

My price is your cost: CBAMs and the new turn in the commodification of CO₂ under CBDR-RC and the WTO's anti-dumping precedents

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ABSTRACT

Developed countries are introducing Carbon Border Adjustment Mechanisms (CBAMs) with the aim of combating carbon leakage and promoting a level playing field for their industries by imposing carbon costs on imports equivalent to domestic carbon prices. This article examines CBAMs within the broader context of commodifying CO₂, highlighting the historical evolution and current trends in this process. The article argues that CBAMs should be viewed not in isolation but as part of the ongoing commodification of CO₂, including establishing a mandatory international CO₂ price. Moreover, the article explores the legal complexities and potential conflicts of CBAMs with established principles under international environmental and trade regimes, particularly focusing on the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) and the World Trade Organization's (WTO) anti-dumping rules and precedents. By examining the EU's CBAM model and its implications, the article underscores the challenges of imposing a unilateral carbon price and the relationship between WTO precedents on the differences between price and cost for these measures. The study concludes by advocating for a nuanced understanding of CBAMs' role in the commodification of CO₂ and the need for an equitable and legally coherent global approach that takes due consideration of States' common but differentiated responsibilities towards climate action and the legitimate and evidence-based difference between the international prices of goods and the domestic costs of producing them, when seeking for carbon emissions reduction.

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1. INTRODUCTION

The shift towards a low-emissions economy to avert climate challenges demands structural changes in the international economy, which countries are implementing in diverse manners and at different speeds. In this context, some States, allegedly leading the ‘sustainability race’, are enacting regulatory climate-related measures such as Carbon Border Adjustment Mechanisms (CBAMs) with two main stated objectives: (i) to reduce the risk of carbon leakage by levelling the playing field for companies facing competition from jurisdictions with weaker sustainability policies and (ii) to foster the transition to a low-emissions economy. However, while acknowledging the urgency that climate change imposes and the potential contribution of these measures towards tackling it, commentators have already raised substantive contradictions between these mechanisms and well-established principles and commitments under multilateral environmental and trade agreements.

Until now, most of the legal literature has focused on CBAMs’ coherence with the international legal system, in particular concerning WTO rules¹ and to a lesser extent the CBDR-RC principle,² as well as on broader arguments of fairness as to when and how these measures would be justified.³ For instance, Espa, Francois, and van Asselt called for alternatives that would be compatible with the Paris Agreement and ‘strengthen an ‘environmental’ defence under WTO law’.⁴ Pirlot and André have recently argued that, in order to be just, CBAMs ‘should include design features that allow for some form of carbon leakage risk, either via country-differentiated prices or via country-specific exemptions’.⁵

However, a broader look at the role of CBAMs in the process of converting CO₂ into a tradable commodity and the establishment of a fixed international CO₂ price is missing. Bakker defined commodification as the ‘creation of an economic good, through the application of mechanisms to appropriate and standardize a class of goods and services, enabling them to be sold at a price determined through market exchange’.⁶ Commodifying CO₂ means not only making emissions tradable, but generating a uniform price. The commodification process of carbon emissions is not new. It began at the international level with the inclusion of emissions trading as an avenue for complying with emissions reduction obligations under the Kyoto Protocol. From this experience, the EU and mostly developed countries have implemented more sophisticated and complex expressions of carbon commodification at the domestic and regional level, including emissions trading schemes (ETS) targeting intensive emitter sectors of the economy. Notably, with few exceptions, the commodification of CO₂ has remained until now at the domestic or regional level of the countries implementing these schemes.

However, within this broader process, we are now at a new juncture in which CBAMs are being established to level the playing field vis-a-vis countries without such schemes. The recent adoption of its fully-fledged Carbon Border Adjustment Mechanism by the European Union⁷ (EU CBAM), constitutes the most developed type of CBAM. From 2026 onwards, the moment in which the final stage of the EU CBAM will enter into force, products under its scope entering the EU will

¹ J Pauwelyn, ‘Carbon Leakage Measures and Border Tax Adjustments under WTO Law’ in G Van Calster, D Prévost and M Lee (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar Publishing 2013); JP Trachtman, *WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes* (Resources for the Future Discussion Paper 16-03, 25 January 2016) <<https://ssrn.com/abstract=2738752>>; I Espa, ‘Reconciling the Climate/Industrial Interplay of CBAMs: What Role for the WTO?’ (2022) 116 AJIL Unbound 208; G Vidigal and I Venzke, ‘Of False Conflicts and Real Challenges: Trade Agreements, Climate Clubs, and Border Adjustments’ (2022) 116 AJIL Unbound 202.

² G Marín Durán, ‘Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes’ (2023) 72 International and Comparative Law Quarterly, 73–103.

³ P André & A Pirlot, ‘When Are Carbon Border Adjustment Measures Just?’ (2024) 73 Political Studies, 305–325, <<https://doi.org/10.1177/00323217241238125>>. For a more critical take, see F Corvino, ‘The Compound Injustice of the EU Carbon Border Adjustment Mechanism (CBAM)’ (2023) Ethics, Policy & Environment 1, 26–45, <<https://doi.org/10.1080/21550085.2023.2272237>>.

⁴ I Espa, J Francois and H van Asselt, The EU Proposal for a Carbon Border Adjustment Mechanism (CBAM): An Analysis under WTO and Climate Change Law (WTI Working Paper No 06/2022, 2022).

⁵ André and Pirlot (n 3) 305.

⁶ K Bakker, ‘The “Commons” Versus the “Commodity”’: Alter-globalization, Anti-privatization and the Human Right to Water in the Global South’ (2007) 39 Antipode 430, <<https://doi.org/10.1111/j.1467-8330.2007.00534.x>> 103.

⁷ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (from now onwards EU CBAM Regulation).

have to pay the European price of CO₂ for their embedded emissions.⁸ While its current scope is limited, the EU CBAM could be only the tip of the iceberg of the unilateral establishment of an international carbon price, as it is already generating a cascade effect in other jurisdictions. The case of the U.S serves as an illustration of this effect, where the establishment of a CBAM became a bi-partisan initiative supported by both Democrats and Republicans.⁹ In the same vein, the UK government has recently announced its intention to implement a CBAM, which would start operating in 2027.¹⁰

This critical juncture and the new turn in the commodification process of CO₂ go far beyond CBAMs. The International Monetary Fund (IMF) has been a strong advocate for a 'carbon price floor' applicable horizontally to all sectors of the economy.¹¹ While proposals include providing certain flexibility to establish price categories on the basis of development, they have recently estimated that a global average price of 85 US dollars per ton of CO₂ would be needed in 2030.¹² In the same vein, the Director General (DG) of the WTO announced in 2023 its intention to work towards a global carbon price framework.¹³ Interestingly, when the framework was presented at the WTO, some traditional strong supporters of the CBDR-RC principle appreciated the publication of the study, 'which demonstrated that a carbon regulatory framework that respects the principles and obligations of multilateral environmental agreements, particularly CBDR, and is not protectionist like existing CBAMs is possible'. Conversely, some supporters of CBAMs in their current design criticized the report harshly, as well as the WTO Secretariat for acting beyond the scope of its mandate.

In this context, this article aims to expand the literature on CBAMs from a *new yet old* perspective (the one that focuses on the process of commodification of CO₂) and shed light on certain implications and complexities that have remained overlooked in the literature. This article makes two main arguments. First, CBAMs are not to be examined in isolation but in the broader process of commodification of CO₂ and the new turn they constitute in such a process. We should not only look at CBAMs and their impact on international trade but also at the establishment of a mandatory international price for CO₂ and its implications.

Secondly, and related to the first point, while scholars have already studied several dimensions of CBAMs, there still remain unexplored angles and interrelations with the international legal system. In this article, we focus on two main issues that remain open in the literature. First, we reinforce that existing literature has tended to downgrade the normativity of the CBDR-RC principle while examining the coherence of CBAM with multilateral environmental agreements. While the contradictions between CBAMs and the CBDR-RC principle have already been explained by Marín Durán, this position remains a minority.¹⁴ In this regard, we argue that CBDR-RC in environmental agreements has a degree of operationalization that has been overlooked in most of the literature. Then, we examine the imposition of a unilateral CO₂ price under WTO rules and precedents on anti-dumping. In short, these precedents contradict the basic premise of current CBAM initiatives that impose the inclusion of a universal price in the calculation of a commodity necessary to produce a tradable good. In *DS473: European Union–Anti-Dumping Measures on Biodiesel*

⁸ The European Commission has proposed a simplification of the EU CBAM in February 2025. If approved, it will delay the sale of certificates to February 2027, while reducing the economic operators falling under its scope. See 'Commission Staff Working Document Accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism' SWD(2025) 58 final (26 February 2025).

⁹ Joint Economic Committee, *Carbon Border Adjustment Mechanism: An Overview* (2023) <https://www.jec.senate.gov/public/_cache/files/908f2a0f-3f7e-4c42-b22d-adebed4b8486/cbam-final.pdf>.

¹⁰ UK Government, 'Consultation on the Introduction of a UK Carbon Border Adjustment Mechanism' (2023) <<https://www.gov.uk/government/consultations/consultation-on-the-introduction-of-a-uk-carbon-border-adjustment-mechanism>>

¹¹ I Parry, S Black and J Roaf, *Proposal for an International Carbon Price Floor among Large Emitters* (IMF Staff Climate Note 2021/001, International Monetary Fund 2021, Washington).

¹² International Monetary Fund, 'World Needs More Policy Ambition, Private Funds, and Innovation to Meet Climate Goals' (27 November 2023) <<https://www.imf.org/en/Blogs/Articles/2023/11/27/world-needs-more-policy-ambition-private-funds-and-innovation-to-meet-climate-goals>>.

¹³ African Climate Wire, 'DG at the WTO Announces Intention to Pursue Carbon Pricing Mechanism Framework in Response to CBAM' (April 2023) <<https://africanclimatewire.org/2023/04/dg-at-the-wto-announces-intention-to-pursue-carbon-pricing-mechanism-framework-in-response-to-cbam/>>.

¹⁴ G Marín Durán (n 2).

from Argentina, the Panel found that the EU violated Article 2.2 of the Anti-Dumping Agreement and Article VI : 1(b)(ii) of the GATT 1994 by imposing a measure using a ‘cost’ different from the cost prevailing ‘in the country of origin’. The EU had argued that it was the international price of the commodity, in this case soybeans, that should be considered when constructing the normal value of a good. Conversely, one of the main lessons from the case is that (an international) price and (a national) cost are not the same and that it is legal and legitimate that a given country has lower costs on certain elements needed to produce a good. In this article, we examine the implications of imposing a universal carbon price in the production of certain goods falling under the scope of CBAMs.

As mentioned earlier, the WTO has recently proposed a global carbon pricing framework. Notably, the framework takes into consideration some of the concerns that have been previously raised by developing countries on the interaction of CBAMs and the obligations of developed countries under multilateral environmental agreements, especially the CBDR-RC principle. More precisely, the framework incorporates a mechanism to establish national carbon prices according to an economy-level criterion that takes into account different factors such as the economic development level and the countries’ contribution to climate change.

This article is structured as follows. The first part traces the process of commodification of CO₂ at the international level and then examines novel CBAMs implemented at the domestic and regional level as a new *momentum* in this process. In so doing, it takes the EU model as a case study, being the most extensive of its type and already being implemented. The second part focuses on the interrelation between CBAMs and the CBDR-RC principle and WTO rules under the anti-dumping precedents to examine the legality of commodifying a CO₂ by replacing effectively incurred costs with an international reference price or a third country one. Finally, the study concludes by advocating for a nuanced understanding of CBAMs’ role in the commodification of CO₂ and the need for an equitable and legally coherent global approach that takes due consideration of States’ common but differentiated responsibilities towards climate action and the legitimate difference between international prices and domestic costs for carbon emissions.

2. COMMODIFYING CO₂: A HISTORICAL PERSPECTIVE AND THE NEW TURN

2.1 ‘Voluntary’ CO₂ commodification at the international level

2.1.1 *The Kyoto Protocol and the origins of the commodification*

In 1997, States adopted the Kyoto Protocol, a landmark international agreement in the realm of climate change mitigation, whose main significance consisted in being the first treaty to establish legally binding targets for reducing greenhouse gas emissions. Within the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol obliged a group of developed countries to curb their emissions by specified percentages compared to their 1990 levels. In this context, the ‘commodification’ process of carbon dioxide emissions can be considered to have formally begun at the international level with the inclusion in the Kyoto Protocol of the possibility for States with legally binding reduction targets to trade emissions units.¹⁵ In short, by virtue of Article 17, the Parties included in Annex B (those with mandatory reduction targets) ‘may participate in emissions trading for the purposes of fulfilling their commitments under Article 3’. Those States having emissions assigned that they did not ‘use’ could sell them to other Annex B States that emitted beyond their limit.

As described by Oberthür and Ott, this mechanism was born at the request of the United States during the negotiations of the Protocol.¹⁶ The Clinton administration changed its position to favour the imposition of legally binding emissions targets in the Protocol, but it did so under

¹⁵ The USA had already put in place trading schemes for environmental protection since the 1970s. See: T Tietenberg, *Emissions Trading: An Exercise in Reforming Pollution Policy* (Resources for the Future 1985).

¹⁶ S Oberthür and HE Ott, *The Kyoto Protocol* (Springer Berlin Heidelberg 1999) 188.

the condition that the realization of such targets should take place ‘through flexible and cost-effective market-based solutions’.¹⁷

These flexible market-based solutions included not only the International Emissions Trading (IET), but also a Clean Development Mechanism (CDM), and a Joint Implementation (JI) one. While the IET allowed for exchanging credits of non-emitted CO₂, the CDM and JI granted emission credits for implementing emissions reduction projects. JI concerned projects in developed States and the CDM investments in sustainable development projects in developing States. As explained by Verde and Borghesi, the economic principle of cost-effectiveness, in other words, to ‘cut emissions where it is cheapest’, underpinned these mechanisms.¹⁸ Notably, the proposal of the US to include an emissions trading scheme, which counted on the support of the JUSCANZ group (Japan, the USA, Canada, and New Zealand), faced fierce opposition from developing countries and rapidly turned to centre stage in the negotiations.¹⁹ The initiative was also confronted by academics and civil society on moral grounds, which accused the proponents of creating ‘pollution rights’.²⁰

Interestingly, the EU as a block was initially not sure about the US proposal, worried that it would allow them to ‘buy’ avoiding their reduction obligations.²¹ In light of this preoccupation, the EU tried to establish a limit on the percentage of the emission reduction obligation to be complied with by trading, and it also requested clear rules to oversee the trading system.²² Consequently, Article 17, in its final version, entrusted the Conference of the Parties with defining ‘the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading’. Furthermore, it established that emission trading ‘shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments ...’.

Despite the above, emissions trading heavily permeated the institutional and discursive foundations of the Kyoto Protocol, as illustrated by the relevant section of its official web page, which proudly reads, ‘(G)reenhouse gas emissions a new commodity’.²³ The truth also is that the fate of the Kyoto Protocol hinged upon the establishment of an emissions trading system (ETS) since the US nor the other JUSCANZ States would have ratified the Protocol ‘without the possibility of meeting a substantial part of their quantified targets by trading’.²⁴ Importantly for this article, despite the several difficulties and the confrontation faced by Kyoto’s market mechanisms, a variety of them made their way into its successor, the Paris Agreement, which followed this path.²⁵

2.1.2 After Kyoto: The Paris Agreement and new trends in the climate change regime

The transition from the Kyoto Protocol to the Paris Agreement is usually seen as a significant evolution in multilateral environmental cooperation. Despite being the first international treaty to set binding targets for reducing greenhouse gas emissions, the Kyoto Protocol’s effectiveness was limited by several factors, including the lack of participation from current major emitters. As it has been said elsewhere, the Paris Agreement, adopted in 2015, represented a departure from the top-down approach of the Kyoto Protocol.²⁶ Unlike its predecessor, the Paris Agreement is a bottom-up framework that relies on voluntary commitments from all countries to reduce their greenhouse gas emissions. This inclusivity was a crucial breakthrough, as it ensured that all States, regardless of their level of development, would contribute to the common effort against climate change. The

¹⁷ *ibid.*

¹⁸ SF Verde and S Borghesi, ‘The International Dimension of the EU Emissions Trading System: Bringing the Pieces Together’ (2022) 83 *Environmental and Resource Economics* 23, 26.

¹⁹ Oberthür and Ott (n 16) 188.

²⁰ S Beder, ‘Trading the Earth: The Politics behind Tradable Pollution Rights’ (2001) Faculty of Arts—Papers (Archive).

²¹ Oberthür and Ott (n 16) 190.

²² *ibid.*

²³ UNFCCC, ‘Emissions Trading’ (UNFCCC) <<https://unfccc.int/process/the-kyoto-protocol/mechanisms/emissions-trading>> accessed 24 September 2024.

²⁴ Oberthür and Ott (n 16) 204.

²⁵ P-M Dupuy and JE Viñuales, *International Environmental Law* (2nd edn, CUP 2018) 183.

²⁶ *ibid.* 197.

Paris Agreement did so by introducing the concept of nationally determined contributions (NDCs), allowing each country to set its own emission reduction targets based on its domestic circumstances and capabilities.

As we said before, some of the Kyoto Protocol's market mechanisms made their way into the Paris Agreement. However, they did so with a renewed strong confrontation from several States.²⁷ Furthermore, as in Kyoto, these mechanisms were one of the last issues to be agreed on by delegates during the Paris Agreement adoption and were phrased in what in diplomacy is called 'constructive ambiguity'.²⁸ The final text of the Paris Agreement envisages four flexible mechanisms or 'cooperative approaches' of compliance with the NDC, namely: cooperative approaches (Paragraph 6.1), transfers of 'Internationally transferred mitigation outcomes' (ITMOs) (Paragraphs 6.2-6.3), a mechanism aiming at contributing to mitigation and support sustainable development (Paragraphs 6.4-6.7), as well as a framework for non-market approaches (Paragraphs 6.8-6.9).

As noted by Verde and Borghesi, despite differing in several aspects, the Paris Agreement's alternative approaches can be considered as the 'direct descendants' of the Kyoto Protocol's flexible mechanisms.²⁹ Also, while the backlash against market mechanisms present in the negotiations of the Paris Agreement prevented the inclusion of direct references to categories such as 'markets' and 'carbon pricing', Article 6 still provided a framework for a process that could eventually lead to the establishment of carbon markets within the UN institutional design and of a global carbon price.³⁰

Notably, market mechanisms remained *one of*, if not *the*, most contentious topic in the negotiations concerning the operationalization of the Paris Agreement in the Conference of the Parties (COPs) from 2015 to the present day.³¹ An agreement on a set of rules for the operationalization of article 6.2, which allows carbon trading, was reached at COP 26 in Glasgow.³² The decision, developed in the form of a 'guidance', established rules on how States transacting mitigation outcomes should count and report the ITMOs, as well as on how to then adjust their NDCs. Member States have further developed the framework but some uncertainties still remain on its operationalization. Remarkably, several States have already reached bilateral agreements to implement ITMOs. Switzerland, for instance, has signed 14 bilateral treaties regulating carbon transfer.³³

In sum, there seems to be an appetite of some developed countries for the establishment of an international carbon market with a common international price, and the further development of carbon trading for the purpose of complying with NDCs under the Paris Agreement. Yet, while Article 6 has provided far more than initially expected, it has not yet allowed for a new tradable commodity to emerge 'or that a Paris Agreement 2.0 carbon market can start'.³⁴

Such a carbon market has been fully developed in domestic and regional jurisdictions, as is the case of the EU, which this article now turns to address. However, as the following section will argue, the EU approach to the commodification of CO₂, particularly since the adoption of CBAM, constitutes a radical departure from the institutional framework that permitted such commodification at the international level within the mechanisms envisaged in the Paris Agreement.

²⁷ A Marcu, *Carbon Market Provisions in the Paris Agreement (Article 6)* (Special Report, Centre for European Policy Studies 2016) 7.

²⁸ *ibid.*

²⁹ Verde and Borghesi (n 18) 28.

³⁰ *ibid.*

³¹ 'How to Operationalize Accounting under Article 6 Market Mechanisms of the Paris Agreement' (2019) 19 *Climate Policy*. <<https://www.tandfonline.com/doi/full/10.1080/14693062.2019.1599803>> accessed 8 May 2024.

³² Decision -/CMA.3. <https://unfccc.int/sites/default/files/resource/cma3_auv_12a_PA_6.2.pdf>.

For extension constraints, this section focuses mostly on the discussions surrounding article 6.2 concerning carbon trading, which is the most relevant for this article.

³³ The texts are available in the following link: <<https://www.bafu.admin.ch/bafu/en/home/topics/climate/info-specialists/climate-international-affairs/staatsvertraege-umsetzung-klimaebereinkommen-von-paris-artikel6.html>>

³⁴ A Marcu, *Carbon Market Provisions in the Paris Agreement (art 6)*, Special Report, Centre for European Policy Studies (2016) 21.

2.2 The new turn in CO₂ commodification

From the initial hesitations on the implications of establishing a carbon trading system at the international level during the Kyoto Protocol negotiations, the EU transitioned to becoming the frontrunner in the implementation of such a system at the European level. Even before the Kyoto Protocol entered into force in 2005, the EU decided that commodifying CO₂ was a valuable tool to cut down emissions, developing the most complex and advanced framework of its type.

2.2.1 *The EU ETS*

In 2003, the EU introduced its ETS with the aim of promoting ‘reductions of greenhouse gas emissions in a cost-effective and economically efficient manner’.³⁵ It is considered ‘a cornerstone of the EU’s climate policy’, and its effectiveness in achieving its goals within the EU cannot be overlooked: since its implementation in 2005, it has contributed to reducing emissions from electricity and heat generation and industrial production by 34.6%.³⁶

The ETS consists of a ‘cap and trade’ scheme, which includes a ‘cap’ or a limit on the absolute quantity of emissions that economic operators included in the scope can emit, and a market for emissions allowances within that cap. The main differences with the UNFCCC trading scheme are that the subjects obliged by the ETS are the companies and not the EU member States, and that the system is mandatory. The emissions cap is divided into pollution permits known as EU Allowances (EUAs), with each EUA representing one tonne of CO₂ equivalent emissions. The cap is periodically reduced in order to drive down emissions of the sectors included. As of 2024, the cap amounted to approximately 1,38 billion EUAs. Within this cap, companies engage in the buying and selling of allowances, which includes those they have received at no cost, on the open market, thereby trading them amongst themselves. This aspect constitutes the ‘trade’ component. As a result, when a company manages to reduce its emissions rapidly, it can sell its surplus allowances to another company or retain them for future use—a practice referred to as ‘banking allowances’.

The initial scope of the EU ETS primarily targeted large energy-intensive industries and power generation, encompassing electricity generation, oil refineries, iron and steel production, cement production, and paper and pulp manufacturing. Since 2005, the ETS has been subject to successive reforms that have increased its scope and ambition. A turning point in this regard was the reforms to the ETS of the ‘Fit for 55’ package, which included, among other things, a clear increase in the ambition targets, as well as the establishment of the EU CBAM.

2.2.2 *The EU CBAM*

As climate policies were implemented worldwide to reduce CO₂ emissions, a concept and concern called ‘carbon leakage’ started to gain traction. Carbon leakage has been defined by the EU as the process by which, ‘for reasons of costs related to climate policies, businesses in certain industry sectors or subsectors transfer production to other countries or imports from those countries replace equivalent products that are less intensive in terms of greenhouse gas emissions’.³⁷ The alleged effects of carbon leakage go from leading to an increase in the total global emissions to competitive advantages to countries with laxer environmental regulations, thus discouraging the adoption of such policies in other jurisdictions. In this context, CBAMs have emerged with two main alleged objectives: enhancing the climate action of third countries and levelling the playing field among countries with disparate ambitions in their climate policies.

³⁵ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a System for Greenhouse Gas Emission Allowance Trading within the Union and Amending Council Directive 96/61/EC Text with EEA Relevance (2023).

³⁶ Report from the Commission to the European Parliament and the Council on the Functioning of the European Carbon Market in 2021 pursuant to Articles 10(5) and 21(2) of Directive 2003/87/EC (as amended by Directive 2009/29/EC and Directive (EU) 2018/410) {SWD(2022) 407 final}.

³⁷ EU CBAM Regulation, para 9.

The EU has developed the most extensive of these mechanisms, the EU CBAM, which is designed to prevent carbon leakage and reduce greenhouse gas emissions by ensuring that imported products bear carbon costs equivalent to those under the EU ETS.³⁸ Thus, an equivalent carbon price is established for both imports and domestic products.³⁹ The regulation applies to goods imported into the EU from third countries, excluding those already subjected to the EU ETS or a linked carbon pricing system. While the EU ETS employs a cap and trade system with quantitative limits on emissions and allowances trading, the CBAM does not impose such limits on imports to avoid restricting trade flows, which would not be compliant with WTO rules.⁴⁰

Additionally, the establishment of a 'Climate Club' forum is proposed to foster international cooperation among countries with carbon pricing instruments and promote ambitious climate policies in alignment with the Paris Agreement.⁴¹ The rationale behind Climate Clubs is to promote the adoption of ETS and CBAMs in other jurisdictions that can be 'connected' to the EU system and, consequently, avoid being subject to the EU CBAM procedure, thus facilitating exporting to the EU. The EU CBAM started its transition phase in 2023 in which traders only have to report on the emissions embedded in their imports falling under its scope, without paying any financial adjustment. The next phase of CBAM will launch in 2026 when the obligation to pay such adjustments will become operative.

2.2.3 The EU CBAM and the new turn in CO₂ commodification

The adoption of the EU CBAM regulation is a turning point in the development of CO₂ as a commodity, in particular as a vehicle for the internationalization of the EU price for CO₂. CBAM converts the process of commodification at the international level from a voluntary one, in which States had the option to play the game or not, into a mandatory one: a company in a third country trying to sell goods falling under the scope of the EU CBAM must pay the carbon costs equivalent to those borne under the EU ETS. Or in other words, the importer will be obliged to buy the new commodity and add the price to the imports, but at the EU carbon market price.

Until now, the commodification process of CO₂ has remained voluntary at the international level. In Kyoto, developed countries could trade emissions, but developing countries were not obliged to reduce their emissions. In a similar vein, in the Paris Agreement, both developed and developing countries can join the emissions market, but the extent to which developing countries can or *want* to contribute to climate action by reducing their emissions remains at their discretion. Beyond the arguments of developing countries against the commodification of CO₂ within the UNFCCC mentioned before, the truth is that this process remained voluntary for them.

It could be counter-argued that the scope of the EU CBAM is rather limited and only affects certain sectors. However, the EU has openly expressed that it plans to expand the scope of the EU CBAM. The preambular paragraph 13 of the regulation clearly states that:

(13) The carbon price is rising, and companies need long-term visibility, predictability and legal certainty to make their decisions on investment in the decarbonisation of industrial processes. Therefore, in order to strengthen the legal framework for fighting carbon leakage, *a clear pathway for gradual further extension of the scope of the CBAM to products, sectors and subsectors at risk of carbon leakage should be established.*⁴²

The question that arises then is which products, sectors, and subsectors are 'at risk of carbon leakage'. Moreover, if this list of products, sectors, and subsectors of both the EU ETS and then, of

³⁸ *ibid* para 15.

³⁹ The term 'equivalent' (price) in the context of the CBAM regulation should be understood as 'identical' (price). This means that the EU will always impose the same carbon price on imported products as that applied under the ETS system. This is clear from art 9 of the CBAM regulation which establishes that 'an authorised CBAM declarant may claim in the CBAM declaration a *reduction* in the number of CBAM certificates to be surrendered *in order to take into account the carbon price paid in the country of origin for the declared embedded emissions*' (*emphasis added*).

⁴⁰ EU CBAM Regulation, para 21.

⁴¹ *ibid* para 71.

⁴² *ibid* para 13, *emphasis added*.

the EU CBAM, has been built or is going to be updated based on data related to the emissions contributions of these sectors or strategic or political considerations. Furthermore, a key factor to take into account is that the EU CBAM is not to be seen in isolation but in the broader cascade effect that it is aimed to generate or is already generating.

The UK government has recently started the consultation process for establishing a CBAM, and in the USA, such a mechanism even became a bi-partisan initiative counting on the support of both democrats and republicans,⁴³ encompassing four different legislative proposals. The two more salient for this article have been introduced in the Senate: the Clean Competition Act (CCA), introduced by Senator Sheldon Whitehouse, and the Fair, Affordable, Innovative, and Resilient Transition and Competition Act (FAIR Act), by Senator Chris Coons. In both initiatives, importers of covered products would be charged the same price that domestic producers would pay to comply with relevant domestic regulatory programs. The CCA establishes the amount to be paid based on the current social cost of carbon. The FAIR Act, on the other hand, determines it by averaging the costs associated with meeting domestic regulations aimed at reducing greenhouse gas emissions for each sector producing a covered product.⁴⁴

Both draft bills depart from the same premise, which is also shared with the already established EU CBAM: the unilateral establishment of a carbon price to which the carbon price paid at the place of production of the imported products has to be compared. This means that emissions would not behave as any other commodity does, which is with a uniform price around the world that derives from, among other factors, the relationship between supply and demand. The emission commodity price will depend on the particular market of the country imposing a CBAM, in case a market mechanism is in place, or on the will of the country if a fixed rate is established.

In this context, the establishment of a mandatory CO₂ price for third countries to comply with is the beginning of a new turn in a process that entails not only serious justice issues, but straightforward legal incoherencies, as the following section depicts.

3. MY PRICE IS YOUR COST: CBAMS, CBDR, AND THE WTO ANTI-DUMPING PRECEDENTS

As mentioned earlier, the establishment of CBAMs entails a complex interaction with environmental and trade agreements. As a consequence, scholars have extensively addressed CBAMs' coherence with international legal rules, particularly WTO rules, and, to a lesser extent, with environmental agreements. This section focuses on a related but slightly different issue: the legal issues arising from the new turn in CO₂ commodification in which countries 'export' a mandatory carbon price for imports through CBAMs.

In doing so, it focuses on two main issues. First, it develops the interrelationship of exporting a price of CO₂ with the CBDR-RC principle. While the literature that has already addressed the relationship between CBDR-RC and CBAMs is key to this section, focusing on commodification brings novel angles into discussion.⁴⁵ Moreover, a considerable portion of the academic literature on CBAMs has tended to weaken the normativity and bindingness of CBDR-RC, which we argue is misleading.

Second, this section addresses the imposition of a unilateral price of CO₂ under the WTO precedents on anti-dumping. In doing so, the article highlights contradictions in current CBAM initiatives. Specifically, it references the DS473 case, where the WTO Panel and the Appellate Body found that the EU violated trade agreements by using an international reference price, rather

⁴³ Joint Economic Committee, *Carbon Border Adjustment Mechanism: An Overview* (2023) <https://www.jec.senate.gov/public/_cache/files/908f2a0f-3f7e-4c42-b22d-adebed4b8486/cbam-final.pdf>. This article was written before the 2024 U.S. elections. It remains to be seen how the Trump administration will approach this issue.

⁴⁴ Resources for the Future, *The Value of International Carbon Markets for Limiting Global Temperature Rise to 1.5°C* (Report 23-14, 2023) <https://media.rff.org/documents/Report_23-14.pdf>.

⁴⁵ For a comprehensive account of EU CBAM (in)compatibility with the CBDR-RC principle see: G. Marín Durán (n 2). See also I Venzke and G Vidigal, 'Are Trade Measures to Tackle the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' (2022) Amsterdam Law School Legal Studies Research Paper No 2022-02.

than effectively incurred costs, to determine the normal value of goods. This case demonstrates that international prices and local production costs are not equivalent and that it is both legal and legitimate for countries to have lower costs for producing certain goods. The article discusses the implications of enforcing a universal carbon price on goods covered by CBAMs, emphasizing the need to respect the cost structures of different countries.

3.1 CBAMs and the normativity of the CBDR-RC principle

As we said before, the EU CBAM constitutes a new turn in the already described process of CO₂ commodification, which has been, at the multilateral level, characterized by its voluntary participation and application, on the one hand, and by its limited scope to the regional and domestic spheres, on the other. At the core of this voluntaristic feature, lies the CBDR-RC principle, a core principle of the international architecture that guides multilateral climate action. CBDR-RC acknowledges the shared responsibility of all nations to address global environmental issues while recognizing their differing capacities and historical contributions to these issues. Developed countries, such as some of the proponents of CBAMs, which have historically contributed the most to environmental degradation, shall bear a greater burden in combating climate change and supporting developing countries in their efforts to mitigate and adapt to its impacts.

At the outset, the first remark to the existing literature on CBAMs concerns the normativity of the CBDR-RC principle. Although the effective contours of the principle remain contested, its legally binding nature cannot be overlooked. In addressing CBAMs, several scholars have, in many cases, drawn a line between WTO rules and the CBDR-RC principle, as if the former had a more binding nature than the latter in assessing the legality of a given CBAM. While several contributions have not even included the CBDR-RC principle in their legal assessment of such measures, others have given it the character of guidance. For instance, in their authoritative contribution to the topic, Mehling et al. expressed that CBDR-RC ‘offers broad guidance that ideally should be taken into account in the design and application of any measure’.⁴⁶ In the same vein, other authors have referred to CBDR-RC as a justice or fairness component of these measures.

As noted by Viñuales, while the legal status of the CBDR-RC principle had remained controversial, this uncertainty had not, until now, posed major problems.⁴⁷ This was due to the fact that it has been used in practice for ‘two main functions, namely, to influence the content of certain agreements and to assist in the interpretation of their provisions, for which an elucidation of the principle’s current status in general international law is less pressing’.⁴⁸ In the Montreal and Kyoto Protocols, CBDR-RC was sorted out by imposing legally binding targets on specific countries. In the Paris Agreement, by giving States *marge de manoeuvre* to decide how much they could contribute towards emissions reductions unilaterally. CBAMs constitute a departure from this situation: we are vis-a-vis an international ‘climate’ measure that directly affects, among others, developing countries trading with developed countries. In the EU CBAM, for instance, by externalizing the CO₂ price paid by European companies and imposing it to third countries, including developing ones, the EU unifies the contribution to emissions reduction, which is incoherent with the Paris Agreement. Paradoxically, the EU itself stated that ‘CBAM is to serve as an essential element of the Union’s toolbox for meeting the objective of a climate-neutral Union at the latest by 2050 in line with the Paris Agreement ...’, which reinforces the argument that such mechanism is to be coherent with the rules contained in it.

In this regard, Article 2.2 of the Paris Agreement is categoric in stating that the ‘(A)greement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’. Furthermore, Article 9.1 is also relevant here since it states that ‘(D)eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and

⁴⁶ MA Mehling and others, ‘Designing Border Carbon Adjustments for Enhanced Climate Action’ (2019) 113 *American Journal of International Law* 433, 472.

⁴⁷ Dupuy and Viñuales (n 25) 85.

⁴⁸ *ibid* 85–86.

adaptation in continuation of their existing obligations under the Convention'. In the same vein, Article 4.5 states the obligation to provide support to developing countries in complying with their obligations regarding NDCs. The imposition of developed countries' carbon prices on developing countries through mechanisms such as the EU CBAM contravenes Articles 4.5 and 9.1, since developed countries thus absorb financial resources from developing countries instead of providing them, which, as the 'shall' precludes, is a hard law obligation.

It is important to highlight that the EU itself was aware of the legal need for consistency between CBAMs and the CBDR-RC principle. It reinforced this while referring to the need to put in place measures to deal with carbon leakage in its 2009 Directive updating the EU ETS system, which stated that '(A)ny action taken would need to be in conformity with the principles of the UNFCCC, in particular the principle of common but differentiated responsibilities and respective capabilities, taking into account the particular situation of least developed countries (LDCs).'⁴⁹

While a provision like the one above was not in the end included in the EU CBAM regulation, this acknowledgment demonstrates the perception of the EU co-legislators about the relationship between CBAMs and CBDR-RC. Strikingly, the EU ETS features an 'intra-EU CBDR-RC principle' in its design for 'least developed' European States. The EU ETS Directive in its Article 10 stipulates that:

*2% of the total quantity of allowances between 2021 and 2030 shall be auctioned to establish a fund to improve energy efficiency and modernise the energy systems of certain Member States (the 'beneficiary Member States') as set out in Article 10d (the 'Modernisation Fund'). The beneficiary Member States for that amount of allowances shall be the Member States with a GDP per capita at market prices below 60% of the Union average in 2013. The funds corresponding to that amount of allowances shall be distributed in accordance with Part A of Annex IIb*⁵⁰

As this provision illustrates, the EU is fully cognizant of the implications for the 'least developed countries' within the Union to pay a uniform ETS price. Therefore, it assigns them resources to reduce the economic impact on their economies. However, such differentiation does not exist within CBAM regulation, which makes no reference to the CBDR-RC principle.⁵¹

Turning to the practical operability of a unilateral CO₂ price for imports from third countries, the EU CBAM regulation clearly establishes that it should ensure that 'imported products are subject to a regulatory system that applies carbon costs equivalent to those borne under the EU ETS, resulting in a carbon price that is equivalent for imports and domestic products'.⁵² In the same vein, it also claims that 'in order to preserve its effectiveness as a measure to prevent carbon leakage, the CBAM needs to reflect closely the EU ETS price'.⁵³ Undoubtedly, those products from third countries falling under the scope of CBAM are to pay the EU carbon price. Moreover, in the case the product pays a carbon price to the exporting country, the price can be 'surrendered corresponding to the carbon price already effectively paid in the country of origin for the declared embedded emissions'.⁵⁴

The above-mentioned provisions have straightforward effects. For instance, if we take a hypothetical example in which the price of a product coming from developing country C is increased in order to integrate the EU carbon price and therefore reduces its profit margin. Paradoxically, the profit margin lost will go to the budget of the EU instead of country C, increasing the

⁴⁹ Directive 2009/29/EC of the European Parliament and of the Council Amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission Allowance Trading Scheme of the Community, 2008 OJ (L 140) 63.

⁵⁰ *ibid* art 10.

⁵¹ The EU CBAM regulation includes only a rather soft indication to the Commission in this regard, which: 'should strive to engage in an even-handed manner and in line with the international obligations of the Union with the third countries whose trade to the Union is affected by this Regulation, in order to explore the possibility for dialogue and cooperation regarding the implementation of specific elements of the CBAM'.

⁵² EU CBAM Regulation, para 15.

⁵³ *ibid* para 23.

⁵⁴ *ibid* para 45.

inequalities between the EU and country C.⁵⁵ This ‘exportation’ or imposition of the European carbon price on third countries clearly contradicts the CBDR-RC principle.

To conclude this section, when examining the imposition of a unilateral carbon price on imports, it is important to reinforce that CBDR-RC has to be examined as a matter of legality and not only as a matter of justice. The Paris Agreement contains a legally binding obligation for developed countries to contribute more towards combating climate change, including by providing sufficient and progressive means of implementation to developing countries. A uniform price of CO₂ clashes with that obligation. Several authors have claimed that ‘recycling’ CBAMs revenues, by allocating part of these resources to low and middle income countries could reverse CBAMs’ potential negative impacts on such countries. Yet, as rightly noted by André and Pirlot, while desirable, ‘such financial transfers are unlikely to undo the impact of CBAMs on how climate mitigation burdens are shared between countries’.⁵⁶

Another point to consider with this practice of exporting a country’s or group of countries’ carbon price is that it may result in an unfair economic protective measure for countries struggling with energy prices. As the European Commission recently acknowledged, ‘(H)igh gas prices themselves contribute to an increasing carbon price since they lead to an increased use of coal for power generation and consequently trigger more demand for emission allowances’.⁵⁷ The question that arises in this context is why a country that may not be affected by the increase in energy prices would need to pay higher carbon prices. Carbon is not a standard commodity; its price varies, among other factors, according to the energy matrix of each country. Externalizing your CO₂ price protects your economy from domestic energy price fluctuations. This practice raises a clear issue of fairness since it protects these countries’ economies from competing with third countries that may have other competitive advantages and disadvantages. Should third countries have the right to implement protective measures vis-a-vis technology, human resources, or credit availability disadvantages?

Finally, the problem of exporting a uniform CO₂ price is that it would not consider the situation of certain countries that are already net zero, in the sense that they capture all or more of the global warming gases they emit. It is the case, for instance, of Gabon, Panama, and Suriname.⁵⁸ Under the EU CBAM and the other CBAM proposals mentioned above, imports from these countries entering the EU would still need to pay their CO₂ price. While such a situation is not yet configured due to the scope of current and proposed CBAMs, the consolidation of the modification process of CO₂ as envisaged by the EU may raise these kinds of problems.

3.2 CBAMs and the differences between cost and price in the WTO anti-dumping precedents

A few decades ago, some countries promoted the discussion of the concept of *environmental dumping*, referring to the sale of goods at a price that did not internalize the costs related to environmental degradation. This debate encountered certain limits given by the multilaterally agreed rules within the WTO’s Anti-Dumping Agreement framework.

Given that environmental issues continue to be relevant, and environmental measures continue to be suitable to address trade concerns and geopolitical partnerships, the debate has politically evolved towards new paradigms. For example, the EU has recognized its direct and indirect responsibility for a certain portion of global emissions, whether due to its own emissions or as an importer of emissions-intensive goods and services produced in third countries. Consequently, even though the debate has become more sophisticated in its arguments, in our view, it continues to pursue the same goal: raising import tariffs on unwanted goods and services to protect its own communitarian producers from foreign competition. This could be seen as an attempt to reflect

⁵⁵ This example contains a simplification, ie, the company may be European and the differential may end in the EU in any case. Still, in that case, it would affect other factors in country C such as employment.

⁵⁶ P André and A Pirlot (n 3) 318. Also in S Perdana and M Vielle, ‘Making the EU Carbon Border Adjustment Mechanism Acceptable and Climate Friendly for Least Developed Countries’ (2022) 170 Energy Policy 113245.

⁵⁷ European Commission, ‘Questions and Answers on the Carbon Border Adjustment Mechanism (CBAM)’ (14 July 2021) https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5202, accessed 12 July 2024.

⁵⁸ World Economic Forum, ‘These Countries Have Already Achieved Net-Zero Emissions’ (22 December 2022) <<https://www.weforum.org/agenda/2022/12/these-countries-achieved-net-zero-emissions/>> accessed 17 July 2024.

the allegedly hidden production and sale costs associated with a particular product, which could constitute a measure that has an equivalent effect⁵⁹ to imposing anti-dumping duties.

It should be noted that it is not the objective of this article to contest or define the legal nature of CBAMs, including by categorizing them as an anti-dumping duty.⁶⁰ Rather, our argument here is that the actual effects of such measures are equivalent to those of anti-dumping duties since the EU CBAM seeks to adjust the price of imported products sold in the EU when they allegedly do not reasonably reflect the embedded CO₂ cost, taking into account the EU CO₂ price as a benchmark.

As mentioned earlier, the disclosed objective of the EU CBAM is to address the risk of carbon leakage, which occurs when companies in certain industrial sectors or subsectors relocate their production to other countries due to costs arising from climate policies, or when imports from these countries replace equivalent products that are less intensive in terms of greenhouse gas emissions.⁶¹ In other words, the EU CBAM seeks to equalize the production costs of third countries with those of the EU to prevent: (i) the outflow of investments from the EU territory, or (ii) the importation of goods and services at lower prices than the European ones.

In this context, the methodology to be used could be summarized in two of the preambular paragraphs:

- i) The CBAM must ensure that imported products are subject to a regulatory regime that *applies carbon costs equivalent* to those borne under the EU ETS, *resulting in an equivalent carbon price* between imported and domestic products.⁶²
- ii) The CBAM must *reasonably reflect* the price of EU greenhouse gas emission allowances as established by Directive 2003/87/EC of the European Parliament and of the Council.⁶³

While recognizing that WTO rules allow Members to assess whether the price of a good reasonably reflects the cost associated with the production and sale, such as in the case that the EU CBAM seeks to address, the WTO has also established that this situation must be handled through an administrative procedure in accordance with the Anti-Dumping Agreement. Notably, one of the elements of that procedure relates to the execution of an objective investigation to determine if prices reflect their normal value in the country of origin (rather than unilaterally allocating a third country cost associated with a product or replacing it by using a national or international reference price).

In this context, without assessing its legal nature but considering the purpose and effects of the EU CBAM, we believe there are sufficient grounds to evaluate it under the Anti-Dumping Agreement. In particular, such an analysis is highly useful as a theoretical and legal framework for examining its design. It should be noted that this article only explores some relevant features of the EU CBAM through the lens of the Anti-Dumping Agreement and precedents, without attempting to provide a full picture of such exploration.

Having this in mind, in this section, we zoom in into two issues: (i) the difference between two related but substantially distinct concepts: ‘*price*’ and ‘*costs*’, and (ii) the entitlement of a national authority to replace the production costs of a given country with national or international prices of another, according to the precedents of the WTO.

⁵⁹ We understand the concept of ‘measures of equivalent effect’ based on the interpretation made by the Court of Justice of the European Union did in Case 8/74 Procureur du Roi v Dassonville et al [1974] ECR 837, 852: ‘All trading rules enacted by a States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent (...).’ See LW Gormley, ‘The Definition of Measures Having Equivalent Effect’ in A Arnall, P Eeckhout & T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford 2008; online edn, Oxford Academic, 1 Jan 2009) <<https://doi.org/10.1093/acprof:oso/9780199219032.003.0011>> accessed 17 July 2024.

⁶⁰ For an overview of the debate on the legal nature of CBAMs, see K Holzer, ‘Emissions Trading and WTO Law’ in SE Weishaar (ed.) *Research Handbook on Emissions Trading* (Edward Elgar Publishing 2016).

⁶¹ EU CBAM para 9.

⁶² *ibid* para 15, *emphasis added*.

⁶³ *ibid* para 23, *emphasis added*.

3.2.1 *The difference between price and costs*

Conceptually, according to the ordinary meaning of terms, ‘price’ generally refers to the amount of money that is paid or received for a good or service in a transaction, while ‘costs’ refers to the expenses actually incurred by the producer or the exporter of a certain product.

While prices can be a national or international construction depending on a wide range of objective and subjective variables, the costs associated with the production and sale of a product are those actually incurred by a producer or/and an exporter and are related to national circumstances, including the availability of an input, including natural resources, its quality and marketability, the distance from the country of origin of an input to the production site, or the methods effectively applied to produce, conserve or transport a certain good. In this specific case, we observe that through the CBAM, the EU provides for the replacement or the addition of a cost of production or sale associated with a product produced in a third country by using the price that would be paid by communitarian producers within the EU territory. It is paradoxical that paragraph 23 of the preamble of the European regulation replicates the language of Article 2.2.1.1 of the Anti-Dumping Agreement when it uses the expression ‘reasonably reflect’ the price/cost of carbon determined within the EU.

3.2.2 The substitution of ‘effectively incurred’ costs with ‘reasonable’ prices

The second issue to address is whether the European authority is empowered to replace or directly add a cost of production to a good produced in a third country with the EU’s own prices. In the context of the WTO Dispute Settlement System, two cases addressed the distinction between prices and costs and the entitlement of national authorities to substitute particular costs with general prices. These cases were *European Union—Biodiesel* (DS473) and *Ukraine—Ammonium Nitrate* (DS 493).

In the first case, during the proceedings, Argentina and the EU discussed whether company records should reflect the costs actually incurred by producers or exporters or whether these records should reflect international prices.

In Argentina’s view, the test under Article 2.2.1.1 of the Anti-Dumping Agreement focuses on the records kept by the producer/exporter, and therefore the ‘costs associated with the production and sale’ are necessarily the costs of that specific producer/exporter. This further flows from the fact that the test refers to the ‘costs associated with the production and sale of the product under consideration’. According to Argentina, instead of calculating the cost of production on the basis of the records of the exporting producers, the EU decided to base the cost of soybeans on an average of the FOB reference price published by the Ministry of Agriculture of soybeans net of fobbing costs. Since the producers under investigation did not pay the reference FOB price minus fobbing costs for soybeans but instead paid the actual amounts reflected in their records, Argentina submitted that the price of soybeans used by the EU to calculate the cost of production was not a price that was associated with the production and sale of the like product.⁶⁴

In response, the EU submitted that Argentina’s claim was based on the assumption that the terms ‘associated with the production and sale’ in Article 2.2.1.1 should be given the meaning ‘prices actually paid by the companies under investigation’. In the EU’s view, however, the term ‘associated’ had a broader meaning than the words ‘actually incurred’ or ‘actually paid’.⁶⁵

The EU submitted that its understanding in this regard was reinforced by the fact that Article 2.2.1.1 mentions the costs associated ‘with the production’, as opposed to the costs incurred by the ‘producer’. The EU noted the *EC—Salmon (Norway)* panel’s finding that the ‘costs of production’ should be understood as the prices to be paid ‘for the act of producing’. For the EU, the use of the terms ‘production’ and ‘act of producing’, instead of the term ‘producer’, showed that Article 2.2.1.1 does not require the costs to have been actually paid by the specific producers that are subject to the investigation. The EU also argued that the context afforded by Article 2.2.2 of

⁶⁴ See *U—Biodiesel (Argentina) (Panel Report)* WT/DS473/R (adopted 26 October 2016), para 7.262

⁶⁵ *ibid* paras 7.263–7.264.

the Anti-Dumping Agreement, which uses the phrase ‘shall be based on actual data pertaining to production and sales in the ordinary course of trade’, can be contrasted with Article 2.2.1.1, which uses the phrase ‘reasonably reflect the costs associated with the production and sale’.

In that case, the Appellate Body concluded that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement—that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration—relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those *costs incurred* by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.⁶⁶ The Appellate Body emphasized that the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more ‘reasonable’ than the costs actually incurred.⁶⁷

In this connection, based on the context provided by Article 2.2 of the Anti-Dumping Agreement, the Appellate Body understood that the second condition ‘should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin’. In *Ukraine—Ammonium Nitrate (DS 493)*, the Appellate Body reiterated its view that there is no standard of ‘reasonableness’ under the second condition in the first sentence of Article 2.2.1.1 that governs the meaning of costs itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally.⁶⁸

In conclusion, this section has developed that *prima facie*, the EU’s decision to replace or add costs associated with the production and sale of a product produced in a third country, by using an internal EU price as a reasonable reference, implies equivalent effects to the imposition of an anti-dumping duty. In this context, such measures are to be examined under the provisions of the WTO Anti-Dumping Agreement and the relevant precedents related to it, particularly those regarding to the distinction between ‘price’ and ‘costs’, as well as the inability of national authorities to unilaterally adjust third countries’ production and sale costs based on their own national or international reference prices.

4. CONCLUSIONS

In this article, we have explored the multifaceted nature of CBAMs within the larger framework of the commodification of CO₂. This exploration involved an examination of the historical evolution of carbon commodification and the new turn that CBAMs constitute in such process.

Our analysis indicates that CBAMs are not just regulatory tools aimed at preventing carbon leakage and promoting fair competition; they are integral components of a broader movement towards establishing a standardized international CO₂ price. This movement has significant legal and economic implications for global trade and environmental policies, particularly concerning the CBDR-RC principle and the implementation of the WTO Antidumping Agreement, considering the interpretation of the scope and extent of the anti-dumping rules made by the WTO Dispute Settlement Body.

From an environmental perspective, the implementation of a unilateral carbon price, as proposed, risks undermining the equity and fairness that are central to multilateral environmental cooperation, including climate action. Any attempt to address carbon pricing should acknowledge different national circumstances and historical contributions to environmental degradation,

⁶⁶ See *EU—Biodiesel (Argentina) (Appellate Body Report) WT/DS473/AB/R* (adopted 26 October 2016) para. 7.2.

⁶⁷ See Panel Report, *EU—Biodiesel (Argentina)*, para. 7.242. See also Appellate Body Report, *EU—Biodiesel (Argentina)* para. 6.56.

⁶⁸ See Appellate Body Report, *Ukraine—Anti-Dumping Measures on Ammonium Nitrate (Ukraine—Ammonium Nitrate) WT/DS493/AB/R* (adopted 12 September 2019), para. 6.88., Panel Report, *European Union—Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia — (Second complaint) WT/DS494/R* (circulated 24 July 2020) paras. 7.95–7.96.

particularly for developing countries, in line with the CBDR-RC principle, a legally binding fundamental principle of international environmental law.

Furthermore, from a commercial approach, the allocation of a unilateral carbon price as a third country products' cost not only can create trade frictions but also challenge the CBAMs WTO consistency. We are of the view that any mechanism should recognize the difference between prices and costs to make clear that, based on each country's particular economic structure, it is both legal and legitimate to have lower costs for producing certain goods that cannot be equalized on a common international reference price or by the exportation of a national price as a benchmark.

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