG) emission reduction targets the idea of a carbon border adjustment (CBA) has been promoted. The advocates of those measures¹ consider them necessary to avoid 'carbon leakage', i.e. uneven climate efforts between countries that can lead to a relocation of production and investment from countries with ambitious climate policies to countries with less stringent requirements and to the replacement of domestic products with more carbon-intensive imports. They also consider that the EU can achieve climate neutrality only if it imposes a CBA at its borders so that third countries do not benefit 'unfairly' from the EU's ambitious climate protection policies. CBA is therefore justified as a measure of 'fairness' to protect both the climate and the domestic industry.

Initially, the proponents of CBA had a rough time.² A first attempt to establish such a mechanism, the so-called FAIR-text (Future Allowance Import Requirements) never developed into a legislative proposal by the European Commission. FAIR was considered to violate WTO-rules.³ Furthermore, notwithstanding stricter EU climate

1 For a comprehensive analysis of CBA with historical details and an impressive list of citations see *Mehling et al.*, pp. 433 f.

2 In 2010 Trade Commissioner designate *de Gucht*, in his confirmation hearing before the European Parliament, rejected the idea of CBA, available at: <https://amp.ft.com/content/ac093724-ffa5-11de-921f-00144feabdc0>. (08/03/2020).

3 For a comment on FAIR, see *Quick* 2008, p. 167.

legislation there was not much evidence of ‘carbon leakage’ in the past.⁴ In spite of several political initiatives in favor of CBA,⁵ the European Commission at the end of 2018 continued to express doubts about the WTO-compatibility of a carbon-tax applied to imports in the context of a domestic ETS-system and wondered whether such a measure would not be seen as “*running counter to the spirit of the Paris Agreement*”.⁶

Politically the situation changed in summer 2019. The then Commission-President designate, Ursula von der Leyen, declared⁷ that she “*will introduce a Carbon Border Tax to avoid carbon leakage. This should be fully compliant with World Trade Organization rules. It will start with a number of selected sectors and be gradually extended*”. Several Commissioners designate reiterated this message in the written answers for their hearings in the European Parliament.⁸ In its ‘Green Deal’-Communication the Commission insists on a WTO-compatible ‘*carbon border adjustment mechanism, for selected sectors, to reduce the risk of carbon leakage*’.⁹ It is noteworthy that the Communication no longer speaks of a ‘carbon border tax’ but more generally of a ‘carbon border adjustment mechanism’ (CBAM). In March 2020, the European Commission launched a public consultation on this issue¹⁰ asking for comments on the following three measures:

- (a) A carbon tax on selected imported and domestic products
- (b) The extension of EU ETS to imports
- (c) A new carbon customs duty or tax on imports

4 *Zachmann and McWilliams* point out that ex-post empirical studies show no clear evidence for leakage; also skeptical *de Cendra*, p. 135. *Mehling et al.*, find some support for carbon leakage, *Mehling et al.*, p. 446; *Demainly and Quirion*, pp. 8 f., confirm carbon leakage for the cement sector; *Yu and Clora*, p.6., consider carbon leakage as an important issue for the formulation of ambitious EU policies, warn however of unilateral EU action; according to their simulations the most ambitious EU decarbonization pathway will lead the rest of the world to increase its GHG emissions considerably.

5 France has been an outspoken supporter of CBAMs and has made several proposals over the last years; see *Lamy et al.*, p. 4; *Mehling et al.*, p. 448 f. President Macron also calls for CBA. In his speech at the Sorbonne University on 26 September 2017 he considered a European carbon tax as crucial, available at: [https://www.elysee.fr/emmanuel-macron/2017/09/26/president-macron-gives-speech-on-new-initiative-for-europe.en.\(20/03/2020\).](https://www.elysee.fr/emmanuel-macron/2017/09/26/president-macron-gives-speech-on-new-initiative-for-europe.en.(20/03/2020).)

6 *European Commission*, ‘In-Depth Analysis in Support of the Commission Communication COM (2018) 773, A Clean Planet for all, A European long-term strategic vision for a prosperous, modern, competitive and climate neutral economy’, 28 November 2018, p. 263.

7 *Ursula von der Leyen*, ‘A Union that strives for more – My agenda for Europe’, Political Guidelines for the next European Commission 2019 -2014, July 2019.

8 For example Vice-President *Timmermans* and Commissioners *Hogan* and *Gentiloni* committed to intensify work on a WTO-compliant proposal of a carbon border tax, available at: [https://www.europarl.europa.eu/news/en/press-room/20190927IPR62382/answers-from-commissioners-designate-to-parliament-s-written-questions\(5/03/2020\).](https://www.europarl.europa.eu/news/en/press-room/20190927IPR62382/answers-from-commissioners-designate-to-parliament-s-written-questions(5/03/2020).)

9 *European Commission*, ‘The European Green Deal’, COM (2019) 640 final, 11 December 2019, p. 5.

10 *European Commission*, ‘Public Consultation, Proposal for a Directive, EU Green Deal, Carbon Border Adjustment’, 4 March 2020, available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism.\(05/03/2020\).](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism.(05/03/2020).)

The Commission's insistence on the WTO-compatibility of the measure serves as an assurance to its trading partners and to the public that the EU is not pursuing a unilateral protectionist policy but continues to be committed to the rules-based WTO trading system. Still, it is astonishing given the previous Commission's view on the potential WTO-incompatibility of CBAs.¹¹ Perhaps the Commission has been convinced by the overwhelmingly positive body of academic literature¹² which argues on the necessity, feasibility as well as WTO-compatibility of CBA. Indeed, the proponents conclude that a CBAM should be introduced because timely measures to protect the climate are needed¹³ whilst only some political commentators suggest that the Commission's initiative could face long delays.¹⁴

In the following the article discusses the conceptual issues of CBAMs in the context of the GATT rules on border tax adjustment (chapter II), their GATT-compatibility (chapter III), possible reactions from the EU's trading partners (chapter IV) and solutions to overcome GATT-incompatibility (chapters V and VI).

B. Conceptual Challenges of CBAMs: The Scope of GATT Article II:2 (a)

Already in 1969 John H. Jackson recognized the potential danger of border tax adjustment for the international trading system. He wrote¹⁵:

"In any event, border tax adjustments are posing a serious challenge to the methods of international trade regulation heretofore followed and touch the center of a growing long-range problem of reconciling freedom for each nation to pursue domestic goals while maintaining international trade to an extent that helps to efficiently and fairly allocate world resources".

At the time of the comment, BTA was high on the political agenda of the GATT. In 1968 the GATT Council established a Working Party¹⁶ whose task was to examine the GATT provisions on BTA, the contracting parties' practices and the possible effects of BTA on international trade. Of relevance then was the question of which type of measures could be adjusted at the border. The Working Party's 1970 report came to remarkably clear conclusions and for many years the GATT contracting parties applied BTA without too many political or legal discussions. John Jackson's warnings have regained relevance today since the debate on CBAMs is yet again a debate on what exactly is adjustable at the border.

11 See Fn. 6.

12 To name but a few: Holzer; Dean; Hufbauer et al.; Bacchus; Horn and Sapir 2013.

13 Lamy et al. p. 3; Mehling et al., p. 481; Horn and Sapir 2019.

14 Khan and Fleming as well as Stratmann and Herbermann.

15 Jackson 1969, p. 302.

16 *GATT Report by the Working Party on Border Tax Adjustment*, L/3464, 2 December 1970, BISD 18S/97, para. 1.

I. Is symmetry required?

The GATT Working Party adopted the following definition of border tax adjustment:¹⁷

Any fiscal measure which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products).

The basic objective of border tax adjustment is “*trade neutrality of domestic taxation*”:¹⁸ a domestic (indirect) tax or a charge on a product is levied on imports and reimbursed for exports. Typically, the value added tax is adjusted in that way. Given the different taxation systems between trading partners and in the absence of tax harmonization such an adjustment creates a level-playing field, avoids double taxation, and *preserve(s) the competitive equality between domestic and imported products*.¹⁹ Economically speaking, the adjustment gives effect to the destination principle according to which taxes are paid where products are consumed and not where they are produced.²⁰

The GATT rules on BTA differentiate between adjustment for imports and exports. For imports GATT Article II:2 (a) allows the levying of a charge upon importation “equivalent to an internal tax” if imposed consistently with the requirements of GATT Article III:2. For exports GATT Ad Article XVI states that export rebates of taxes not in excess of those applied domestically shall not be considered a subsidy. Confirming the Ad Note GATT Article VI:4 stipulates that the rebate should not lead to anti-dumping or countervailing duties either. If these rules are respected the border tax adjustment of an indirect tax on products does not cause any GATT-compatibility issues.

Like a typical fiscal measure, such as VAT, a CBAM on imports serves to preserve the competitive equality between domestic and imported products. With respect to exports the situation differs though in that one could argue that the rebate should not be allowed since it would be contrary to the environmental objective of the domestic measure. Environmental considerations should therefore trump the trade-neutrality aspects of the adjustment. If a CBAM is applied for imports only, can one conceptually still speak of a border tax adjustment? In other words, does the concept of BTA always require an import adjustment and an export rebate of the domestic tax in parallel (symmetry) or can countries freely decide to use the import adjustment only without applying the export rebate (asymmetry)?

17 Ibid., para. 4.

18 WTO, Taxes and Charges For Environmental Purposes – Border Tax Adjustment, Note by the Secretariat, WT/CTE/W/47, 2 May 1997, p. 6.

19 Ibid.

20 Demaret and Stewardson, p. 6.

There is no definitive answer to this question. Some commentators favor symmetry²¹ whilst others consider that symmetry is not required²² and that governments can choose freely. Those who favor cite one conclusion of the GATT Working Party – “*it was agreed that GATT provisions on tax adjustment applied the principle of destination identically to imports and exports*”²³ – those who oppose it cite another – “*it was further agreed that these provisions set maxima limits for adjustments (compensations) which were not to be exceeded, but below which every contracting party was free to differentiate in the degree of compensation applied, provided that such action was in conformity with other provisions of the General Agreement*”²⁴. The proponents of asymmetry also cite the GATT *Superfund* Panel²⁵ which confirmed border tax adjustment as a right but not as an obligation.²⁶

1. A carbon tax on selected imported and domestic products

If the EU were to apply a carbon tax on products based on their carbon content it could follow the BTA-rules if this tax were an indirect tax on products. In principle, it could charge the imports with the tax in conformity with GATT Articles II:2 (a) and III:2 and rebate the exports in conformity with GATT Ad Article XVI. The example of a carbon tax nicely demonstrates the difference between CBA and BTA. Whilst nobody would challenge the trade neutrality concept of a VAT adjustment and therefore accept without any hesitation a symmetrical approach, the same approach is questionable for a CBAM. Should a carbon tax on products be rebated upon exports if such rebate destroys the very idea of the strict domestic climate regulation?²⁷ As mentioned above an asymmetrical approach can be justified if *such action was in conformity with other provisions of the General Agreement*.²⁸ The non-rebate of the tax for export could potentially fall under the broad scope of GATT Article XI, since “*it imposes a condition which limits the exportation of a product*”.²⁹ Yet, even if it constituted a GATT violation it could be justified with GATT Article XX. Furthermore, GATT Article I should be respected, the non-rebate should apply *erga omnes*. WTO-members could therefore, in principle, opt for an asymmetric approach in case of a carbon border tax.

The parallel application of symmetry and asymmetry leads to further complications. If WTO members are free to decide which approach to choose, they can opt for either

²¹ Ibid., p. 31.

²² Holzer, p. 80, *Hufbauer et al.*, p. 39.

²³ Fn 16, para. 10.

²⁴ Ibid., para. 11.

²⁵ GATT, Panel Report, United States – Taxes on Petroleum and Certain Imported Substances, BISD 34S/136, para. 5.25.

²⁶ Holzer, p. 78.

²⁷ Holzer, p. 202, supports the export rebates of carbon taxes.

²⁸ GATT, Report by the Working Party on Border Tax Adjustment, L/3464, 2 December 1970, BISD 18S/97, para. 11.

²⁹ WTO, Appellate Body Report, Argentina – Measures Affecting the Importation of Goods, WT/DS 438/AB/R, para. 5.271 (2015).

approach without infringing the GATT. If a WTO member adopts a carbon tax on products and opts for a symmetric application of the border adjustment, it remains within the GATT legal boundaries provided the carbon tax is applied to domestic and imported products alike and the rebate upon exportation does not exceed the domestically applied tax. If another WTO member also adopts a carbon tax and opts for the asymmetric approach this adjustment process also remains within the GATT legal boundaries. Conceptually symmetry causes an environmental problem whilst asymmetry frustrates the level-playing field rationale of BTA and can lead to double taxation.

2. The extension of EU ETS to imports

The situation gets more complicated if the CBAM envisaged is not a typical indirect tax on products but an adjustment mechanism of a domestic regulation, such as the extension of the EU ETS to imports (and possibly exports). In this case the adjustment process at the border could be covered by GATT Articles II:2 (a) and III:2, if ETS were considered a fiscal measure or by GATT Article III:4, if the measure were considered the application of a domestic regulation at the border. The drafters of the above-mentioned FAIR-text³⁰ required importers to surrender on imported products the respective amounts of certificates which domestic producers must surrender under the national ETS system for domestic products; they also opted for a rebate upon exportation. If one considers this example as a fiscal CBA, and there is a considerable body of literature supporting this view,³¹ the conceptual issues discussed in the previous sub-chapter apply here as well.

If the extension of ETS to imports is not a fiscal but a regulatory measure the 'adjustment' for imports could be covered by GATT Article III:4. In this case we are leaving the GATT rules on BTA and are no longer guided by GATT Articles II:2 (a), III:2 and GATT Ad Article XVI. Since there are no specific provisions covering exports with respect to GATT Article III:4 the question of symmetry or asymmetry of import and export adjustment becomes irrelevant. *Holzer* suggests³² to apply the WTO rules on subsidies with respect to the 'adjustment' of exports. Also, *Hufbauer et al.*³³ consider an export rebate as a potential prohibited export subsidy "*if an emissions allowance is viewed by the WTO as the equivalence of money*". The rebate on exports could therefore be a prohibited export subsidy. GATT Article III:4 is however not the only GATT-alternative in this case. If the import adjustment were considered as a border measure and not as a domestic measure applied at the border, one could apply GATT Article II:1 (b) instead of GATT Article III:4.³⁴

30 The so-called FAIR-text developed by the European Commission in 2007 indeed contained the idea of an export rebate; see *Quick* 2008, p. 167.

31 *Pauwelyn* 2007, pp. 21-22; *Dean*, p. 196; *de Cendra*, p. 136.

32 *Holzer*, p. 78.

33 *Hufbauer et al.*, pp. 69/70.

34 *Quick* 2011, p. 131.

Hufbauer et al. put forward a further argument concerning the application of the chapeau of GATT Article XX. They write³⁵

“Although GATT Article XX is not directly relevant to whether a BTA for outward shipment is an export subsidy, the rebate of an energy tax for exports could undermine the Article XX environmental justification for applying the BTA to imports. For example, consider how a panel might have appraised the US shrimp import ban if US law had allowed shrimp caught without turtle exclusive devices to be exported by the United States. In those circumstances the import ban would have appeared as arbitrary or unjustifiable discrimination”.

The considerations concerning subsidies and those concerning the chapeau of GATT Article XX can be explained by using the above-mentioned FAIR-text. If FAIR is a fiscal CBAM and the export rebate complies with GATT Ad Article XVI, this puts an end to the discussion. In the absence of a GATT violation the issue on whether the export rebate could be used in the context of GATT Article XX becomes irrelevant. The arguments made by *Hufbauer et al.*, also addressed by others,³⁶ become relevant outside the context of BTA. If FAIR is a non-fiscal CBAM the export rebate could become a prohibited subsidy under the rules of the SCM Agreement or could be used as an argument to prove ‘arbitrary and unjustifiable discrimination’ under the chapeau of GATT Article XX provided a violation of other GATT articles (e.g. Articles III:4, or alternatively, II:1 (b)) has been established.

3. A new carbon customs duty or tax on imports

A carbon customs duty is not an indirect tax on products, it is not covered by GATT Articles II:2 (a) and III:2 but rather by GATT Article II:1 (b) or (a).

With respect to a ‘tax on imports’ we need to look at the nature of this ‘tax’ and not at its name. GATT Articles II:2 (a) and III:2 apply to internal and not to border measures and presuppose the existence of an internal tax levied on products.³⁷ If a measure applied to imports does not have a domestic parallel, however, GATT Article II:2 (a) is not applicable. It is a border measure, and that independently of its name. The so-called ‘tax on imports’ would then mutate into a ‘carbon charge’ potentially incompatible with GATT Article II:1 (b).

Both a new carbon customs duty and a carbon tax on imports are border measures for which the GATT rules on BTA are not applicable; hence a discussion on symmetry or asymmetry is not necessary.

35 *Hufbauer et al.*, p.69.

36 *Holzer*, pp. 78, 168; *Mehling et al.*, p. 471.

37 The GATT Note Ad Article III speaks about ,any **internal** tax’, (emphasis added).

II. What exactly is adjustable?

The GATT Working Party stipulated the general rule that taxes *directly levied on products* were eligible for border tax adjustment whilst taxes *that were not directly levied on products* were not³⁸ (emphasis added). The examples given for the first category (also referred to as 'indirect' taxes) are *excise duties, sales taxes and cascade taxes and the tax on value added* and for the second category (also referred to as 'direct' taxes) are *social security charges whether on employers or employees or payroll taxes*. The above-mentioned note from the WTO Secretariat reaffirms the rationale for this distinction:³⁹

*"The preference granted to indirect taxes relies on the assumption that indirect taxes are shifted completely "forward" by the taxpayer; they are eventually reflected in the final price of the product and, thus, are paid by the consumer. On the contrary, it is assumed that direct taxes are shifted "backward": they are finally borne by the manufacturer of the product and are not reflected in the final price of the product. In brief, WTO provisions on border tax adjustment follow the destination principle for indirect taxes, and the origin principle for direct taxes. Border tax adjustment is therefore not possible for direct taxes whether levied on imported or exported products."*⁴⁰

This distinction still applies today. For subsidies, it has been codified: the SCM Agreement⁴¹ defines 'direct' and 'indirect' taxes⁴² and refers in its Annex I to export adjustment practices which are permissible or not.⁴³ For the GATT, Articles II:2 (a) and III: 2 continue to apply. If 'indirect' taxes are shifted 'forward' and are paid by the consumer it seems fair to impose the tax at the destination.⁴⁴ Yet here lies the problem. The economic rationale of the 'forwarding' of an indirect tax and the 'backwarding' of a direct tax has been questioned for quite some time now⁴⁵ and it has been shown that also 'direct' taxes are forwarded and are reflected in the price of the product.⁴⁶

38 Fn. 16, para. 14.

39 See Fn. 18, p. 36.

40 The ineligibility of direct taxes for adjustment was confirmed by a GATT panel in the DISC case: the U.S. DISC legislation which allowed certain types of corporations to be partially exempt from federal income tax on their export earnings was considered an export subsidy; *GATT, Panel Report, United States Tax Legislation (DISC)*, BISD 23S/98, para. 69.

41 Already the 1979 Code on Subsidies and Countervailing Measures contained those definitions as well as an Illustrative List of Export Subsidies. The Code only bound those GATT contracting parties which had signed it.

42 Footnote 58 of the SCM Agreement defines 'direct' taxes as taxes on wages, profits and interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property and 'indirect' taxes as sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges.

43 Letter (g) of Annex I of the SCM Agreement allows the export rebate of indirect taxes if they are not levied in excess of those taxes applied domestically whilst letter (e) prohibits the export rebate of 'direct' taxes and social welfare charges.

44 *Jackson 1989*, p. 195.

45 *Low et al.*, p. 10; *Holzer*, p. 70; *Demaret and Stewardson*, p. 16.

46 See the studies cited by *Demaret and Stewardson*, p. 14 f.; *Jackson 1989*, p. 196.

One wonders therefore why the distinction still applies today and what the reasons for a continuing prohibition of the adjustments of direct taxes are? The answer given by the literature to this question is both stunning and simple:⁴⁷ whilst the adjustability of direct taxes may not reflect economic reality the distinction should continue to apply for reasons of administrative convenience: firstly, because taxes on products can be detected more easily than taxes on producers and secondly to avoid WTO disputes over the adjustments of 'direct' taxes since they are open to abuse.⁴⁸ Jackson concludes⁴⁹ "*perhaps the present rule is as good a rough approximation of equity as can be found, and it is at least administrable*".

1. A carbon tax on selected imported and domestic products

In order to be adjustable at the border a carbon tax on selected imported and domestic products must fall within the ambit of GATT Articles II:2 (a) and III:2, it must be "*a charge equivalent to an internal tax ... imposed ... 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*" and it must comply with GATT Article III:2, namely being an "*internal tax or other internal charge of any kind ... applied, directly or indirectly, to ... products*".

We do not know the exact nature of the carbon tax which the European Commission is contemplating. A carbon tax on domestically consumed products, imposed for example at the time of distribution or sale would, just like a VAT, be adjustable at the border.⁵⁰ The adjustability of a carbon tax imposed on installations or producers for the amount of greenhouse gases emitted in the production of a specific energy-intensive product, e.g. steel, already raises more questions. The measure to be proposed could also take the form of a tax on the generation of power or a tax on the major users of such power. The special feature of these taxes is that they are not levied on the final product (e.g. steel) but that they are either levied on an input (energy) or on an output (emissions) of the production process. Arguably, they fall into the category of *taxes occultes* or hidden taxes⁵¹ for which the GATT Working Party was unable to provide an answer on whether these taxes were adjustable. It only noted the divergence of views but did not examine the issue further given the scarcity of complaints. In the *US-Superfund* case⁵² the GATT panel confirmed that a prior-staged specific tax on chemicals used as inputs for producing other chemicals could be adjusted at the border and was in conformity with GATT Article III:2. The panel did not specify whether the input-chemicals still had to be present in the end-product. The text of GATT

47 Demaret and Stewardson, p. 16; Holzer, p. 70; Pauwelyn 2007, pp. 18-19.

48 Demaret und Stewardson, p. 16.

49 Jackson 1989, p. 196.

50 Pauwelyn, 2013, p. 477.

51 The examples given for hidden taxes are "*taxes on advertising, energy, machinery and transport*", Fn. 16, para. 15.

52 Fn. 25, para. 5.2.7.

Article II:2 (a) seems to allow for such an adjustment even if the ‘input’ has been consumed in the production process since it reads “*or in respect of an article from which the imported product has been manufactured or produced in whole or in part*” whilst the equally authentic French version of the article says “*une merchandise qui a été incorporée dans l'article importé*” and therefore implies that the input still has to be present in the finished article.

The adjustability of taxes on inputs consumed in the production process triggered a lively academic debate.⁵³ It centered on the question whether the concepts of letters (g) or (h) of Annex I of the SCM Agreement could be used *mutatis mutandis*⁵⁴ to justify the import adjustment of taxes on inputs consumed in the production process. One position⁵⁵ refers to letter (h)⁵⁶ together with footnote 61⁵⁷ of Annex II of the SCM Agreement: the carbon tax would be considered as a prior-stage tax on an input which is consumed in the production process. Letter (h) however applies to prior-stage *cumulative* indirect taxes, as Brack *et al.*⁵⁸ point out. Cumulative indirect taxes are defined⁵⁹ as “*multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to the tax at one stage of production are used in a succeeding stage of the production*”. A tax on the emission of carbon dioxide is not multi-staged, it is a tax imposed on the total amount of the emissions of a specific production facility, therefore the concept of letter (h) seems inapplicable for carbon taxes. The other position, suggested by Pauwelyn,⁶⁰ interprets the language of letter (g), i.e. “*in respect of the production and distribution of exported products*”, broadly so as to cover process and production-related taxes as taxes in respect of the production of exported products and consequently applies letter (g) to taxes on inputs consumed in the production process. The carbon tax could therefore be a ‘charge equivalent to an internal tax’.

Until now a CBAM has never been the subject of a dispute settlement in the WTO. We do not know whether the WTO’s adjudicatory body would confirm the adjustability of carbon taxes at the border, either confirming, in particular, the application of the concepts contained in Annex I of the SCM Agreement *mutatis mutandis* to the import adjustment of a carbon tax, or following, more generally, the GATT Working

53 Pauwelyn 2007, p. 20; de Cendra, p. 140; Hufbauer *et al.*, pp. 41f.; Holzer, pp. 99f.

54 Based on the position of the GATT Working Party that the GATT-rules on rebates for exports and taxes on imports are equivalent one could argue that if the SCM-Agreement allowed the exemption of the taxes on inputs consumed in the production process upon exportation one could apply this concept also with respect to the adjustment of the tax upon importation, see Holzer, p. 101.

55 Hufbauer *et al.* pp. 41f., discussing letter (h) with respect to taxes on ‘energy’ though.

56 Letter (h) allows the export rebate of prior-stage cumulative indirect taxes on goods used in the production of exported products if they are not levied in excess of those taxes applied domestically.

57 Footnote 61 defines inputs consumed in the production process as “*inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product*”.

58 Brack *et al.*, pp. 85 – 87.

59 Footnote 58 SCM Agreement.

60 Pauwelyn 2007, p. 20, Fn. 52.

Party's conclusions or the GATT panel's reasoning in the Superfund case. The Appellate Body has implicitly confirmed the SCM Agreement's distinction between 'direct' and 'indirect' taxes when it ruled, in the *FSC-case*, that footnote 1 of the SCM Agreement referred to "*the exemption of exported products from product based consumption taxes*".⁶¹ The Appellate Body's language could be an indication of a narrow reading of the term 'indirect tax'. A carbon tax imposed on the emissions of an installation would then probably not be covered, as it is not a product-based consumption tax. Moreover, the Appellate Body would also not be inclined to follow the GATT Working Party's assumption that the different wordings "borne by", and "levied on" contained in the relevant GATT Articles had not led to any differences in the interpretations of these provisions.⁶² Rather, the Appellate Body would criticize such an interpretation as not following the principles of treaty interpretation⁶³ and insist that these terms are interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties by using their ordinary meaning in the context and in light of the object and purpose of the Treaty.⁶⁴ The Appellate Body would probably also aim for objective criteria to determine whether the carbon tax is a tax 'directly' levied on products.

The literature is divided on the issue:⁶⁵ the proponents argue that although the tax would reflect the amount of carbon dioxide emitted in the production process it would nevertheless be assessed on the product itself;⁶⁶ another view⁶⁷ considers that the goal of the tax ultimately lies in increasing the price of the final product so that both producers and consumers reduce the consumption of carbon-intensive products and shift to more environmentally-friendly products; *Pauwelyn*⁶⁸ states "*as the very reason for the tax is to make carbon-intensive products more expensive, the tax does (or should) shift forward to consumers (depending, again, on factors such as market competition and elasticity of supply and demand) and therefore could be said to be adjustable at the border*". The opponents think that carbon taxes fall on the producers and not on the product⁶⁹ or consider them more similar in character to direct taxes than to product taxes.⁷⁰

Conceptually, where should one draw the line between a 'direct' and an 'indirect' tax and how broadly should the WTO's adjudicatory bodies interpret the term 'indirectly' applied to products? Since the economic rationale of the 'forwarding' of the

61 *Appellate Body Report*, United States – Tax Treatment For Foreign Sales Corporations, WT/DS/108/AB/R (2000), para. 93.

62 Fn. 16, para. 19.

63 Already the first report of the Appellate Body confirmed this approach. *Appellate Body Report*, United States – Standards for Reformulated and Conventional Gasoline WT/DS/2/AB/R (1996), pp. 17f.

64 For a detailed comparison of the reasonings of the GATT Superfund Panel with actual Appellate Body's reasonings see *Goh*, pp. 405f.

65 For an overview of the different positions see *Holzer*, pp. 102, 103.

66 *Hillman*, p. 6.

67 *Pauwelyn* 2007, p. 20.

68 *Pauwelyn* 2013, p. 480.

69 *Low et al.*, p. 10.

70 *Goh*, p. 411.

indirect tax to the consumer can no longer be a guiding principle one could be tempted to look for other criteria to make the distinction work. Three criteria are discussed in the literature:

a. Calculability

The criterion ‘calculability’, which *Hillman* seems to refer to,⁷¹ would be a translation of the administrative convenience argument mentioned above. Would the fact that the tax in question can be assessed on the final product be sufficient to define it as ‘indirect’? Against this argument speaks the fact that also a corporate tax or social security charges can as much be broken down to, and be calculated on, the individual product. The assessment of the carbon tax on the individual product is necessary to levy the import charge at the border, yet domestically such an assessment is not required: a carbon tax is assessed on the total amount of the carbon emitted during the production process and not on the number of products produced. Assume for example two installations producing energy intensive products, one using lignite coal, the other natural gas. With the same amount of GHG emissions the installation using natural gas will be able to produce more products than the installation using lignite coal, yet the carbon tax for both installations will be the same.

b. Proximity

Proximity could be a distinguishing criterion. The more related the tax would be to the final product the more it would be considered an ‘indirect tax’. This approach could possibly cover taxes on inputs incorporated into the final product or consumed in the production process such as an energy tax or a tax on input chemicals.⁷² But could such a relationship also be established for a carbon tax? It is not a tax on an article from which the imported article has been manufactured or produced, it is a tax on the consequences of the production, namely its emissions. One could adjust a tax on emissions by broadly interpreting the words ‘in respect of the production’ contained in letter (g) of Annex I of the SCM Agreement, applied *mutatis mutandis* for imports, as *Pauwelyn* suggests,⁷³ provided however that the tax is ‘indirect’. Footnote 58 of the SCM Agreement defines the term ‘indirect tax’ as *sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges*” (*emphasis added*). The footnote does not speak of taxes on emissions, nor could one interpret any other item contained therein to cover those taxes. Carbon taxes are imposed on emissions to control the negative environmental externalities which they cause during the production process. They are

71 *Hillman*, p. 6.

72 *Vranes*, p. 337, doubts whether taxes on non-incorporated inputs to the production process can be adjusted on importation yet considers this position problematic from an environmental point of view.

73 *Pauwelyn* 2007, p. 20, fn. 52.

borne by the producer in the same way as are the costs of traditional command-and-control regulations on air, water, soil, or waste. Conceptually they are similar to corporate taxes and therefore rather fall into the category of 'direct' than 'indirect' taxes.⁷⁴ Imagine a tax on wastewater in the production of chemicals: it would be a tax on emissions to control the negative environmental externalities of the production of the chemicals but should it be adjusted at the border when importing or exporting the chemical?

c. Purpose

A further distinguishing element could be the 'environmental goal' of the tax, as *Pauwelyn*⁷⁵ seems to suggest: for environmental reasons, the purpose of the carbon tax should increase the price of the final product, hence, independent of its nature, it could be considered a tax on products. In the *Superfund* case the GATT Panel rejected this argument and held that it was the type of the tax (direct or indirect) that mattered and not the purpose of the tax.⁷⁶

To sum up, even if one were to consider taxes on inputs in the production process as an 'indirect' tax, taxes on emissions are conceptually more similar to a corporate tax and therefore fall more into the category of a 'direct' rather than an 'indirect' tax.

2. The extension of EU ETS to imports

The border adjustment of an emission trading system raises several conceptual issues: Is it a fiscal measure covered by GATT Article III:2? Is it the application of a domestic measure at the border covered by GATT Article III:4? Or is it a border measure covered by GATT Article II:1 (b)?

The European ETS legislation⁷⁷ establishes the so-called cap-and-trade system:⁷⁸ a cap is set on the total amount of GHG emissions that can be emitted by the covered installations and this cap is reduced over time. Both the cap and the reduction to be achieved are binding and, together with the general prohibition of emissions (Article 4 EU ETS) and the system of emission permits (Article 6 EU ETS) resemble a typical environmental command-and-control regulation. Furthermore, the legislation adds the trading system which introduces a flexible, market-based element ensuring

74 *Low et al.*, p. 10.

75 *Pauwelyn* 2007, p. 20.

76 The Panel said: "whether a sales tax is levied for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of the tax for border adjustment", *GATT Superfund case*, Fn. 25, para. 5.2.4.

77 The consolidated text of the ETS Directive (EU ETS) is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02003L0087-20180408&qid=1589020931743&from=EN>. (15/04/2020).

78 *European Commission*, ETS Handbook, 2015, pp. 16, available at: https://ec.europa.eu/clima/sites/clima/files/docs/ets_handbook_en.pdf (15/04/2020).

that “*emissions are cut where it costs least to do so*”.⁷⁹ Fines are imposed on companies which fail to surrender the required allowances in time. Two important aspects of EU ETS should be noted: First, the legislation applies to installations and not to products.⁸⁰ Second, EU ETS does not cover imported products.⁸¹

a. Border Adjustment of ETS: a fiscal measure?

Some authors consider the border adjustment of an emission trading system as a fiscal measure.⁸² Based on the OECD definition of the term ‘tax’ as a “*compulsory, unrequited payment to the government*”⁸³ they consider that the holding of emission allowances entails a cost⁸⁴ for which the owner of the installation receives nothing identifiable in return and conclude this cost could be regarded as an ‘internal tax’ or ‘other internal charge of any kind’ ‘indirectly’ applied to products.⁸⁵ The assumption that the installations receive nothing in return for the requirement to hold emission trading certificates is questionable with respect to the EU ETS. The legislation prohibits GHG emissions in general but allows installations to emit GHGs through permits if they participate in the cap-and-trade system. One condition for the issuance of the permit is the requirement to surrender emission trading allowances (Article 6 para. 2 (e) EU-ETS). Hence, the permit to emit GHGs is inextricably linked with the cap-and-trade system, as it would not be issued in the absence of those allowances. In return for complying with ETS the owner of the installation receives a permit to emit greenhouse gases.⁸⁶ The costs for holding ETS allowances can therefore not be considered an unrequited payment to the government. Yet could they be ‘charges of any kind’? Charges are imposed by governments as fixed payments for a specific service, ETS allowances,

79 European Commission, EU Emission Trading System, available at: https://ec.europa.eu/clima/policies/ets_en (15/04/2020).

80 The European Commission writes: “*It is also recalled that ETS is not a tax and in any event it is not a tax on products but is imposed on producers*”, see, fn. 6, p. 263.

81 An earlier version of the Directive contained a provision on the potential inclusion of importers (i.e. Article 10 (b) 1 (b) Directive 2009/29/EC), which has however been replaced recently; the new Article 10 (b) no longer contains a reference to such inclusion. The ‘old’ Article 10 (b) was inserted into EU ETS by Article 1 No 12 of Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC. Later it was replaced by Article 1 (15) of the Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC and Decision (EU) 2015/1814.

82 *Pauwelyn* 2007, p. 21; *de Cendra*, pp. 135-136; *Dean*, pp. 190 -196. *Dean*, p. 196, is hesitant however to qualify EU ETS as a ‘tax’ because of the general prohibition to emit greenhouse gases.

83 OECD, Note on the Definition of Taxes by the Chairman of the Negotiating Group on the Multilateral Agreement on Investment (MAI) (DAFFE/MAI/EG2(96)3), 19 April 1996, p. 1.

84 Free allowances entail an opportunity cost and can be sold on the market if the installation successfully reduces its emission cap.

85 *Pauwelyn* 2007, p. 21, fn. 54, points out that GATT Article II:2 (a) only refers to ‘internal taxes’ yet submits that the cross-reference to GATT Article III:2 would allow the use of ‘other internal charges of any kind’, for border tax adjustment purposes.

86 *McLure*, p. 286; *Murayama*, pp. 694-695.

in contrast, have a market price and are not fixed since they depend on supply and demand. They can be sold by the owner of the installation on a secondary market outside the sphere of the government and therefore have a value which neither a 'tax' nor a 'charge' would have.⁸⁷

It is interesting to note that the Court of Justice of the European Union, in a case concerning the Chicago Convention and the EU U.S. Open Skies Agreement, opined, when considering the EU ETS aviation scheme, that the allowances under the scheme were neither a duty, nor a charge or a tax since the price for the allowance was established by market forces and was not fixed by the State.⁸⁸ The character of the EU ETS legislation is therefore more of a regulatory than of a fiscal nature so that for border adjustment purposes other GATT provisions than GATT Articles II:2 (a) and III:2 apply.

*b. Border Adjustment of ETs: a domestic measure applied at the border or a border measure?*⁸⁹

I would like to start the analysis with two hypothetical cases:

(a) Country A adopts a GHG emissions regulation in form of fixed maximum amounts of GHG emissions for each energy intensive installation which cannot be exceeded. The fixed amounts will be reduced over time and the companies are invited to invest in GHG emission reduction technologies to cope with this requirement. For energy intensive imports, country A adopts a separate regulation which provides for a 'GHG emissions tax' for each ton of imports. The 'tax' corresponds to the costs of the domestic GHG emissions regulation broken down, on average, to one ton of the domestically produced energy-intensive items. Importers can ask to be relieved of the tax if they demonstrate that the country of exportation has similar commitments to reduce GHG emission to those of country A.

(b) Country B adopts a regulation like EU ETS yet adds specific provisions on imports. The regulation covers only those imported products which domestically are produced in the ETS installations. Importers are required to surrender emission trading allowances equivalent to the average level of GHG emissions resulting from the production of one ton of products produced in country B. The import requirements are not applicable to imports from countries with emission trading systems comparable to that of country B.

87 Bartels, pp. 8-9.

88 CJEU, case C-366/10, *Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change*, 21 December 2011, ECLI:EU:C:2011:864, para 143. The Court implicitly followed the opinion of Advocate General Kokott who said "It would be unusual, to put it mildly, to describe as a charge or tax, the purchase price paid for an emission allowance, which is based on supply and demand according to free market forces, notwithstanding the fact that the Member States do have a certain discretion regarding the use to be made of revenues generated....". *Opinion of Advocate General Kokott*, Case C-366/10, 6 October 2011, para. 216.

89 This sub-chapter draws from an article written earlier, see Quick 2011, pp. 126 f.

In both cases countries A and B establish a carbon border adjustment mechanism with which they intend to equalize the compliance costs which domestic producers have when complying with domestic environmental regulations. Country A introduces an environmental command-and-control regulation with maximum emission limits for covered installations plus the border 'tax', whereas Country B establishes an emissions trading system with an import regulation inspired by the above-mentioned FAIR-text.

The basic reference for the distinction between a border measure and a measure applied at the border is GATT Ad Article III:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III (emphasis added).

The words emphasized were at the heart of the much-criticized GATT Tuna Panel Report which concluded that GATT Article III "covers only measures affecting products as such".⁹⁰ Much of the criticism concerning the so-called product-process doctrine was addressed in later WTO dispute settlement cases regarding the substantive issues of Article III,⁹¹ yet the conceptual issue of the scope of the Ad Note which the GATT panel tried to answer is still relevant. The decisive issues for both CBAMs of the hypothetical case is whether they "apply to an imported product and to the like domestic products", or, in terms of GATT Article III:1, whether they "affect the internal sale, offering for sale, purchase, transportation, distribution or use of products". It seems clear that this language covers more than 'regulations which directly govern the conditions of sale or purchase'⁹² but does it also cover all the indirect effects on products which a domestic legislation can have?

In its report *China – Measures Affecting Imports of Automobile Parts* the Appellate Body dealt with the difference between a customs duty and an internal tax.⁹³ In its report the Panel observed that 'a charge' cannot be at the same time an 'ordinary customs duty' under GATT Article II:1 (b) and an 'internal tax or other internal charge' under GATT Article III:2.⁹⁴ The Appellate Body accepted that the panel had

⁹⁰ GATT, Panel Report, United States – Restrictions on Imports of Tuna, unadopted, BISD 39S/155, para.5.11.; on the criticism see Hudec, p. 194. Professor Hudec considers that the panel could have addressed the issue on the scope of the Ad Note quite easily – "it required nothing more than a literal reading of the words of the Ad Note to say that the U.S. embargo did not qualify under the Ad note" – instead of elaborating a conceptual architecture on the product-process doctrine.

⁹¹ See Quick 2013, pp. 973 f.

⁹² GATT, Panel Report, United States – Section 337 of the Tariff Act of 1930, BISD 36S/345, 385.

⁹³ *Appellate Body Report*, China – Measures Affecting Imports of Automobile Parts, WT/DS339/AB/R, 2008.

⁹⁴ *Panel Report*, China – Measures Affecting Imports of Automobile Parts, WT/DS339/R, para. 7.105 (2008).

to begin its analysis by ascertaining which of these provisions applied in the circumstances of that dispute. In response to the substantive question the Appellate Body considered that charges covered by GATT Article III are those imposed on goods that have already been ‘imported’ and that the obligation for these charges is triggered by an internal factor. It stated that:⁹⁵

“the key indicator of whether a charge constitutes an ‘internal charge’ within the meaning of GATT Article III para. 2 of the GATT 1994 is whether the obligation to pay a charge must accrue due to an internal factor (e.g. because the product was resold internally or because the product was used internally), in the sense that such ‘internal factor’ occurs after the importation of the product of one Member into the territory of another.”

With respect to GATT Article II instead, the Appellate Body stated that for a charge to constitute an ordinary customs duty the obligation to pay must accrue at the moment and by virtue of, or, in the words of Article II:1 (b), ‘on’ importation.⁹⁶ In other words, a border measure specifies the amount to be paid for the good to be allowed into the market.

In hypothetical case (a) the ‘tax’ is due upon importation. It would normally be covered by GATT Article II:1 (b) unless it were a ‘charge’ equivalent to an internal tax. In the latter case GATT Article II:1 (b) would be inapplicable.⁹⁷ The reason for the ‘tax’ is an internal factor, the country’s emissions regulation. This regulation is a typical environmental command-and-control regulation which binds installations, it is not a fiscal measure. Therefore the ‘tax’ is not a ‘charge’ under GATT Articles II:2 (a) and III:2. Given the fact that the domestic regulation does not apply to products the ‘tax’ on imports would also not be considered a domestic regulatory measure applied at the border covered by GATT Ad Article III and GATT Article III:4. The ‘tax’ is a border measure covered by GATT Article II:1 (b).⁹⁸

Hypothetical case (b) stipulates the surrender of a given amount of emission trading certificates upon importation, in other words the obligation accrues ‘on’ importation. The underlying reason for the import measure is an internal event, the domestic emission trading system. Hypothetical (b) seems to have some features which could be categorized as a border measure and others that could be categorized as an internal measure applied at the border. The Appellate Body recognized the difficulty panels might have when deciding whether a specific measure is covered by GATT Articles II:1 (b) or III:2:⁹⁹

95 *Appellate Body Report*, China – Measures Affecting Imports of Automobile Parts, WT/DS339/AB/R, 2008, para. 163.

96 *Ibid.*, para. 158.

97 See *Appellate Body Report*, India – Additional and Extra-Additional Duties on Imports from the United States, WT/DS/360/AB/R, 2008, paras 150-153.

98 Given the broad scope of GATT Article XI the import measure could, in theory, also fall under GATT Article XI, yet according to the principle of effective treaty interpretation Article XI cannot cover measures covered by Article II since otherwise the latter article would become redundant; see *Mavroidis*, p. 40.

99 *Appellate Body Report*, China – Measures Affecting Imports of Automobile Parts, WT/DS339/AB/R, 2008, para. 171.

"We consider that a panel's determination of whether a specific charge falls under Article II:1(b) or Article III:2 of the GATT1994 must be made in the light of the characteristics of the measure and the circumstances of the case. In many cases this will be a straightforward exercise. In others, the picture will be more mixed, and the challenge faced by a panel more complex. A panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics. Having done so, the panel must then seek to identify the leading or core features of the measure at issue, those that define its "centre of gravity" for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge. It is not surprising, and indeed to be expected, that the same measure may exhibit some characteristics that suggest it is a measure falling within the scope of Article II:1(b), and others suggesting it is a measure falling within the scope of Article III:2. In making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify all relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant charge and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements." (emphasis added)

The Appellate Body's guidance relates to the distinction between GATT Articles III:2 and II:1 (b). But is it also relevant in the context of GATT Article III:4? The Note Ad Article III establishes the general rule to assess when a measure, be it a tax or a law on products, can be considered a domestic measure applied at the border and not a border measure. GATT Articles II:2 (a) and III:2 deal with a subset of this general rule, namely border tax adjustment, or in other words the application of a domestic tax on products upon imports. It therefore seems plausible to apply the 'centre of gravity'-test also to decide the scope of application between GATT Articles III:4 and II:1 (b).

On its face the CBAM seems to be an internal regulation which applies to an imported product for which GATT Ad Article III stipulates the application of the national treatment principle instead of the GATT rules on border measures. The Ad Note however only applies to "*regulations of the kind referred to in paragraph 1*" of GATT Article III. Is EU ETS therefore a regulation '*affecting the internal sale of products*', in other words is EU ETS a product regulation covered by GATT Article III?

As mentioned above ETS applies to installations and not to products. It is remarkably similar to typical environmental command and control regulations yet differs from them in one aspect, the 'cap-and-trade' system. This system is described as follows:¹⁰⁰

"Cap-and-trade systems guarantee an environmental outcome by setting a limit ("cap") on the total amount of carbon emissions. Such a system foresees the issuance of allowances in quantities corresponding to the emissions cap, and these allowances are then allocated to companies covered by the system. The trading of these allowances is allowed, while maintaining the obligation that companies covered regularly surrender sufficient allowances to match their actual emissions. The benefit is that it enables reductions in emissions

100 Meadows et al., p. 30.

across all the installations covered by the system in the most cost-effective manner. A company will find it in its own interest to cut emissions and sell allowances when the market price for allowances is higher than the costs to reduce its emissions. Conversely, those companies with reduction costs exceeding the market price will prefer to purchase allowances. Reductions are incentivised where costs of abatement are lowest, while the environmental outcome remains guaranteed by the overall emissions ceiling. When a variety of sectors is covered, it allows continued growth for individual sectors by purchasing allowances from other sectors, where emission reductions are cheaper to make”.

If one compares the domestic and the import measure one finds that, on the one hand, domestically ETS does not apply to products, it reduces GHG-emissions by requiring from installations compliance with the ‘cap-and-trade’ system, the import measure, on the other hand, applies to products but does not require a reduction of GHG-emissions. Could one, in this specific situation argue convincingly that the import measure is the application of a domestic regulation applied at the border covered by GATT Ad Article III or should one not define the import measure as a ‘charge’ accruing upon importation and hence as a border measure? It is nothing but a payment at the border for a ‘climate-sin’ committed abroad and should therefore not lead to an extensive interpretation of the wording ‘affecting the internal sale of products’ of GATT Article III:1.¹⁰¹

III. Preliminary Conclusions

First, even if WTO members are free to choose between a symmetric and an asymmetric approach, for BTAs they always opt for symmetry for level-playing-field reasons. However, for a CBAM, their choice could be reduced to zero and an asymmetric application (no export rebates) could become the norm.¹⁰² It could be argued that a WTO member cannot impose an import adjustment for environmental reasons and at the same time relieve exporters from exactly those constraints for which it imposes the import measure,¹⁰³ hence the environmental considerations trump the level-playing field arguments. Besides, leaving the freedom of choice could lead to double taxation if one WTO member follows an asymmetric and another a symmetric approach.

Second, for non-fiscal CBAs the issue of symmetry or asymmetry is irrelevant since the GATT rules on BTA are not applicable. At issue here is whether the CBAM is a domestic measure applied at the border or a border measure. Any export adjustment

¹⁰¹ In the FSC case the Appellate Body has given the term ‘affecting’ a broad scope of application, see Fn. 61, paras 208-209.

¹⁰² *Mehling et al.*, p. 473.

¹⁰³ *Holzer*, p. 168, defends a symmetric approach with industrial policy and competitiveness arguments; *Pauwelyn* 2013, p. 495, provides for an interesting argument in favor of symmetry in the specific situation where a country adopting a fiscal CBA does not exclude countries with a comparable fiscal CBA from the scope of its measures for reasons to avoid a GATT Article I violation.

provided for by a non-fiscal CBAM must be compatible with WTO rules, particularly the provisions of the SCM Agreement

Third, the fact that the weak economic rationale for the adjustment of indirect taxes at the border never led to any WTO disputes seems to indicate that the WTO membership, so far, had a common understanding on the difference between 'direct' and 'indirect' taxes. The introduction of CBAMs potentially risks putting an end to this common understanding since it requires an objective demarcation line between the two types of taxes. Only a carbon tax on domestically consumed products, imposed for example at the time of distribution or sale would, just like a VAT, be a typical 'indirect' tax and would be adjustable at the border. All the other fiscal CBAMs, e.g. a carbon tax on producers or the extension of ETS to imports (if considered fiscal in nature), require a creative interpretation of GATT Articles II:2 (a) in order to be defined as 'indirect' taxes. These interpretations however blur the distinction between 'indirect' and 'direct' taxes and potentially open the floodgate for adjusting also 'direct' taxes at the border.¹⁰⁴ How can one continue to reject the adjustability of a producer tax, such as a corporate tax, if one considers a carbon tax on producers to be an adjustable 'indirect' tax?

Fourth, CBAMs further require a discussion on the scope of GATT Ad Article III. For the time being the WTO membership considers typical environmental command and control regulations as producer regulations. The costs caused by domestic air-, soil, or water regulations are borne by the producers and are not adjustable at the border. In contrast, domestic product regulations can be applied at the border following the principles set out in GATT Ad Article III. Arguably, the requirement to surrender emission trading allowances in hypothetical case (b) can be seen as the application of the domestic ETS measure at the border in compliance with GATT Article III:4. But where then do we draw the line on how to interpret the words 'indirectly applied to products'? If one went as far as to define as product regulation any domestic legislation which affects to some extent the internal sale of products, then WTO members could justify border adjustments for all types of environmental command and control regulations. The creative interpretations proposed to justify the different CBAMs blur the 'thin line'¹⁰⁵ between border measures and domestic measures applied at the border.

To sum up, CBAMs are not just a simple variant of BTAs, conceptually they differ from BTAs and raise many questions for which we have no definitive answers for the time being. The WTO as an institution is ill-equipped to find those answers. In theory, it could establish a Working Party on CBAMs whose reflections could result in an authoritative interpretation according to WTO Article IX para. 2 on how far CBAMs could be adjusted at the border. Given the actual political instability of the organization this solution is however just as unlikely as an authoritative 'judicial' ruling by the Appellate Body on the issue. As long as the WTO's rulemaking and 'adjudicatory' bodies cannot provide these answers, I can only conclude, adapting John Jackson's

104 Mattoo *et al.*, p. 17.

105 Holzer, p. 80.

warning, that carbon border adjustments pose a serious challenge for the international trading system.

C. The 'Ifs' and 'Buts' of a GATT-Compatibility of CBAMs

I. GATT Article III:2

In the previous chapter I have come to the conclusion that, with the exception of a consumption based carbon tax on products, all other CBAMs are not covered by GATT Article II:2 (a) and can therefore not be adjusted at the border. If one were of the view that a carbon tax on selected imports were an 'indirect' tax on products covered by GATT Article II:2 (a), such a 'tax' would have to comply with the provisions of GATT Article III:2.

1. Likeness

The essence of the national treatment clause of GATT Article III is non-discrimination. If a fiscal CBA treats imported products less favorably than like domestic products, it violates GATT Article III:2. In our case the carbon 'tax' is imposed at the border because the imported product has a higher carbon footprint than the domestically produced product. The products to be compared in the 'likeness' analysis are identical in all aspects except for the GHG emissions during their production process. Can they nevertheless be considered 'unlike'?

a. Aims-and-effect

Under GATT dispute settlement two panels¹⁰⁶ invoked the so-called aims-and-effects test when deciding on 'likeness'. The test elevates the purpose of the regulatory distinction to a decisive criterion when deciding whether two goods are like. In the context of this analysis a discussion of this test seems unnecessary given its explicit rejection by the Appellate Body.¹⁰⁷

b. Presumption of 'Unlikeness'

Referring to the GATT *Superfund* case in which the tax in question had been considered adjustable at the border and the issue of 'likeness' had not been addressed by the

106 GATT, Panel Report, US -Measures Affecting Alcoholic and Malt Beverages, DS 23 adopted (19 June 1992), BISD 39S/206; GATT, Panel Report, US – Taxes on Automobiles, DS 31/R not adopted (1994), reprinted in 33 ILM 1397.

107 For a detailed discussion of the 'aims and effects' test with further references, see *Quick and Lau*, pp. 426/427.

panel under the substantive test of GATT Article III *Pauwelyn*¹⁰⁸ suggests that a WTO dispute settlement panel could proceed in the same way and just presume ‘unlikeness’. He argues that if the Appellate Body were to follow this approach “*then the distinction made by a carbon tax between high-carbon and low-carbon steel could be equally taken for granted so that it could at least be presumed that these different types of steel are not like (and a WTO member can, as a result, validly distinguish between them without violating its ‘national treatment obligation’).*” Such a presumption seems unlikely however since, as *Pauwelyn* recognizes,¹⁰⁹ the Appellate Body has analyzed the substantive ‘likeness’ requirements in a series of comparable cases. Therefore, the acceptance of a border adjustment of a specific tax will probably not be translated by the Appellate Body into a presumption of ‘unlikeness’ of the goods in question, rather the substantive requirements of ‘likeness’ will have to be met.

c. ‘like’ or ‘directly competitive or substitutable’ products

The first sentence of GATT Article III:2 refers to ‘like’ products, the second sentence to ‘directly competitive or substitutable’ products. In *Korea – Alcoholic Beverages* the Appellate Body explained the difference between the two likeness-concepts:¹¹⁰

“Like products are a subset of directly competitive or substitutable products; all like products are, by definition, directly competitive or substitutable products, whereas not all directly or substitutable products are like. The notion of like products must be construed narrowly but the category of directly competitive or substitutable products is broader. While perfectly substitutable products fall within Article III.2, first sentence, imperfectly substitutable products can be assessed under Article III.2, second sentence.”

The requirement to interpret ‘likeness’ narrowly under the first sentence of GATT Article III:2 leads to the question whether the products covered by a fiscal CBA are ‘like’ or ‘directly competitive or substitutable’ products. The Appellate Body considers the four criteria developed by the GATT Working Party¹¹¹ as a starting point for the analysis which, taking into account also other relevant criteria, should confirm that ‘likeness’, under GATT Article III:2, first sentence, is “*fundamentally a determination about the nature and extent of a competitive relationship between and among products*”¹¹².

Since, as mentioned above, the products to be compared in this case are ‘identical’ except for their carbon footprint, the analysis of the four criteria should, normally, support a finding of ‘likeness’. In *Philippines – Distilled Spirits*, the Appellate Body

108 *Pauwelyn* 2013, p. 489.

109 *Ibid.*

110 *Appellate Body Report*, *Korea – Taxes on Alcoholic Beverages*, WT/DS/75/AB/R (1999), para. 118.

111 See Fn. 16, para. 18. The four criteria are: (1) the properties, nature and quality of the products; (2) the end-uses of the products; (3) consumers’ tastes and habits; and (4) the tariff classification of the products.

112 *Appellate Body Report*, *Philippines – Taxes on Distilled Spirits*, WT/DS396, 403 /AB/R (2012), para. 170.

dealt with the use of different raw materials in the production of the final product. At issue in this case was the use of different raw materials for distilled spirits, e.g. whiskey and brandy, namely whether these spirits made from cereals or grapes respectively were 'like' those made from sugar cane. The Appellate Body says¹¹³

"We consider 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 of the GATT 1994. Article III:2, first sentence, refers to "like products", not to their raw material base. If differences in raw materials leave fundamentally unchanged the competitive relationship among the final products, the existence of these differences would not necessarily negate a finding of "likeness" under Article III:2. As we have explained above, the determination of what are "like products" under Article III:2 is not focused exclusively on the physical characteristics of the products, but is concerned with the nature and the extent of the competitive relationship between and among the products. We consider, therefore, that as long as the differences among the products, including a difference in the raw material base, leave fundamentally unchanged the competitive relationship among the final products, the existence of these differences does not prevent a finding of "likeness" if, by considering all factors, the panel is able to come to the conclusion that the competitive relationship among the products is such as to justify a finding of "likeness" under Article III:2." (emphasis added)

In our case the final products show differences as to the energy used in the production process, yet these differences do neither affect the properties, nature and quality of the product nor do they affect its end-use. The products compared seem to be 'perfectly substitutable' and they do compete with each other, since the CBAM is imposed to avoid an 'unfair' competition from cheaper imported products with a higher carbon content. As to the 'tariff classification' criterion we assume that the products to be compared are classified in the same tariff heading, since for the time being the classification does not take societal considerations, e.g. carbon footprint, into account.¹¹⁴

The analysis of 'consumer tastes and habits' criterion could lead to a finding of 'unlikeness' if consumers treated the products in question differently. *Howse and Eliason* argue¹¹⁵ that a responsible consumer might indeed not buy an imported product if its production leads to higher GHG emissions than the production of the domestic product. *Horn and Mavroidis*¹¹⁶ point out that this argument might be valid in case of products that directly affect the health of the ultimate buyer (e.g. a product containing a carcinogen, e.g. asbestos) but are doubtful about the validity of this argument in cases where the purchasing decision of an individual consumer has only indirect health effects. *Van den Bossche et al.*¹¹⁷ argue that individual consumers are primarily guided by the price of a product. Even if the purchasing behavior of an

113 Ibid., para. 125.

114 This might change in the future if the WTO negotiations on environmental goods are successfully concluded.

115 *Howse and Eliason*, p. 70.

116 *Horn and Mavroidis* 2011, p. 1917. They say: "hence, even though the buyer's health may be seriously affected by the general climate problem, this is no reason for a consumer to treat climate-friendly, and climate-unfriendly products very differently".

117 *Van den Bossche et al.*, p. 64.

individual consumer might change the competitive relationship between the compared products, it is of no relevance with respect to a fiscal CBA. As I have argued elsewhere,¹¹⁸ fiscal CBAs target energy-intensive products which are purchased by industrial consumers whose decisions will predominantly be based on economic considerations.

The Appellate Body's emphasis on a 'competitive relationship' has considerably influenced the academic debate on 'non-product-related PPMs'. In the absence of this relationship even identical products can be considered 'unlike' provided a finding that consumers indeed distinguish between these products in the marketplace. Such a result might however be difficult to demonstrate, as we have argued elsewhere¹¹⁹ and as the different opinions on consumer preferences mentioned in the previous paragraph show.

To sum up, the products in question are perfectly substitutable, they are in a competitive relationship and in the absence of a clear indication of a purchasing preference of industrial consumers based on societal grounds the products covered by the fiscal CBA are 'like' according to the first sentence of GATT Article III:2.¹²⁰

2. 'Taxes in Excess of' – GATT Article III:2

The fiscal CBA will tax energy-intensive imports with a high carbon footprint more heavily than domestically produced energy-intensive products with a low carbon footprint. The different tax treatment between like products is applied 'in excess of', and therefore constitutes a violation of the first sentence of GATT Article III:2 which neither requires a *de minimis* standard nor a 'trade effects'-test.

II. GATT Article III:4

In the previous chapter I have come to the conclusion that the extension of ETS to imports cannot be considered as an application of the domestic ETS regulation at the border and that the Note AD Article III is not applicable in that case. Rather the measure constitutes a border measure not covered by GATT Article III. If one were to consider the extension of ETS to imports as the application of the domestic ETS Regulation at the border a subsidiary analysis of the substantive requirements of GATT Article III:4 becomes necessary.

1. Likeness

'Likeness' under GATT Article III:4 is also established by an analysis of the four criteria mentioned above and the existence of a competitive relationship. As in the case

118 Quick 2011, p. 124.

119 Quick and Lau, pp. 448 f.

120 Low *et al.*, pp. 7/8 and Horn and Mavroidis 2011, p. 1917, also conclude that the products are 'like'.

above, the products to be compared can be distinguished only with respect to their carbon footprint, they are perfectly substitutable and are in a competitive relationship. If they are ‘like’ under the narrow interpretation of the first sentence of GATT Article III:2, they are also ‘like’ under the possibly broader interpretation under GATT Article III:4.¹²¹

2. ‘Treatment no less favorable’

The long-established interpretation of the term ‘treatment no less favorable’ is a treatment requiring effective equality of competitive opportunities.¹²² The disputed measure does not have to treat imported products in exactly the same way as it treats domestic like products but it cannot negatively affect the conditions of competition of the imported product in the domestic market.

a. Reformulated Gasoline

The above-mentioned FAIR-text established the following methodology¹²³ for the calculation of the amount of emission trading allowances to be surrendered by importers: “*Importers or exporters of goods shall be respectively required and entitled to surrender or receive allowances equivalent to the average level of green-house gas emissions resulting from the production of those goods across the Community, reduced by the average transitional free allocation given in respect of the production of such goods, and multiplied by the tonnage of goods imported*”. Under ETS domestic producers also have to surrender allowances but have considerably more freedom in complying with ETS than importers. In fact the owner of the installation can take into consideration the energy efficiency of the production process, the type of fuels and energy used and the energy mix in the country of production and on that basis takes an entrepreneurial decision either to switch to a ‘greener’ production or to maintain the same production and buy the necessary emission trading allowances on the market or else to reduce production. These possibilities will influence the domestic price of the product considerably – in effect the financial burden of ETS differs from producer to producer. The importer, on the other hand, cannot avail himself of the same possibilities. Hence the question whether this difference “*modifies the conditions of competition in the relevant market to the detriment of the imported products*”¹²⁴? In *Reformulated Gasoline* the Panel found¹²⁵ “*that....since, under the baseline establishment*

121 For an analysis of the different scopes of ‘likeness’ in GATT Articles III:2 first and second sentence and GATT Article III:4, see *Quick and Lau*, pp. 424 f.

122 *GATT*, Panel Report, United States – Section 337 of the Tariff Act of 1930, BISD 36S/345, para. 5.11, confirmed by the Appellate Body in *US Gasoline*.

123 *Quick* 2008, p. 167.

124 *Appellate Body Report*, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, para. 135/136 (2001).

125 *Panel Report*, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R, para. 6.16 (1996).

methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.” One could use the same arguments with respect to FAIR: imported products are subjected to one methodology while domestic products benefit from a variety of possibilities on how to comply with the ETS regulation. The non-availability of these possibilities for importers could modify the conditions of competition to the detriment of the imported product and could result in discrimination.

In order to avoid such a finding, *Hillman*,¹²⁶ also citing *US – Gasoline*, cautions on the use of different methodologies for imported and domestic products. She considers that the difference between “*the reporting of actual carbon emissions on a per ton basis from a specific plant*” and “*a universally applicable benchmark*” could lead to a finding of less favorable treatment and suggests instead that the methodology for the CBAM be based on “*a certification of the relevant aspects of their production process and related carbon emissions used in their production*”.

The proposals made by *Lamy et al.* for an allowance floor price¹²⁷ would not automatically result in a comparable competitive position between imported and domestic products either. Even if importers and domestic producers pay the same floor price for the allowances ETS could still be considered to modify the conditions of competition to the detriment of the imported product. The introduction of a floor price aims at a stable income for the state in times of allegedly too low market prices because of an economic slowdown. As such, it does not affect the competitive situation of the imported product in the domestic market.

b. The Asbestos ‘obiter dictum’ and the Dominican Republic Cigarettes Case

Two further arguments can be made to defend the environmental goal of the CBAM and hence the non-existence of less favorable treatment. First, the Appellate Body’s famous *obiter dictum* in the Asbestos case.¹²⁸ *Pauwelyn*¹²⁹ points out that a national treatment violation requires that the overall group of imported like products be affected more heavily than the overall group of like products and suggests that, depending on the individual case, such proof could probably be difficult. Furthermore,

126 *Hillman*, p. 7.

127 *Lamy et al.*, p. 14.

128 The Appellate Body said: “*However, a Member may draw distinctions between products which have been found to be “like”, without, for this reason alone, according to the group of “like” imported products “less favourable treatment” than that accorded to the group of “like” domestic products*”. *Appellate Body Report, EC-Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS/135/AB/R*, para. 100 (2001).

129 *Pauwelyn* 2013, p. 491.

he refers to the *Dominican Republic* case¹³⁰ where the Appellate Body held¹³¹ that “*the existence of a detrimental effect on a given product.... does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product*” (emphasis added). He suggests that if that requirement were applied to CBAMs the detrimental effect on the imported product could probably be explained by the environmental rationale of the domestic measure and not by the foreign origin of the product. It should be noted that the Appellate Body found it necessary to explain this ruling in a later case¹³² were it held “*when read in isolation (this statement) could be viewed as suggesting that a further inquiry into the rationale for the detrimental impact is necessary*” which the Appellate Body rejected for GATT Article III:4 cases but confirmed for Article 2.1 TBT cases. In summarizing its case law on GATT Article III: 4 the Appellate Body in a later ruling¹³³ insisted that “*there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products*”.

Summing up, EU ETS gives domestic producers a variety of choices which importers do not have. Whether these choices amount to a ‘treatment less favorable’ will depend very much on the design of the Commission’s concrete proposal.

III. GATT Article II

1. The difference between the first and the second paragraph

In the case *India – Additional Import Duties* the Appellate Body¹³⁴ elaborated on the relationship between GATT Articles II:2 (a) and II:1 (b) and confirmed that if a ‘charge’ complies with the requirements of GATT Article II:2 (a) it is not covered by GATT Article II:1 (b):¹³⁵

“*The chapeau of Article II:2, therefore, connects Articles II:1(b) and II:2(a) and indicates that the two provisions are inter-related. Article II:2(a), subject to the conditions stated therein, exempts a charge from the coverage of Article II:1(b)*”.

130 In this case Honduras challenged a Dominican Republic domestic measure, which, inter alia, required importers and domestic producers of cigarettes to post a bond of 5 million Dominican pesos before being able to sell the cigarettes on the Dominican Market. Honduras considered this requirement as a less favorable treatment since the bond requirement affected importers more heavily than domestic producers, since the per unit cost of the bond requirement for imported cigarettes was higher than for domestic products.

131 *Appellate Body Report*, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, AB/WT/DS320/AB/R, para. 96 (2005).

132 *Appellate Body Report*, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, para. 179, fn. 372 (2012).

133 *Appellate Body Report*, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS 400,401/AB/R, para. 5.101 (2014).

134 *Appellate Body Report*, India – Additional and Extra-Additional Duties on Imports from the United States, WT/DS/360/AB/R, 2008.

135 *Ibid.*, para. 153.

The relationship between the two paragraphs can be explained by the following examples:¹³⁶ First, a carbon tax on domestically consumed products would be considered a ‘charge’ equivalent to an internal tax under GATT Article II:2 (a). It is not a border measure covered by GATT Article II:1 (b) but the application of a domestic measure at the border for which the substantive requirements of GATT Article III:2 apply. Second, a carbon tax on the producer is a non-adjustable ‘direct tax’. It is therefore not a ‘charge’ equivalent to an internal tax exempted from the scope of GATT Article II:1 (b) but a border measure for which the substantive requirements of this article apply. The chapeau of Article II:2 sets up a clear distinction between the two paragraphs: the measures enumerated in GATT Article II:2 do not interfere with the upper limit imposed by GATT Article II:1 (b) on ordinary customs duties or other duties or charges, while border measures, not covered by GATT Article II:2 have to respect the upper limit of GATT Article II:1(b).

2. GATT Article II:1 (b), first or second sentence?

In the case *India – Additional Import Duties* the Appellate Body discussed the scope of GATT Article II:1 (b) first and second sentence. The first sentence requires WTO members not to impose a duty on imported products higher than those provided for in the member’s schedule.¹³⁷ The second sentence extends this requirement to ‘all other duties and charges of any kind’ (ODC) on imports.¹³⁸ Besides, the Appellate Body clarified that ordinary customs duties (OCDs) and ODCs can be of a ‘similar’ or ‘dissimilar’ nature since the language of GATT Article II:1 (b) allows for either interpretation.¹³⁹ It is therefore irrelevant whether the Commission describes its carbon customs duty as a ‘duty’, a ‘charge’ or a ‘tax’, what is relevant is that the measure “pertains to the event of importation”.¹⁴⁰ Moreover, the Appellate Body rejected the panel’s interpretation that OCDs and ODCs must ‘inherently discriminate against imports’ stating that “Article II:1 (b) does not set out a specific rationale for imposing duties or charges”.¹⁴¹ In other words, the purpose of the carbon customs duty is not relevant for defining it as a measure covered by GATT Article II:1 (b).

Above I concluded that a carbon tax on producers or the extension of the ETS to imports are ‘duties’ covered by GATT Article II:1 (b). Independent of their character (OCD or ODC) they cannot go beyond the upper limit set by this article. The EU, therefore, cannot impose via the CBAMs a higher tariff on the imported products than the bound tariff contained in its tariff schedule. As it is unlikely that the Commission will introduce the CBAMs as an ordinary customs duty in its tariff schedule these cannot be considered under the first sentence of this Article but have to be regarded as ‘another duty or charge’ under the second sentence. It is also unlikely that the

136 See also *Horn and Mavroidis* 2010, pp. 22, 23.

137 Ibid., para 150.

138 Ibid., para. 151.

139 Ibid., para. 157.

140 Ibid., para. 157.

141 Ibid., para. 158.

Commission will record the CBAMs in its schedules of concession on the basis of the *Understanding on the Interpretation of Article II:1 (b) of the General Agreement on Tariffs and Trade 1994 Agreement*. According to *Mavroidis*¹⁴² non-recorded ODCs are *ipso facto* GATT-inconsistent and even when recorded they are not automatically GATT-compatible since they can be challenged within a given period of time as laid down in the above Understanding. If the CBAMs go beyond the bound EU tariff for the specific product in question they will be inconsistent with GATT Article II:1 (b) second sentence.

IV. GATT Article I

In principle, CBAMs distinguish between countries on the basis of their commitments to reduce GHG emissions. Countries undertaking climate protection efforts comparable to those of the country imposing the measure will normally be exempted from it. The FAIR-text, for example, contained the following wording:¹⁴³

“...this requirement shall not apply to countries and administrative entities which are taking binding and verifiable action to reduce greenhouse gas emissions comparable to the action taken by the Community, subject to the principle of common and differentiated responsibilities as indicated in paragraph 2. Where countries have ratified the international agreement referred to in Article 28 or countries or administrative entities are linked with the EU emission trading system pursuant to Article 26, such countries or administrative entities may be determined in accordance with Article 23(2) to be taking comparable action, and therefore exempted from this requirement.”

Thus, the advantage given to the products of some countries are not *immediately and unconditionally* granted to the like products¹⁴⁴ of other countries. The CBAM therefore violates GATT Article I.

V. GATT Article XX – Why ‘Paris’ is the biggest obstacle for a GATT-compatibility of CBAMs

CBAMs raise serious GATT-compatibility issues but obviously could be justified with the public policy exceptions of GATT Article XX.

142 *Mavroidis*, p. 65.

143 *Quick* 2008, p. 167.

144 Given the Appellate Body’s accordion approach on the concept of ‘likeness’ the question could be asked whether this concept is the same under GATT Articles I and III. I have discussed this issue elsewhere and concluded that ‘likeness’ in GATT Article I can be given the same meaning as in GATT Article III; see *Quick* 2011, pp. 123-6.

1. Excursus: The Paris Agreement – A bottom-up approach on self-determination and self-differentiation

Over the past thirty years, climate negotiations have taken a bumpy ride.¹⁴⁵ Most countries accepted the United Nation's Framework Convention on Climate Change (UNFCCC). Its goal is “*to stabilize greenhouse gas concentrations at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system*”. Then came the ambitious Kyoto Protocol with binding emission reduction targets for industrialized countries only. The difference in commitments between the countries was explained by the fact that industrialized countries “*were largely responsible for the high levels of GHG emissions in the atmosphere*” and was justified by the notion of *common but differentiated responsibilities*.¹⁴⁶ The Kyoto Protocol met with considerable resistance, particularly from the United States. The ensuing UNFCCC negotiations saw fundamental disagreements (EU, U.S., China, India) and failures (Copenhagen). Then the Paris Agreement of 2015¹⁴⁷ adopted a more modest approach but binds all signatories;¹⁴⁸ its outcome has been hailed as a landmark success.¹⁴⁹ The agreement does not prescribe the exact measures which the parties should take but leaves it to them to define their own targets, the so-called ‘nationally determined contributions’ (NDCs, Article 4.2 Paris); these mitigation measures are not legally binding,¹⁵⁰ yet the parties accept procedural commitments about them (“*prepare, communicate, maintain and periodically update NDCs*”). Moreover, the parties will progressively increase their national targets (Article 4.3 Paris) so that the ultimate objectives of the agreement (Article 2 Paris) can be achieved, yet they will do this “**in a manner which reflects common but differentiated responsibilities and respective capabilities in light of different national circumstances**” (emphasis added). To strengthen NDCs overtime the agreement also foresees a ‘global stocktake’ to assess the progress of implementation and to achieve its long-term goals (Article 14 Paris) and requires parties to communicate their (updated) NDCs every five years (Article 4.9 Paris). The aim of this stocktake is “*to inform Parties in updating and enhancing, in a nationally determined manner, their actions...*” (Article 14.3 Paris). Paris stresses the lead role of developed countries with respect to mitigation efforts yet requires all parties to adopt NDCs, including developing countries; these are encouraged to “*move over time towards economy-wide emission reduction or limitation targets*”

¹⁴⁵ For background information see: http://unfccc.int/essential_background/convention/its_ms/6036.php (19/06/2020).

¹⁴⁶ https://unfccc.int/kyoto_protocol (19/06/2020).

¹⁴⁷ UN FCCC/CP/2015/L.9 of 12 December 2015.

¹⁴⁸ President Trump has terminated the U.S. membership at the end of 2019 taking effect at the end of 2020, available at: <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> (20/06/2020).

¹⁴⁹ Bodansky, p. 289.

¹⁵⁰ For a thorough analysis of the legal character of the NDCs, see Bodansky, pp. 304 f. with further references.

(Article 4.4 Paris). When submitting NDCs parties are required to provide “*the information necessary for clarity, transparency and understanding*” (Article 4.8 Paris) as well as to account for their NDCs in order “*to promote transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting*” (Article 4.13 Paris). All these procedural requirements are embedded in a transparency framework so that the parties can be held accountable of their activities (Article 13 Paris). The parties shall establish an inventory of green-house gas emissions and shall provide “*information necessary to track progress in implementing and achieving its NDC*”. The information submitted will “*undergo a technical expert review*” which evaluates the consistency of the information provided with “*the modalities, procedures and guidelines*” and which “*identifies areas of improvements for the Party*” (Article 13.12 Paris).

The overarching feature of the Paris Agreement with respect to mitigation measures can be described as a bottom-up, non-binding approach based on self-determination and self-differentiation. This approach is coupled with binding procedural commitments and transparency provisions. The Paris Agreement establishes an iterative process which will require further decisions, particularly regarding implementation and update. It does not provide for an enforcement mechanism, rather it promotes accountability and effectiveness through procedural obligations and peer pressure. It is ‘work in progress’ and much of its success will depend on whether the ‘spirit of Paris’ will be maintained by future decisions.

The agreement itself does not contain any dispute settlement provisions. Since it was adopted as a COP Decision in the UNFCCC’s context it can be assumed that the UNFCCC’s dispute settlement provisions will apply. Article 14.8 UNFCCC says that “*the provisions of this Article shall apply to any related instruments which the Conference of the Parties may adopt, unless the instrument provides otherwise*”. One can deplore the fact that the Paris negotiators have not decided on a mandatory dispute settlement system;¹⁵¹ instead, opting for a system of review, stocktaking and peer pressure as a viable and pragmatic solution to overcome disagreements on mitigation measures the Paris signatories deliberately chose the traditional diplomatic way of solving disputes. Hence, in a WTO dispute settlement context, the Appellate Body will have to address Paris-compatibility issues within the balancing process of the chapeau of GATT Article XX, as the E-15 experts fear:¹⁵²

“*Moreover, what may be most important for purposes of international trade law is that, to date, there has been virtually no discussion by either climate negotiators or delegates to the WTO of the specific kinds of national measures that could be seen as “climate measures” taken to fulfil these voluntary “contributions,” or of how those national measures could be reconciled with WTO law if they restricted or otherwise affected trade in goods or services and, thus, fell within the scope of the WTO treaty. Therefore, as of now, it can be anticipated that there will be no effective mechanism in the climate agreement for settling disputes about these “contributions”. The current draft... simply incorporates by reference the dispute settlement provisions in the UNFCCC – which are optional and have not been used*”, Bacchus, p. 11.

151 “*Not least and importantly, there will most likely not be any effective mechanism in the climate agreement for settling disputes about these “contributions”. The current draft... simply incorporates by reference the dispute settlement provisions in the UNFCCC – which are optional and have not been used*”, Bacchus, p. 11.

152 Ibid., p. 11.

pated that post 2020 there will be no reliable way of discerning from the Paris Agreement whether a national “measure” supposedly taken in furtherance of a “contribution” promised in fulfilment of that agreement would be a “climate measure” or not. And, it can thus already be anticipated that there will, in the aftermath of the conclusion of the Paris Agreement, be no agreed way of judging whether such a national “measure” should be exempt or not from what would otherwise be WTO trade obligations.”

To sum up, signatories of the Paris Agreement are free to determine their climate mitigation measures, they are under no obligation to adopt an ETS system, nor do they have to establish a CO₂-price. As long as their nationally determined contributions contribute to achieving the Agreement’s overall goal in the context of differentiated responsibilities and respective capabilities they comply with the Agreement.

2. Can GATT Article XX be invoked in case of a violation of GATT Article II:1 (b)?

The GATT allows its members to re-establish the balance of concessions through negotiations. In a nutshell GATT Article XXVIII allows a WTO member to renegotiate its tariffs concessions and to eventually raise tariffs following the procedures described therein. Other WTO members can respond in kind and also raise their tariffs. The finding of a violation of GATT Article II:1 could lead to a rebalancing exercise under GATT Article XXVIII, but there is no obligation for the offending member to do so. Instead it could accept the violation but argue that it was justified by GATT Article XX. If one compares the two cases one could conclude that the responding WTO member finds itself in two different situations: in case of Article XXVIII negotiations it could take retaliatory action if no agreement was found whilst in an Article XX defense it would have to accept the finding and, depending on the outcome, could eventually take or not take any retaliatory measures. Could one argue, therefore, that GATT Article XXVIII limits the application of GATT Article XX?

It is unlikely that such an argument will hold. In stating “*nothing in this Agreement*” the chapeau of GATT Article XX refers to the GATT Agreement in its entirety and connects the article with the rest of the Agreement. This connection is made to find the ‘line of equilibrium’ between the right of a member to invoke the exception and the rights of other members under the other provisions of the GATT “so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement”.¹⁵³ A finding that a violation of GATT Article II:1 (b) is justified by GATT Article XX is an assertion of this line of equilibrium notwithstanding the process provided for in GATT Article XXVIII.

153 *Appellate Body Report*, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R 1998, US—Shrimp, para. 159.

3. Paragraphs (b) or (g)?

The CBAM to be proposed by the European Commission could be covered by either paragraph (b) or (g) of GATT Article XX. Given the Appellate Body's many rulings on these paragraphs¹⁵⁴ and the extensive literature¹⁵⁵ there seems to be fair chance that the CBAM will most likely be covered by either paragraph.

One note of caution must be made though.¹⁵⁶ Both paragraphs require either a genuine relationship between the measure and the policy objective (paragraph g) or a material contribution to the achievement of the objective (paragraph b). If the measure adopted by the EU led to an increase of GHG emissions in the rest of the world not compensated by the decrease in the EU's GHG emissions, then such a material contribution or genuine relationship could be put in doubt. A recent European analysis comes exactly to that conclusion.¹⁵⁷ If such data were available at the time of a WTO dispute, the analysis could result in a finding that the measure was not necessary to protect the environment nor that it related to the conservation of exhaustible natural resources.

4. The chapeau of GATT Article XX

For trade and environment cases the chapeau of GATT Article XX has become one of the most decisive provisions of the GATT. In analyzing the terms 'arbitrary or unjustifiable discrimination where the same conditions prevail' or 'a disguised restriction on international trade', the Appellate Body looks at the way in which the measure is actually applied and will consider issues such as even-handedness, fairness and most importantly local conditions. In *US – Shrimps* the Appellate Body held the measure at issue to be a *single, rigid, and unbending requirement* whose *coercive effect* on the policy decisions of other WTO members had been *intended* and confirmed arbitrary and unjustifiable discrimination. It said:¹⁵⁸

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

We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries" (emphasis added).

¹⁵⁴ To name but a few *US – Shrimp* (1998), *China – Raw Materials* (2012), *EC – Asbestos* (2001); *Brazil – Tyres* (2007).

¹⁵⁵ See for example *Van den Bossche and Zdouc*, pp. 557 f.; *Holzer*, pp. 151 f.; *Pauwelyn* 2013, pp. 497-500; *Horn and Mavroidis* 2010, pp. 28 f.

¹⁵⁶ See also *Quick* 2011, pp. 137 f.

¹⁵⁷ *Yu and Clora*, p. 1.

¹⁵⁸ Fn. 153, paras 164, 165.

In the subsequent Article 21.5 case the Appellate Body accepted the slightly amended domestic U.S. measure because it no longer constituted *an octroy* but took the specific domestic situation of the exporting country into account;¹⁵⁹ it confirmed the necessity of bona fide negotiations before imposing the measure.

In order to comply with the chapeau of GATT Article XX the EU would have to demonstrate that the CBAM was not an octroy but that it took the specific situations of the countries concerned into account. This will however be difficult to demonstrate given the bottom-up approach of the Paris Agreement which does not require its signatories to adopt a specific measure such as an ETS system or a carbon tax on the production. On the contrary the signatories have every freedom to comply with the Paris Agreement with a variety of different climate mitigation measures. Viewed in the terms of the *US – Shrimps* ruling, the EU CBAM could be considered to have an intended and coercive effect on the policy decisions of foreign governments requiring them to adopt essentially the same policy as the EU. The CBAM seems contrary to the spirit of the Paris Agreement, a conclusion which even the European Commission seems to have accepted.¹⁶⁰ Could the EU's trading partners therefore argue that an objective determination of their compliance with the requirements of the Paris Agreement would automatically lead to a finding of arbitrary and unjustifiable discrimination because the EU's CBAM coerced them into adopting climate mitigation measures which they had not intended to adopt when complying with the Paris Agreement? In other words, could a WTO member which is a signatory to the Paris Agreement invoke a 'Paris-compatibility' defense under the chapeau of GATT Article XX?

At issue here is not the question whether a WTO member can invoke the substantive provisions of the Paris Agreement in a WTO complaint¹⁶¹ but whether and how the Appellate Body would interpret the chapeau of GATT Article XX under the angle of 'a single, rigid, and unbending requirement with a coercive effect'. The rulings of the Appellate Body have shown that it does not interpret the WTO provisions in 'clinical isolation' but takes the objectives of sustainable development and of protection of the environment into account. The UNFCCC, the Kyoto Protocol and the Paris Agreement contain the substantive international obligations to address climate change and therefore provide the context for the interpretation of the chapeau of GATT Article XX. Neither agreement contains provisions for trade measures, Article 3 para. 5 UNFCCC repeats Principle 12 of the 1992 Rio Declaration on Environment and Development that "*measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade*". All three agreements refer to common but differentiated responsibilities. The Paris' Agreements bottom-up approach to na-

¹⁵⁹ *Appellate Body Report*, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS257/AB/R (2001).

¹⁶⁰ See Fn. 6, p. 263; *Mehling et al.*, p. 438, also refer to this incompatibility, they stress however the Agreement's recurrent theme of scaling-up climate ambitions.

¹⁶¹ On this issue see *Van den Bossche and Zdouc*, p. 67, rejecting Pauwelyn's position that non-WTO agreements could be invoked in WTO disputes as a defence against a claim of violations of WTO rules (*Pauwelyn* 2003, p. 491).

tionally determined contributions reflects the notion of “differentiated *responsibilities and respective capabilities in light of different national circumstances*”. A signatory’s compliance with the substantive requirements of the Paris Agreement is therefore relevant context towards the achievement of ‘sustainable development’. To require a different, and in most cases more stringent climate mitigation measure through a CBAM than the ones in force in the exporting country seems to be coercive in so far as it ignores different responsibilities and capabilities in light of different circumstances. The objective demonstration by the exporting WTO member of its compliance with the requirements of the Paris Agreement could therefore result in a finding of ‘arbitrariness’ of the EU’s CBAM.¹⁶² The bilateral negotiations would have to respond to this argument, since otherwise the exporting country could still claim that the CBAM does not take its specific situation into account.¹⁶³

Even if one were not to follow this line of thinking, the EU would nevertheless have to consider (a) the determination of the cost equivalence, and (b) country coverage:¹⁶⁴ The climate mitigation measures of other countries could eventually lead to (no) or lower carbon taxes or (no) or lower emission trading allowances. It is unclear whether the EU in this analysis could compare its CBAM only with comparable mitigation measures concerning the product sector or whether all other climate mitigation measures of the country concerned would have to be taken into account. For example, will the existence of mitigation measures in the housing sector or the existence of a huge rain forest be considered in this analysis?¹⁶⁵ The EU will furthermore have to take into account whether and how it will adapt its CBAM to the exports from developing and least developed countries given the fact that the industrialized countries accepted that their burden to combat climate change will be higher than that of developing countries.¹⁶⁶ Another interesting argument in the context of the chapeau of GATT Article XX would be Principle 12 of the Rio Declaration which states that “*environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus*”. The EU’s CBAM is not based on international consensus but is a unilateral measure to address climate change mitigation measures taken outside the EU. Again, could one go as far

162 The Submissions of NDCs could be used as evidence of compliance with the Paris Agreement. The NDC Registry are available at: <https://www4.unfccc.int/sites/NDCTesting/Pages/All.aspx> (20/06/2020).

163 *Pauwelyn* 2013, p. 505, points out that the decree of trade restrictiveness of the measure will influence the negotiations, yet in this situation even if the CBAM does amount to a trade ban, the exporting country could still claim that the EU does not take its specific situation into account.

164 *Pauwelyn* 2013, pp. 502-3.

165 The difficulties of computing such a cost equivalence have been amply demonstrated by *Low et al.*, pp. 17-20.

166 Article 4, para. 4 Paris Agreement says: “*Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances*”.

as to argue that such a unilateral measure seems to coerce exporting countries into accepting the EU's climate change mitigation measures?

To sum up, it will be quite a challenge for the EU to comply with the requirements of the chapeau of GATT Article XX. The CBAM could be proven to be a protectionist measure rather than a measure to protect the climate.

D. Possible Reactions by the EU's Trading Partners

Mehling et al. argue¹⁶⁷ that CBAMs have two central functions, “*to level the playing field among competing producers and to create political leverage for more ambitious climate action across countries*”. Although they acknowledge that CBAMs could be seen as ‘sanctions’ so “as to exert political pressure on climate laggards” they nevertheless see CBAMs as ‘incentives’ for other countries to take comparable action. This is a courageous statement since CBAMs, as border measures, will trigger trade policy reactions by the EU’s trading partners in the same way as their border measures trigger EU reactions.¹⁶⁸ Several WTO members have already raised objections against the EU’s intended CBAMs at the June 2020 meeting of the WTO Committee on Market Access.¹⁶⁹

I. Trade Diversion

A CBAM targets energy-intensive imports which in their production phase release more GHG- emissions than those released during the domestic production. The EU imports a considerable amount of those products such as chemicals, basic metals, refined petroleum products or pulp and paper, as trade statistics show.¹⁷⁰ These imports will become more expensive domestically so that European like products which are burdened by domestic climate regulations have a ‘fair’ chance to compete. Consequently, only imports with a slightly higher carbon footprint will be able to afford the ‘border payment’ and to compete within the EU’s market. ‘Dirty’ products from third countries will probably no longer be exported to the EU. Their production will not stop though but will be sold on other markets. Such a trade diversion will in turn trigger demands by EU producers to be compensated for the potential loss of sales in third markets. If the specific CBAM is covered by GATT Article II:2 (a) a rebate on exports can be granted, if not, any compensation will come under the scrutiny of the SCM Agreement.

167 *Mehling et al.*, p. 441.

168 The Commission’s 2020 Report on Trade and Investment Barriers stresses the fact its trading partners have adopted more ‘border measures’ in 2019 than ‘behind-the-border’-measures, available at: https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158789.pdf, p. 8 (01/07/2020).

169 https://www.wto.org/english/news_e/news20_e/mark_08jun20_e.htm (01/07/2020).

170 https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Main_goods_in_extra-EU_imports (01/07/2020).

II. Escalation in Creative Interpretation

The European Commission will most probably propose one of the three above mentioned types of CBAMs. The EU's trading partners affected by the measure chosen might also consider Carbon Border Adjustment Mechanisms since they could rightfully claim that as frontrunners for ambitious climate goals,¹⁷¹ they have to protect their domestic production. We do not know which instrument they would choose¹⁷² yet given the possible creative GATT-interpretations discussed above these countries could avail themselves of a variety of measures which, if adopted, will affect EU exports in turn. The EU's unilateral imposition of a CBAM could therefore lead to a plethora of other carbon measures by its trading partners. It remains to be seen whether the different instruments chosen will be compatible with each other and will take into consideration the carbon footprint of the product and the different mitigation policies adopted by the different WTO members.¹⁷³

III. Retaliation

In times of trade wars and unilateral impositions of additional tariffs, it is not exaggerated to assume that some countries affected by an EU CBAM could take retaliatory measures. The United States under President Trump will most likely react in such a way.¹⁷⁴ The recent steel case or the U.S. actions against China can serve as an example: the U.S. would threaten the EU with retaliatory action and start an investigation under Section 301 of the Tariff Act of 1974¹⁷⁵ at the end of which it would impose retaliatory measures.¹⁷⁶ Political commentators consider that a democratic President would not

171 For example, the *IEA Report on China's emission trading system* considers that “*the ETS could become a major climate policy tool to help China realise its Nationally Determined Contribution (NDC) to the Paris Agreement on climate change and its long-term low-carbon strategy*”. See *China's Emission Trading Scheme*, IEA, June 2020, p. 5.

172 Thailand, Vietnam, the Philippines, and Indonesia are planning to introduce an ETS system, see *Ritchie and Ewing*, p. 5.

173 The Leaders' Declaration of the 2019 Osaka G 20 Summit says: “*We need to elaborate further and foster coherence between mitigation action, adaptation measures, environmental protection, and resilient infrastructure*”. So far, the G 20 has not yet agreed on a joint approach on how to combine the different climate adaptation measures. *G 20 Leaders' Declaration*, Osaka, 2019, p. 10 available at, <https://g20.org/en/g20/Documents/2019-Japan-G20%20Osaka%20Leaders%20Declaration.pdf>. (01/07/2020).

174 *Financial Times*, U.S. threatens retaliation against EU over carbon tax, available at: <https://www.ft.com/content/f7ee830c-3ee6-11ea-a01a-bae547046735>, 26 January 2020, (05/03/2020).

175 See for example USTR action on digital service taxes of 6 June 2020, available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/june/ustr-initiates-section-301-investigations-digital-services-taxes> (01/07/2020).

176 Tariffs against China under Section 301 of the Trade Act of 1974. See Office of the U.S. Trade Representative, ‘USTR Finalizes Second Tranche of Tariffs on Chinese Products in Response to China's Unfair Trade Practices’, available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-finalizes-second-tranche> (01/07/2020).

impose retaliatory actions against the EU but might be tempted to adopt its own CBAM or to seek a joint transatlantic measure.¹⁷⁷

E. Solutions to Overcome GATT-Incompatibility

I. A consumption-based carbon tax on products

A carbon tax on domestically consumed products, imposed for example at the time of distribution or sale would not cause many WTO problems. Such a tax would, just like a VAT, be a typical 'indirect' tax on products and would be adjustable at the border. Apart from the TFEU's unanimity requirement (Article 113) the biggest obstacle for such a tax seems to be of administrative nature, namely the computation of the carbon content in the final product, as the European Commission points out:¹⁷⁸

"A theoretical carbon tax on domestically-consumed products, based on their carbon footprint, could be imposed at the border also on imported products. However, this type of tax would necessitate an entire new system of accounting and certification of the carbon content of inputs and production processes, which would need to be applied to any producer anywhere in the world selling its products in the EU. The tax would also have to be adjusted depending on the sources of energy used by each producer at the time of production and the effectiveness of the climate policies of the country of production. This would be clearly unmanageable at this stage" (emphasis added).

It seems doubtful that the European Commission will opt for such a proposal.

II. A Cooperative Approach

Within a normally functioning WTO the many GATT-compatibility issues of the CBAMs under consideration would be of no concern even if the European Commission were to present a proposal which required some creative interpretations. The EU would adopt its measure, defend it in WTO proceedings and eventually implement the results in a WTO-compatible manner. Due to the U.S. blockage of appointments of new Appellate Body members the WTO dispute settlement system, once called the 'crown jewel' of the WTO, has been seriously compromised.¹⁷⁹ Whilst it is possible that a WTO Panel could rule authoritatively on the compatibility of CBAMs it is more likely that its ruling would be appealed 'into the void' or that the case would be submitted to the newly adopted Multi-Party Interim Appeal Arbitration Arrangement (MPIA) which has the character of an arbitration procedure.¹⁸⁰ Therefore it is ques-

177 *Wettengel*, p. 1.

178 See Fn. 6, p. 263.

179 *Bronckers*, p. 226.

180 For the text of the *MPIA*, which has become effective on 30 April 2020, see WTO/JOB/DSB/1/add.12, 30 April 2020.

tionable whether the MPIA will “*preserve the WTO dispute system*”.¹⁸¹ Moreover, we do not know whether the EU, itself, in a WTO dispute with another member not party to the MPIA concerning its CBAM would accept the adoption of the panel recommendations and forfeit the possibility of an appeal or whether it would, in case of a negative ruling, be tempted to nevertheless appeal ‘*into the void*’.

It should be noted that in August 2020, the European Commission appealed a lost anti-dumping case brought by Russia (WTO Case DS 494) ‘*into the void*’¹⁸² notwithstanding its recently proposed *Enforcement Regulation*¹⁸³ which condemns such appeals and asks Council and Parliament to authorize countermeasures. In its proposal the Commission writes:¹⁸⁴

“However, where the responsible party fails to cooperate in good faith in the dispute settlement procedures, thereby preventing the injured party from completing such procedures, the possibility to resort to countermeasures in accordance with the requirements of general public international law necessarily revives”.

It will be interesting to see how the European Commission and more importantly the European Union will live up to the claim that the CBAM has to be WTO-compatible. The European Commission’s intentions are clear: It will present a proposal and the EU will eventually introduce a carbon adjustment mechanism.¹⁸⁵ Even the German Chancellor now seems to support the idea of CBAMs. It is noteworthy that the Chancellor insisted on WTO-compatibility and explicitly mentioned that this would

181 Lester, p. 3. The *Saudi Trade Group* for example argues that “*the MPIA suggests that there is a shift-away from the rules-based trading system and a reversion to the negotiation-based model that existed before the conclusion of the Uruguay Round*”, WTO Needs Urgent Reform, Says Saudi Trade Group, 3 July 2020 available at: <https://www.arabnews.com/node/1699132/saudi-arabia>, (04/07/2020). If such recommendations were adopted the MPIA would be quite different from the two track WTO dispute settlement process.

182 See Summary ‘Other Business’ of the meeting of the WTO Dispute Settlement Body of 28 August 2020 available at https://www.wto.org/english/news_e/news20_e/dsb_28aug20_e.htm (17/09/2020).

183 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union’s rights for the application and enforcement of international trade rules, COM (2019) 623 final, 12 December 2019.

184 *Ibid.*, p. 4.

185 The conclusions of the historic European Council of 21 July 2020 say: “*As a basis for additional own resources, the Commission will put forward in the first semester of 2021 proposals on a carbon border adjustment mechanism and on a digital levy, with a view to their introduction at the latest by 1 January 2023.*” European Council, Conclusions, EUCO 10/20 of 21 July 2020, point A 29.

not be a “*trivial*” matter.¹⁸⁶ The unilateral imposition of such a measure will put the EU into a dilemma. Under the chapeau of GATT Article XX, the European Union cannot impose an octroy on other WTO members and instead has to negotiate in good faith with the countries concerned. In principle, these negotiations do not have to come to a result, it is sufficient for the EU to demonstrate good intentions to negotiate. If the negotiations fail and the EU insists on its measure, then the measure will undergo the traditional ‘arbitrariness’-test under GATT Article XX; and in this situation the Paris Agreement becomes relevant insofar as the Paris signatories could argue that they are under no obligation to adopt a specific climate mitigation measure and that, if they fully comply with the letter and the spirit of agreement, the imposition of the CBAM against them is an arbitrary and unjustifiable discrimination since the EU has not taken their specific country situation into account. In other words, the required GATT Article XX negotiations on an otherwise GATT incompatible CBAM oblige the EU not only to negotiate in good faith with the countries concerned but also to demonstrate that it has taken their specific situation into account, which, practically, compels the EU into finding an agreement with the countries concerned. The European Commission would therefore be well advised to start negotiations the moment it has adopted its legislative proposal as *Mehling et al.*¹⁸⁷ point out:

“Serious and inclusive negotiations, conducted in good faith, should precede the application of a BCA and aim to reduce the differential in carbon constraints that raise concerns of leakage. Such bi- or multilateral engagement is critical to evade assumptions of protectionism. Because individual climate efforts remain within the discretion of each individual party rather than being centrally negotiated, with policy heterogeneity a sanctioned feature of the international climate regime, the Paris Agreement may not be enough to satisfy this requirement.” (emphasis added)

Such negotiations could be conducted bilaterally, plurilaterally or multilaterally. The most obvious forum for negotiations would be the UNFCCC. CBAMs are justified for reasons of climate protection, the EU has to adopt ambitious climate policies to reach the goal of the Paris Agreement and in doing so has to protect itself against the (allegedly) insufficient climate protection measures undertaken by other signatories. CBAMs therefore contain an embedded criticism of other countries’ lack of climate protection efforts and hence a hidden criticism of the Paris Agreement’s bottom-up approach to achieve its goals. If the EU is not satisfied with the actual state of the

186 At a joint press conference with President Macron on 29 June 2020 Chancellor Merkel said: “*Zweitens zu der Frage des Klimaschutzes und der Grenzsteuer – „border adjustment tax“ –: Es ist eine gemeinsame Position, dass wir eine solche Steuer brauchen. Das muss im Zusammenhang mit unseren Klimazielen dann auch entschieden werden. Für uns in Deutschland ist wichtig – aber ich glaube, da gibt es auch gar keinen Widerspruch mit Frankreich –, dass sie WTO-kompatibel sein muss. Das ist nicht ganz trivial. Aber wenn wir sehr ambitionierte Klimaschutzziele haben, dann müssen wir uns sozusagen auch gegenüber denen schützen, die Produkte klimaschädlicher beziehungsweise unter weit viel mehr Ausstoß von CO2 zu uns importieren*“; available at: <https://www.bundesregierung.de/breg-de/suche/pressekonferenz-von-bundeskanzlerin-merkel-und-dem-franzoesischen-praesidenten-m-acron-1764982> (01/07/2020).

187 *Mehling et al.*, p. 479.

implementation of the Paris Agreement, it seems obvious to use the Paris forum to agree on the necessary changes. Given the Paris Agreement's notion of "*common but differentiated responsibilities and respective capabilities in light of different national circumstances*" and its assertion that "*Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets*" the negotiations could also be conducted at a plurilateral level between those countries with the highest GHG emissions. Alternatively, since the EU wants to start its adjustment policy for some specific sectors only the negotiations could be held between the major exporting countries of the sector concerned.

F. Concluding Remarks

In times of swindling support for multilateralism it seems daring to propose a cooperative approach of pluri- or multilateral negotiations on CBAMs. Experience shows that these negotiations arrive at rather modest solutions or, far too often, at no solution at all, as demonstrated by developments in WTO and UNFCCC:

At the Marrakesh Ministerial Conference in 1994 the Committee on Trade and Environment (CTE) was established¹⁸⁸ and given the task to make appropriate recommendations on how to amend the multilateral trading rules to take environmental considerations better into account and to promote sustainable development. One specific subject of these discussions was elevated to a negotiating item of the DDA negotiations, namely "*the relationship between the existing WTO rules and specific trade obligations set out in Multilateral Environmental Agreements (MEAs)*".¹⁸⁹ Neither the CTE nor the DDA did make any recommendations on how to amend the WTO rulebook, yet, fortunately, the Appellate Body solved many issues of the trade and environment debate with far-reaching and forward-looking rulings;¹⁹⁰ unfortunately, today the Appellate Body can no longer help to ease the tensions created by CBAMs.

As mentioned above also the climate negotiations were fraught with disagreements and failures and resulted in the rather modest Paris Agreement. The 2019 UNEP Emission Gap Report comes to the sobering result that the Paris goal to limit global warming by the end of the century to two degrees Celsius above preindustrial levels will not be achieved and suggests that deeper and faster cuts in GHG-emissions are necessary.¹⁹¹ Will the Paris signatories reflect this need and react accordingly by adapting their NDCs? It seems that the Paris bottom-up approach has come to its limits and that the Paris community has to agree on more binding climate mitigation measures. The European Commission has promoted for a long time the use of market-based instruments to achieve the Paris goal, yet these instruments are heavily criticized

188 https://www.wto.org/english/docs_e/legal_e/56-dtenv.pdf (01/07/2020).

189 *Doha WTO Ministerial Declaration*, WT/MIN(01)/DEC/1, 20 November 2001, para. 31.

190 See *Quick* 2013, p. 967f.

191 *UNEP Emission Gap Report 2019*, p. XIV.

by some¹⁹² and the Paris signatories have been unable to agree on how to combine market-based and non-market based approaches.¹⁹³

Given this bleak outlook on pluri- or multilateral negotiations the proponents suggest that the unilateral imposition of a CBAM should be the preferred route for the EU. They acknowledge the political and administrative difficulties of CBAMs and the necessity of a cooperative approach but think that the EU should nevertheless take the risk:¹⁹⁴

"If successful, the need for BCAs should wane over time, as climate ambition across trading partners converges and any BCAs in place address diminishing leakage rates. Given their complexity and trade-offs, BCAs are neither a desirable nor stable option for global climate action in the long run. Collective climate action at the required level of stringency will always remain preferable over unilateral efforts, even with BCAs. But under the climate regime established by the Paris Agreement, such convergence will take time, and time is currently of the essence. If BCAs are able to remove even one of the many barriers to more ambitious climate action and thereby accelerate this convergence, the residual risks and trade-offs associated with their use may be a price worth paying". (emphasis added)

The EU will have to decide whether to adopt a unilateral measure or to choose a cooperative approach and start negotiations with the countries concerned. A cooperative approach best reflects the rules of both the WTO and the Paris Agreement and has the potential of a win-win-win situation, namely to increase climate protection, to decrease the relocation of greenhouse gas emissions and to avoid retaliatory and other non-coordinated responses. The EU cannot claim to defend the rules-based approach of the WTO and the climate objectives of the Paris Agreement whilst at the same time adopting a unilateral and potentially protectionist measure whose climate benefit is doubtful if other countries do not follow suit.

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192 European Commission, Consultative Communication, The 2015 International Climate Change Agreement: Shaping international climate policy beyond 2020, COM (2013) 167 final, 26 march 2013, p. 8.

193 Article 6 Paris Agreement, see Bodansky, p. 307.

194 Mehling *et al.*, p. 481.

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Kontrafakturen und Cover-Versionen aus Karlsruhe

Anmerkungen zu den „Recht auf Vergessen“-Entscheidungen des Bundesverfassungsgerichts (6.11.2019, 1 BvR 16/13 und 1 BvR 276/17)

Nikolaus Marsch*

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