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## Carbon Border Adjustment Mechanism CBAM

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2

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1 European Parliament and European Council, *Regulation (EU)2023/956 Establishing a Carbon Border Adjustment Mechanism*, *Official Journal of the European Union* (L 130/52), European Commission (10 May 2023), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2023:130:FULL>.

2 UNCTAD, *A European Union Carbon Border Adjustment Mechanism: Implications for Developing Countries*, UNCTAD (1 September 2021), [https://unctad.org/system/files/official-document/osginf2021d2\\_en.pdf](https://unctad.org/system/files/official-document/osginf2021d2_en.pdf).

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8 Bhagwati WTO

9

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11 CBAM

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3 European Commission, *Impact Assessment Report Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, SWD (2021)643 final, 17 July 2021, p. 64–66. CBAM 45.4 47.3 / 11%

4 Michael A. Mehling, Gilbert E. Metcalf & Robert N. Stavins, *Linking Climate Policies to Advance Global Mitigation: Joining Jurisdictions Can Increase Efficiency of Mitigation*, 359 *Science* 997, 997–998 (2018).

5 William Nordhaus, *Climate Clubs: Overcoming Free-Riding in International Climate Policy*, 105 *American Economic Review* 1339, 1339–1370 (2015).

6 Lars H. Gulbrandsen, Jørgen Wettestad, David G. Victor & Arild Underdal, *The Political Roots of Divergence in Carbon Market Design: Implications for Linking*, 19 *Climate Policy* 427, 427–438 (2018).

7 ——— 2023 2 46–59

8 Paul-Erik Veel, *Carbon Tariffs and the WTO: An Evaluation of Feasible Policies*, 12 *Journal of International Economic Law* 749, 749–800 (2009).

9 Jagdish Bhagwati & Petros C. Mavroidis, *Is Action Against US Exports for Failure to Sign Kyoto Protocol WTO-Legal?*, 6 *World Trade Review* 299, 299–310 (2007).

10 Joost Pauwelyn, *Carbon Leakage Measures and Border Tax Adjustments Under WTO Law*, in G. Van Calster & D. Prévost eds., *Research Handbook on Environment, Health and the WTO*, Edward Elgar Publishing, 2013, p. 448–506.

11 Zhongxiang Zhang, *The U.S. Proposed Carbon Tariffs, WTO Scrutiny and China’s Responses*, 7 *International Economics and Economic Policy* 203, 203–225 (2010).



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” like domestic products 2 2

22

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19 Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law: Text, Materials and Commentary*, Hart Publishing, 2012, p. 227–257, 263–268.

20 Bradley J. Condon, *Climate Change and Unresolved Issues in WTO Law*, 12 *Journal of International Economic Law* 895, 895–926 (2009).

21 2019 299–300

22 Appellate Body Report *Japan-Taxes on Alcoholic Beverages* WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R 4 October 1996 p. 25.

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 39  
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 “ ” 40 “ ” 41  
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36 Niall Moran, *The First Twenty Cases Under GATT Article XX: Tuna or Shrimp Dear?*, In Giovanna Adinolfi, Freya Baetens, José Caiado et al. eds., *International Economic Law: Contemporary Issues*, Springer, 2017, p. 3 – 21.

37 Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996; Appellate Body Report on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998.

38 Appellate Body Report on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras. 129 – 130.

39 WTO 2010 7 82  
 2022 2 11 – 12  
 Bradley J. Condon, *Climate Change and Unresolved Issues in WTO Law*, 12 *Journal of International Economic Law* 895, 911 (2009); Sarah Davidson Ladly, *Border Carbon Adjustments, WTO-Law and the Principle of Common But Differentiated Responsibilities*, 12 *International Environmental Agreements: Politics, Law and Economics* 63, 76 – 77 (2011).

40 Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 15.

41 Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 141; Appellate Body Reports, *China-Measures Related to the Exportation Of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, para. 355.

g “ ”

42 43

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44

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45

46 b “

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”

48

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“ ” 49 GATT

WTO “ ” “ ”

42 E.g., Zhongxiang Zhang, *Trade and Climate Change: Focus on Carbon Leakage, Border Carbon Adjustments and WTO Consistency*, 12 *Foundations and Trends® in Microeconomics* 1, 1 – 108 (2018).

43 Hui Zhou & Jichuan Sheng, *Has EU ETS Caused Carbon Leakage in the EU Carbon-Intensive Industries? A Study from the Perspective of Bilateral Trade*, 13 *Chinese Journal of Population Resources and Environment* 132, 132 – 138 (2015).

44 Peter Van Den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, 2008, p. 591 – 688.

45 Appellate Body Reports, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, para. 5.144; Panel Report, *Brazil-Certain Measures Concerning Taxation and Charges*, WT/DS472/R, WT/DS497/R, 30 August 2017, para. 7.884.

46 Panel Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007, paras. 7.53, 7.84., 7.102.

47 Appellate Body Reports, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, para. 5.144; Panel Report, *Brazil-Certain Measures Concerning Taxation and Charges*, WT/DS472/R, WT/DS497/R, 30 August 2017, para. 7.904.

48 Appellate Body Report, *Colombia-Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R, 7 June 2016, para. 5.68; Panel Report, *Brazil-Certain Measures Concerning Taxation and Charges, Brazil-Taxation (Japan)*, WT/DS472/R, WT/DS497/R, 30 August 2017, para. 7.905.

49 Axel Desmedt, *Proportionality in WTO Law*, 4 *Journal of International Economic Law* 441, 441 – 480 (2001).

50 “ ” “ ” 2005  
 “ ” 2005 51 “ ” 2007  
 GATT 20 b “ ”

“ ”

52

“ ”

53

“ ”

54

“

”

---

50 Simon Lester, Bryan Mercurio & Arwel Davis, *World Trade Law: Text, Materials and Commentary*, Hart Publishing, 2018, p. 397–402.“

”  
 WTO  
 “ ” indispensable GATT Panel  
 Report United States – Section 337 of the Tariff Act of 1930 L/6439 – 36S/345 16 January 1989 para. 5.26.  
 51 “ ” 2001 “ ” “ ” “ ” “ ” 337  
 ” 1989 GATT “ ” — “ ” “ ” Appellate  
 Body Report, Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R WT/DS169/AB/R, 11 December 2000,  
 para. 161; Appellate Body Report, Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R, 25  
 April 2005, para. 12.

52 Panel Report on Brazil-Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, 12 June 2007, paras. 139 – 145, 178, 182.

53 Panel Report on Brazil-Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, 12 June 2007, paras. 145 – 146.

54 Appellate Body Reports, European Communities-Measures Prohibiting the Importati



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62

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63

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64

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65

” “ ”

” “ ” “ ” 66

” “ ” “ ”

67

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62 Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, para. 166.

63 Appellate Body Report, United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by the United States, WT/DS381/AB/RW/USA, WT/DS381/AB/RW2, 14 December 2018, paras. 6.280–6.281. 2016

64 E.g., Thomas Rutherford & Mustafa Babiker, *The Economic Effects of Border Measures in Subglobal Climate Agreements*, 26 *The Energy Journal* 99, 99–125 (2005); Stéphanie Monjon & Philippe Quirion, *A Border Adjustment for the EU ETS: Reconciling WTO Rules and Capacity to Tackle Carbon Leakage*, 11 *Climate Policy* 1212, 1212–1225 (2011); Hui Zhou & Jichuan Sheng, *Has EU ETS Caused Carbon Leakage in the EU Carbon-Intensive Industries? A Study from The Perspective of Bilateral Trade*, 13 *Chinese Journal of Population Resources and Environment* 132, 132–138 (2015); Stefano F. Verde, *The Impact of the EU Emissions Trading System on Competitiveness and Carbon Leakage: The Econometric Evidence*, 34 *Journal of Economic Surveys* 320, 320–343 (2020).

65 Appellate Body Report, European Communities-Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 194.

66 Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, para. 25.

67 Panel Report, European Communities-Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/R, 18 September 2000, para. 8.236.

“ ” “ ”

68

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70

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68 Panel Report, Brazil-Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, 12 June 2007, para. 227.

69 . —WTO

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304

70

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4 13 14 15

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79

UNFCCC “ ”

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2.

UNEP 2022 9 166 UN Environment Programme NDCs 88

2 250 170 81 “ ” 1.5

82 “

”

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77 — 2016 1 61–67

78 “ ” 2016 3 64–76

79 David G.Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet*, Cambridge University Press, 2011, p. 1–10.

80 2018 6 198

81 United Nations Environment Programme, *Emissions Gap Report 2022*, [www.unep.org/resources/emissions-gap-report-2022](http://www.unep.org/resources/emissions-gap-report-2022).

82 Håkan Pihl, *A Climate Club as a Complementary Design to the UN Paris Agreement*, 3 *Policy Design and Practice* 45, 45–57 (2020).



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83

93

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99

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95

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21

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6.4

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93 Robert Falkner, *The Paris Agreement and the New Logic of International Climate Politics*, 92 *International Affairs* 1107, 1107–1125 (2016).

94 Michal Nachmany, Sam Fankhauser, Jana Davidová et al., *The 2015 Global Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries: Summary for Policy-Makers*, [https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2015/05/Global\\_climate\\_legislation\\_study\\_20151.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2015/05/Global_climate_legislation_study_20151.pdf).

95 Qianwen Li, Ruyin Long & Hong Chen, *Empirical Study of the Willingness of Consumers to Purchase Low-Carbon Products by Considering Carbon Labels: A Case Study*, 161 *Journal of Cleaner Production* 1237, 1237–1250 (2017).

1.

96

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2. GATT 20 d

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“ ”

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97

20 d “ ”

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98

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100

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96 Diana Ivanova, John Barrett, Dominik Wiedenhofer et al., *Quantifying the Potential for Climate Change Mitigation of Consumption Options*, 15 Environmental Research Letters 93, 93 – 112 (2020).

97 Panel Report, India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/R, 24 February 2016, paras. 7.285, 7.288, 7.296.

98 Appellate Body Report, India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/AB/R, 16 September 2016, para. 5.140.

99 Panel Report, India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/R, 24 February 2016, paras. 7.298 – 7.301; Appellate Body Report, India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/AB/R, 16 September 2016, para. 5.141.

100 Panel Report, India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/R, 24 February 2016, paras. 7.302 – 7.309, 7.311; Appellate Body Report, India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/AB/R, 16 September 2016, para. 5.114.

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GATT 20 d “ ” 102

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WTO “ 103

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104

105

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101 Maria Socorro Manguiat & Andy Raine, *Strengthening National Legal Frameworks to Implement the Paris Agreement*, 12 *Carbon & Climate Law Review* 15, 15 – 22 (2018).

102 Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R WT/DS169/AB/R, 11 December 2000, para. 162.

103 WTO 2020 103

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UNFCCC

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6

106

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106 Martin L. Weitzman, *Can Negotiating a Uniform Carbon Price Help to Internalize the Global Warming Externality?*, 1 Journal of the Association of Environmental and Resource Economists 29, 29 – 49 (2014).

## The Relative Legality of Carbon Trade Barriers Under the WTO Regime

WANG Yunpeng

**Abstract:** Unilateral climate measures with trade-deterrent effects, such as the EU's carbon border adjusted measures, are becoming the new trade barriers in the climate era. WTO judicial practice shows that, the flexibility of the standard of for like products and discriminatory treatment allows for greater flexibility in the application of the non-discriminatory principles. There is also considerable uncertainty about the application of the necessity standard in Article 20(b) of the GATT and the interpretation of its chapeau. These flexibility and uncertainty allow trade measures in the name of addressing climate change to invoke the general exception rule to justify their necessity. The key bones of the international climate regime under the *Paris Agreement*, such as the nationally determined reduction target, the clubbing of international mitigation cooperation and the burgeoning of domestic climate legislation, have strengthened the rationale to defend the legality of carbon trade barriers based on the WTO's general exception rule and increased the possibility of invoking the GATT Article 20(d) exception. China should actively improve its domestic carbon market mechanism and promote bilateral cooperation with the EU and others to effectively reduce the negative impact of carbon border regulation measures on relevant Chinese industries and promote multilateral international regulation of such measures.

**Keywords:** Mitigation of Climate Change; WTO; Trade Barriers; Paris Agreement