

# The EU Volunteered to Lead the Vanguard in the Fight Against Climate Change, but Will the WTO Let It?

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## INTRODUCTION

As the Earth rapidly approaches a tipping point in the fight against climate change, governments are scrambling to create cost-effective and efficient climate-change-fighting policies that may be implemented without violating World Trade Organization (“WTO”) obligations. Of all the governing bodies in the world, the European Union (“EU”) has created the most cost-effective and efficient climate-change-fighting policy, thus volunteering to stand in the vanguard and lead the way forward in the fight against climate change: the EU’s Emissions Trading System (“ETS”) as its shield and its Carbon Border Adjustment Mechanism (“CBAM”) as its sword.

The ETS has long been the EU’s shield to guard the environment against the EU’s own climate change contributing activities—namely carbon emissions. The ETS accomplishes this by requiring that domestic producers include the cost the environment incurs from their carbon emissions into the final price of their product. The success of the EU’s ETS as a shield has been criticized by environmentalists for not being expansive enough—not eliminating the EU’s climate change contributions—nor having an “offensive” capacity to reduce climate change contributions from other States. In response to these criticisms and the looming threat of climate change, the EU forged its CBAM to act as its sword. If implemented, the CBAM will require foreign importers to also include the cost the environment incurs from their carbon emissions into the final price of their product. In this manner, the CBAM acts as a sword to slash carbon emissions originating from within and outside the EU. Despite the CBAM’s promising climate-change-fighting capabilities coupled with the urgency and threat of climate change, the CBAM may be knocked out of the fight by the World Trade Organization before it can demonstrate its merit.

The WTO may side with CBAM critics that argue the European Union’s CBAM is merely a protectionist ruse to disguise a tax that discriminates in favor of domestic producers, favoring imports from certain countries over others. If critics are correct, the CBAM is a clear violation of the most favored nation

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clause under Article I of the General Agreement on Tariffs and Trade (“GATT”). Yet, this Note argues that the CBAM will remain in the fight against climate change because the CBAM is a charge equivalent to an internal tax imposed on like domestic products in accordance Article II.2 and Article III.2 of the GATT. Even if the CBAM is inconsistent with any substantive GATT provision, such inconsistency is permissible under Article XX of the GATT.

This Note also considers the role legal ethics may play in the fight against climate change. Because of the existential threat climate change poses to the lives and wellbeing of all life on this planet, can and should legal ethics play a role in ensuring carbon price measures like CBAM are successfully implemented? While this Note finds that legal ethics should not play a role, such a possibility may arise as climate change’s harmful effects become ever more visceral.

Ultimately, whether States are prepared for the fight against climate change or not, the fight is here, and the threat is existential. Because of the real dangers of climate change, the WTO should interpret the GATT broadly to find that the CBAM is in accordance with the substantive provisions of the GATT or that the CBAM is permissible under the Article XX exception(s). States must also carefully craft policies to combat climate change to prevent the need for legal ethics to play a role in implementing such policy measures. The CBAM is the first of its kind, and its success or failure will influence other States that are considering implementing a CBAM or a similar program.

Section I of this Note provides the legislative history of the EU’s climate change policy from 1992 to 2021 and the economic policy arguments that support a CBAM. Section II argues that the CBAM is consistent with Article II.2 and III.2 of the GATT. Section III considers that even if the CBAM is not in accordance with the GATT, the CBAM may still survive under Article XX of the GATT. Section IV discusses what role legal ethics may play in the enforcement of carbon price measures.

## I. THE LEGISLATIVE HISTORY OF CBAM AND ECONOMIC POLICY ARGUMENTS IN FAVOR OF CBAM

### A. THE CBAM AS THE EU’S “NEWEST” LEGAL INSTRUMENT TO COMBAT CLIMATE CHANGE

The CBAM presented in the EU’s “Fit for 55” package<sup>1</sup> is a product resulting from over thirty years of policy measures intended to combat climate change.<sup>2</sup> The EU proposed a “carbon tax” in 1992 after the Intergovernmental Panel on Climate Change (“IPCC”) first issued its climate change report.<sup>3</sup> The IPCC’s

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1. Commission Communication 2021 O.J. (L. 550) 6 [hereinafter Fit for 55].

2. Andreas Prahl & Elena Hofmann, *European Climate Policy - History and State of Play*, CLIMATE POL’Y INFO HUB (Nov. 14, 2014), <https://climatepolicyinfohub.eu/euro-pean-climate-policy-history-and-state-play> [<https://perma.cc/H47M-3A4B>].

3. *Id.*

1990 report confidently indicated that human activity, primarily greenhouse gas (“GHG”) emissions,<sup>4</sup> were causing a rise in global temperatures.<sup>5</sup> According to the 1990 report, a rise in global temperatures causes harm to human health, places a great burden on developing countries, increases the likelihood of severe weather events, and disrupts trade.<sup>6</sup> In light of these dangers, the EU committed to maintaining its GHG emissions at 1990 levels by 2000<sup>7</sup> and considered imposing a carbon tax and energy tax in 1992 to meet this goal.<sup>8</sup> The carbon tax initiative failed because neither the EU Council nor the Member States (“MS”) could devise an actionable plan for implementing the tax.<sup>9</sup> However, the EU successfully implemented several legal instruments to reduce its GHG emissions: the 1991 Specific Actions for Vigorous Energy Efficiency,<sup>10</sup> the 1993 Altener Programme,<sup>11</sup> the 1993 GHG Emissions Monitoring Mechanism,<sup>12</sup> the 1999 Landfill Directive to reduce methane,<sup>13</sup> the 2000 European Climate Change Programme,<sup>14</sup> the 2001 promotion of renewable energy powered

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4. According to the IPCC Report, greenhouse gases include carbon dioxide, methane, chlorofluorocarbons, and nitrous oxide. *Intergovernmental Panel on Climate Change, Climate Change: the 1990 and 1992 IPCC 63 (1992)*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, [https://www.ipcc.ch/site/assets/uploads/2018/05/ipcc\\_90\\_92\\_assessments\\_far\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/05/ipcc_90_92_assessments_far_full_report.pdf) [<https://perma.cc/D3QA-ZJUJ>] [hereinafter 1992 IPCC Report].

5. 1992 IPCC Report, *supra* note 4, at 63.

6. *Id.* at 87–90.

7. Prahll & Hofmann, *supra* note 2.

8. *Id.*

9. Sebastian Oberthür & Marc Pallemmaerts, *The EU's Internal and External Climate Policies: An Historical Overview*, THE NEW CLIMATE POLICIES IN THE EUROPEAN UNION, 2010, at 31.

10. The Specific Actions for Vigorous Energy Efficiency (“SAVE”) sought to pro-mote energy efficiency throughout the Community to contribute to the Community’s environmental objectives, improve fund allocation, and further the realization of the internal market through: technical measures to monitor the performance of equipment, financial instruments to create incentives to support the technical measures, further measures to influence consumer behavior, and associating third countries with actions undertaken under SAVE. Commission Communication 1992 O.J. (L. 23), <https://op.europa.eu/en/publication-detail/-/publication/1a5952cc-3ce9-4407-9711-a32334c00dfc> [<https://perma.cc/TPV7-Y8KA>].

11. The Altener Programme required Community Member States to contribute to the limitation of carbon dioxide emissions via energy policies by financing actions on renewable energy sources including studies and technical evaluation to define technical standards and specifications; extending or creating renewable energy infrastructures; creation of an information network; and methods to assess technical feasibility, economic advantages, and the environment that is exploited for biomass (e.g., heat and electricity production). Council Decision 1993 O.J. (L. 235) 1–2, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51992AC1314&from=EN> [<https://perma.cc/5N3R-5PRB>].

12. The GHG Emissions Monitoring Mechanism sought to limit passenger car carbon dioxide emissions from 180g of carbon dioxide per kilometer (average level in 1995) to 120 g of CO<sub>2</sub>/km by 2005. After negotiations with automotive manufacturers, an agreement was reached to limit average emissions from newly registered cars to 140g CO<sub>2</sub>/km by 2010 on technological developments. Oberthür & Pallemmaerts, *supra* note 9, at 32.

13. The Landfill Directive sought to create “stringent” operational and technical requirements related to the whole life cycle of the landfill to prevent pollution and negative effects on the global environment. Council Directive 1993 O.J. (L. 182), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0031&from=EN> [<https://perma.cc/YQ5Z-RFTW>].

14. The European Climate Action Programme sought to identify the most environmentally- and cost-effective policies and measures to meet its target under the Kyoto Protocol for reducing greenhouse gas emissions at the European level. *European Climate Change Programme*, EUROPEAN COMM’N, [https://ec.europa.eu/clima/en-action/european-climate-change-programme\\_en](https://ec.europa.eu/clima/en-action/european-climate-change-programme_en) [<https://perma.cc/64LZ-YR5S>] (last visited Jan. 10, 2022).

electricity,<sup>15</sup> the 2003 Emissions Trading System (“ETS”),<sup>16</sup> the 2008 Climate and Energy Package,<sup>17</sup> the 2012 Energy Efficiency Directive,<sup>18</sup> and the 2015 Paris Agreement.<sup>19</sup> This twenty-year string of successful policy and regulatory mechanisms demonstrates the EU’s steadfast commitment to reducing its GHG emissions to minimize its contribution to global rising temperatures. However, for the EU, minimizing its contributions to climate change is insufficient. As of December 2019, the EU’s goal shifted from minimizing its contribution to climate change to *eliminating* its contribution.<sup>20</sup> To accomplish this goal, the EU turned to one of its oldest policy proposals to combat climate change—implementing a carbon tax.<sup>21</sup>

The Union successfully (re)proposed implementing a CBAM<sup>22</sup> in December 2019 as an instrument to combat climate change in its Green New Deal.<sup>23</sup> The

15. This directive sought to promote and create a foundation for a future Community framework regarding the contribution of renewable energy sources to electricity production in the internal market. European Parliament and Council Directive 2001 O.J. (L. 238), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0077&from=en> [<https://perma.cc/63K9-4BFF>] [hereinafter Directive 238].

16. The ETS was created to combat climate change via reducing greenhouse gas emissions in a cost-effective manner; it was and continues to be the largest carbon market. *EU Emissions Trading System*, EUROPEAN COMM’N, [https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets\\_en](https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en) [<https://perma.cc/7KGD-JJBY>] (last visited Jan. 10, 2022) [hereinafter EU ETS].

17. The 2008 Climate Energy Package aimed to reduce greenhouse gas emissions by 20%, for renewable energy sources to meet 20% of final energy consumption, and to raise energy efficiency by 20%, all with the possibility of committing to 30% reductions. *Climate change: Commission welcomes final energy adoption of Europe’s climate and energy package*, EUROPEAN COMM’N, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_08\\_1998](https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1998) [<https://perma.cc/9epz-azgf>] (last visited Jan. 23, 2022).

18. The EU sought to promote reductions of greenhouse gas emission by creating a system for greenhouse gas emissions allowance trading under the ETS and expanding the scope of the ETS to include emissions from more sources. European Parliament and Council Directive 2003 O.J. (L. 275), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0087&from=EN> [<https://perma.cc/4Z7D-9M9N>]; European Parliament and Council Directive 2004 O.J. (L. 338), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0027&from=EN> [<https://perma.cc/QC8E-S4WH>].

19. Under the Paris Agreement, the Union committed to reducing its GHG emissions by 40% of 1990 GHG emission levels by 2030 as part of its nationally determined contribution. *Paris Agreement*, EUROPEAN COMM’N, [https://ec.europa.eu/clima/eu-action/international-action-climate-change/climate-negotiations/paris-agreement\\_en](https://ec.europa.eu/clima/eu-action/international-action-climate-change/climate-negotiations/paris-agreement_en) [<https://perma.cc/H96T-6D8P>] (last visited Jan. 10, 2022).

20. Commission Communication 2019 O.J. (L. 640), [https://eur-lex.europa.eu/re-source.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC\\_1&for-mat=PDF](https://eur-lex.europa.eu/re-source.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&for-mat=PDF) [<https://perma.cc/CM65-3PLQ>] [hereinafter Communication 640].

21. European Parliament and Council Regulation 2021 O.J. (L. 243), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1119&from=en> [<https://perma.cc/H599-JKBH>] [hereinafter Regulation 243].

22. For the purposes of this Note, a carbon tax and CBAM will be used interchangeably as both are equally effective policy measures to combat climate change. Noah Kaufman, *Carbon Tax vs. Cap-and-Trade: What’s Better Policy to Cut Emissions?*, WORLD RES. INST. (March 1, 2016), <https://www.wri.org/insights/carbon-tax-vs-cap-and-trade-whats-better-policy-cut-emissions#:~:text=A%20carbon%20tax%20directly%20establishes,emissions%20%E2%80%9Callowances%E2%80%9D%20each%20year> [<https://perma.cc/9YFT-FTTE>].

23. Commission Communication 2021 O.J. (L. 252), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0252&from=EN> [<https://perma.cc/Z8VX-E2L8>]; *2050 long-term strategy*, EUROPEAN COMM’N, [https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy\\_en](https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy_en) [<https://perma.cc/57HS-BTUD>] (last visited Jan. 10, 2022).

EU's Green New Deal ambitiously presented the EU's goal of reducing its GHG emissions by 55% by 2030 and its goal of reaching climate neutrality by 2050.<sup>24</sup> In July 2021, the EU enshrined these goals into law through the European Climate Law.<sup>25</sup> The European Climate Law is profound as the EU now, unlike in 1992, possesses a strong legal argument as to why a CBAM must be enforced via EU law.<sup>26</sup>

The EU's legislative history along with the EU's goals for fighting climate change strongly supports the argument that the CBAM is a genuine climate-change-fighting policy measure.

#### B. THE EU'S CBAM AS ITS MOST COST-EFFECTIVE AND EFFICIENT INSTRUMENT TO COMBAT CLIMATE CHANGE

Most economists around the globe<sup>27</sup> argue that implementing a carbon pricing measure is the most cost-effective means of reducing carbon emissions at the scale and speed necessary to combat climate change, further supporting that the CBAM is not a protectionist policy measure.<sup>28</sup> According to climate scientists, reducing carbon emissions is vital because carbon dioxide ("CO<sub>2</sub>") is the principal GHG emitted from human activities and thus the principal GHG contributing

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24. Communication 640, *supra* note 20, at 2.11.

25. Regulation 243, *supra* note 21.

26. The European Commission adopted the proposal for its CBAM and is now waiting for the European Parliament and European Council's approval so it may become law. Robert Schütze, AN INTRODUCTION TO EUROPEAN LAW 40 (3d ed. 2020).

27. The largest public statement of economists in history in support of a carbon tax is currently the 2019 Economists' Statement on Carbon Dividends supported by: 3,623 U.S. economists, 4 Former Chairs of the U.S. Federal Reserve, 28 Nobel Laureates, and 15 Former Chairs of the Council of Economic Advisers. Though the 2019 Statement is primarily made by U.S. economists to persuade the U.S. government to adopt and implement a carbon tax, the 2019 Statement is applicable to most governments as the benefits of mitigating climate change—along with the dangers of failing to do so—are not constrained by national borders. Economists who do not support a carbon tax are in the minority. *Economists' Statement on Carbon Dividends*, CLIMATE LEADERSHIP COUNCIL (Jan. 17, 2019) [hereinafter 2019 Economists' Statement].

28. 2019 Economists' Statement, *supra* note 27; *The world urgently needs to expand its use of carbon prices but doing so could provoke a trade war*, THE ECONOMIST (May 23, 2020), <https://www.economist.com/briefing/2020/05/23/the-world-urgently-needs-to-expand-its-use-of-carbon-prices> [<https://perma.cc/R2KD-5TLB>]; Michael Baltensperger & Bruegel, *The Economists' Statement on Carbon Dividends and the Green New Deal* (Feb. 25, 2019), <https://www.bruegel.org/2019/02/the-economists-statement-on-carbon-dividends-and-the-green-new-deal/> [<https://perma.cc/5V4A-N57A>]; Howard Gleckman, *Economists Love Carbon Taxes. Voters Don't.*, FORBES (Dec. 27, 2018), <https://www.forbes.com/sites/howardgleckman/2018/12/27/economists-love-carbon-taxes-voters-dont/?sh=55cb14d4338d> [<https://perma.cc/S4PA-QZAE>]; *Economists*, CARBON TAX CTR., <https://www.carbontax.org/economists/> [<https://perma.cc/YZ83-5CSR>] (last visited Jan. 10, 2022); David Roberts, *The political hurdles facing a carbon tax and how to overcome them*, VOX (Apr. 26, 2016), <https://www.vox.com/2016/4/26/11470804/carbon-tax-political-constraints> [<https://perma.cc/W739-PZFH>]; Gregory Mankiw, *One Answer to Global Warming: A New Tax*, N.Y. TIMES (Sept. 16, 2007), <https://www.nytimes.com/2007/09/16/business/16view.html> [<https://perma.cc/R95L-42DG>]; Kyle Pomerleau & Elke Asen, *Carbon Tax and Revenue Recycling: Revenue, Economic, and Distributional Implications*, TAX FOUND. (Nov. 6, 2019), <https://taxfoundation.org/carbon-tax/> [<https://perma.cc/8BY9-NFS7>].

to climate change.<sup>29</sup> Reducing carbon emissions reduces the concentration of CO<sub>2</sub> in the atmosphere, which retards and mitigates the harmful effects of climate change.<sup>30</sup> In addition to economists, scientists,<sup>31</sup> over 1,000 businesses,<sup>32</sup> and nearly 100 countries all support a carbon pricing measure.<sup>33</sup> Carbon pricing measures like a carbon tax or a carbon cap-and-trade system, such as the EU's ETS, function similarly to reduce GHG emissions. The difference between the two is that a carbon tax places a direct charge on companies for every tonne of carbon emissions produced, while a cap-and-trade system sets a cap on companies' carbon emissions that is lowered over time.<sup>34</sup> Despite the benefits a carbon tax or cap-and-trade system may provide, neither may be fully implemented at the scale and speed necessary to combat climate change without taxing *imported* products. Consequently, a CBAM is crucial and essential for three reasons.

First, CBAM ensures that domestic producers do not incur a competitive disadvantage from paying a domestic carbon tax while foreign producers gain a competitive advantage from entering a carbon regulated market without having included the cost of their carbon emissions in the final price of their product.<sup>35</sup> For example, the EU presently prevents competitive (dis)advantages under its ETS by providing ETS-regulated EU producers with free allowances.<sup>36</sup> Free allowances enable EU producers to account for the cost per unit of carbon emissions emitted during the creation of their products without including the full price of such emissions in their products—the difference in price permitted by free

29. John Reilly & Henry Jacoby, *Multi-Gas Contributors to Global Climate Change*, PEW CTR. ON GLOB. CLIMATE CHANGE (Feb. 2003), <https://www.c2es.org/document/multi-gas-contributors-to-global-climate-change/> [<https://perma.cc/STW5-QQDY>].

30. *Impose a Tax on Emissions of Greenhouse Gases*, CONG. BUDGET OFF., Dec. 13, 2018, <https://www.cbo.gov/budget-options/54821> [<https://perma.cc/6BVE-VEGR>]; *Car-bon Tax*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/carbon-tax-basics/> [<https://perma.cc/DN55-M55C>] (last visited Jan. 10, 2022); Aimee Dushime, *Ad-dressing climate change through carbon taxes*, WORLD ECON. F. (June 16, 2021), <https://www.weforum.org/agenda/2021/06/addressing-climate-change-through-carbon-taxes/> [<https://perma.cc/8226-LTZS>].

31. *Scientists issue carbon price call to curb climate change*, PHYS.ORG (July 10, 2015), <https://phys.org/news/2015-07-scientists-issue-carbon-price-curb.html> [<https://perma.cc/WPY5-6ZL6>].

32. *Carbon Pricing is Expanding: Initiatives Now Valued at Nearly \$50 Billion*, WORLD BANK, May 26, 2015, <https://www.worldbank.org/en/news/feature/2015/05/26/carbon-pricing-initiatives-nearly-50-billion> [<https://perma.cc/6R9H-VZWA>].

33. *73 Countries and over 1,000 Businesses Speak Out in Support of a Price on Car-bon*, WORLD BANK (Sept. 22, 2014), <https://www.worldbank.org/en/news/feature/2014/09/22/governments-businesses-support-carbon-pricing> [<https://perma.cc/HKQ8-MLC6>].

34. Cap-and-trade systems generally operate by having a yearly limit or “cap” on emissions—these are set by governments—which is then divided into allowances and given to companies in a certain industry. Companies in regulated industries are then limited by how much pollution they can emit. Over time, the cap is lowered, which then lowers the amount of carbon emissions companies produce. Kaufman, *supra* note 22; Will Kenton, *Cap and Trade*, INVESTOPEDIA (Dec. 05, 2020), <https://www.investopedia.com/terms/c/cap-and-trade.asp> [<https://perma.cc/HKQ8-MLC6>].

35. Angel Gurría, *Climate Change and Competitiveness*, OECD (April 22, 2010), <https://www.oecd.org/env/cc/climatechangeandcompetitiveness.htm> [<https://perma.cc/Y6Y3-5HFE>].

36. Directive 238, *supra* note 15.

allowances is an externality cost incurred by the environment.<sup>37</sup> With the implementation of a CBAM, the EU could eliminate free allowances because the EU would no longer need free allowances to maintain a level playing field between EU and foreign-produced products.<sup>38</sup> The CBAM holds foreign importers responsible for including their carbon emissions in the final price of their product by requiring foreign importers to purchase a carbon certificate equal to the cost that the importer would have incurred if it produced the same product in the EU subject to the ETS.<sup>39</sup> The cost of production for EU products subject to the ETS is determined by how much carbon allowance producers must spend to create the product.<sup>40</sup> Thus, the carbon cost imported products must include in their final price is based on the cost that an EU-like product incurs through using a company's carbon allowance to offset the GHG emissions from production. Further, to ensure a level playing field, the implementation of CBAM and the elimination of free allowances would share an inverse relationship.<sup>41</sup> As CBAM is gradually implemented, free allowances are accordingly gradually eliminated resulting in domestic and foreign producers equally being responsible for incurring the cost of their carbon emissions.<sup>42</sup> The CBAM, functioning alongside the ETS, thus ensures domestic and foreign producers do not acquire competitive (dis)advantages from the climate-driven necessity of eliminating free allowances.

Second, CBAM prevents carbon leakage, which occurs when domestic producers avoid paying for carbon emissions by moving to a host country that may have no, or less stringent, carbon pricing measures.<sup>43</sup> The result is that domestic carbon emissions are reduced but global emissions either remain the same or increase.<sup>44</sup> For example, if the EU were to eliminate free allowances or aggressively lower the carbon cap of its ETS to meet its climate change goals without a CBAM, domestic producers and manufacturers would seek to evade paying a high price for their carbon emissions by moving outside the EU to a State without

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37. Commission Regulation 2018 O.J. (L. 59); Directive 238, *supra* note 15.

38. Fit for 55, *supra* note 1.

39. The EU's ETS imposes charges on EU-produced products under the cement, iron and steel, aluminum, fertilizer, and electricity sectors. EU ETS, *supra* note 16; *Carbon Border Adjustment Mechanism*, EUROPEAN COMM'N, [https://ec.europa.eu/taxation\\_cus-toms/green-taxation-0/carbon-border-adjustment-mechanism\\_en](https://ec.europa.eu/taxation_cus-toms/green-taxation-0/carbon-border-adjustment-mechanism_en) [<https://perma.cc/6ANV-BUFU>] (last visited Dec. 29, 2022) [hereinafter CBAM].

40. *Emissions cap and allowances*, EUROPEAN COMM'N, [https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/emissions-cap-and-allowances\\_en](https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/emissions-cap-and-allowances_en) [<https://perma.cc/UG5T-FH5L>] (last visited Jan. 13, 2022).

41. Fit for 55, *supra* note 1.

42. Fit for 55, *supra* note 1.

43. *Carbon Leakage*, CARBON MKT. WATCH (Aug. 29, 2014), <https://carbonmar-ketwatch.org/2014/08/29/carbon-leakage/> [<https://perma.cc/BH3H-UZRN>]; Prah & Hofmann, *supra* note 2; Pomerleau & Asen, *supra* note 28; *Carbon Border Adjustment Mech-anism: Questions and Answers*, EUROPEAN COMM'N (July 14, 2021), [https://ec.europa.eu/commission/presscornerdetail/en/qanda\\_21\\_3661](https://ec.europa.eu/commission/presscornerdetail/en/qanda_21_3661) [<https://perma.cc/7GKD-8WEF>] [hereinafter CBAM Q&A].

44. Gurría, *supra* note 35; Prah & Hofmann, *supra* note 2; Pomerleau & Asen, *supra* note 28; CBAM Q&A, *supra* note 43.

a carbon pricing measure.<sup>45</sup> These same producers and manufacturers could then reenter the EU market as a foreign importer and successfully avoid the EU's ETS. Carbon leakage would frustrate the EU's climate policy goals and keep the Earth on a trajectory towards passing the climate change tipping point.<sup>46</sup> Because the CBAM's primary function is to ensure foreign importers include their carbon emissions in the cost of their products, economists strongly support carbon pricing measures like CBAM for their carbon leakage prevention capabilities.<sup>47</sup>

Third, CBAM addresses the "free rider problem." The free rider problem within the climate change context is a phenomenon that occurs when States do not contribute to mitigating the harmful effects of climate change but benefit from the efforts of other States, as the climate is a global commons.<sup>48</sup> The free rider is a problem because States are incentivized to avoid investing in climate change policies as these States will nonetheless benefit from the efforts of other States.<sup>49</sup> Meanwhile, the free rider problem disincentivizes States seeking to invest in climate change policies because of the lack of globally united efforts—why incur the extra costs to fight climate change if no one else will and one's efforts are not sufficient alone?<sup>50</sup> However, CBAM addresses the free rider problem because it requires foreign importers (whether state-owned or privately owned) to take responsibility for their carbon emissions and financially incentivizes them to find less carbon-intensive means of production.<sup>51</sup> Economists thus support CBAM as a solution to overcome the free rider problem.

These three reasons are not an exhaustive list as to why a CBAM is necessary for the successful implementation of a carbon pricing measure, nor why the EU presented its CBAM in Fit for 55. However, these three reasons do strongly support the EU's reasoning for adopting its CBAM and the high likelihood the CBAM will maximize the climate change mitigating benefits of the ETS,<sup>52</sup> reduce its carbon emissions by 55% by 2030,<sup>53</sup> and help the EU reach climate neutrality by 2050.<sup>54</sup>

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45. Fit for 55, *supra* note 1.

46. Fit for 55, *supra* note 1.

47. 2019 Economists' Statement, *supra* note 27.

48. William Nordhaus, *Climate Clubs to Overcome Free Riding*, XXXI ISSUES IN SCI. & TECH. 4 (2015), <https://issues.org/climate-clubs-overcome-free-riding-climate-agreement-policy/#:~:text=Free%2Dridding%20occurs%20when%20a,without%20tak-ing%20proportionate%20domestic%20abatement> [<https://perma.cc/L2DT-6J7Q>].

49. Climate Change 2014 Mitigation of Climate Change, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2014, (2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc\\_wg3\\_ar5\\_full.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_full.pdf) [<https://perma.cc/PXL6-LHYL>].

50. *Id.*

51. *Why Climate Progress is Deadlocked*, CLIMATE LEADERSHIP COUNCIL, <https://clcouncil.org/why-climate-progress-is-deadlocked/#:~:text=The%20Free%20Rider%20Problem,ride%20on%20those%20of%20others> [<https://perma.cc/9CSU-PSR3>] (last visited Jan. 12, 2022).

52. The EU's ETS is the EU's cap-and-trade system. EU ETS, *supra* note 16.

53. Communication 640, *supra* note 20.

54. *Id.*



## II. THE CBAM AND WTO LEGAL CHALLENGES

Though the climate change fighting benefits of the CBAM appear promising, the CBAM may face legal challenges before it is successfully implemented. States like Brazil, South Africa, India, Russia, and China (“BRICS nations”)<sup>55</sup> believe the CBAM violates international trade law and, should the CBAM be adopted, BRICS nations are prepared to file disputes against the CBAM before the WTO.<sup>56</sup>

The primary obligation of all WTO Members is to act consistently with the General Agreement on Tariffs and Trade 1947 and 1994 (“GATT”).<sup>57</sup> A founding principle of the GATT is non-discrimination, evidenced by Article I, Article II, and Article III of the GATT.

*Article I: General Most-Favoured-Nation Treatment* states that “any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

*Article III: National Treatment on Internal Taxation and Regulation* of the GATT prohibits countries from treating imported goods less favorably than domestically produced goods, stating in Article III.1:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.<sup>58</sup>

While Article III.4 states that “[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded

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55. Mathew Gross, *The European Union, the Carbon Border Adjustment Mechanism, and Global Climate Leadership*, HARV. REV. (Nov. 17, 2021), <https://hir.harvard.edu/the-european-union-the-carbon-border-adjustment-mechanism-and-global-climate-leadership/> [<https://perma.cc/U22J-D9C6>].

56. *China says EU's planned carbon border tax violates trade principles*, REUTERS, July 26, 2021, <https://www.reuters.com/business/sustainable-business/china-says-ecs-car-bon-border-tax-is-expanding-climate-issues-trade-2021-07-26/> [<https://perma.cc/6D98-NUHH>]; *Carbon taxes and international trade: What are the key issues?*, PWC (Aug. 2021), <https://www.pwc.com/us/en/services/tax/library/carbon-taxes-and-international-trade-what-are-the-key-issues.html> [<https://perma.cc/4ASD-8QS5>]; Vishwa Mohan, *BASIC nations oppose EU's plan to impose a 'carbon border tax'*, TIMES OF INDIA (Apr. 10, 2021), <https://timesofindia.indiatimes.com/india/basic-nations-oppose-eus-plan-to-im-pose-a-carbon-border-tax/articleshow/81998314.cms> [<https://perma.cc/VMH5-W67Q>].

57. GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Mar-rakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT]; GATT Article XVI.1: “[e]xcept as other-wise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.”

58. GATT, *supra* note 57, at Article III.1.

treatment *no less favourable* than that accorded to like products of national origin.”<sup>59</sup>

With these provisions in mind, critics argue that the CBAM is a protectionist ruse to disguise a tariff that favors imports from certain countries over others and discriminates in favor of domestically-produced products.<sup>60</sup> The best strategy for opponents of the CBAM would be to argue that the CBAM violates most-favored-nation treatment, an Article I violation, and treats imported products differently from “like” domestic products, an Article III violation. Both claims would require EU CBAM opponents to demonstrate that the imported and domestic products are “like products” and that the EU favored like products differently.<sup>61</sup> For the CBAM to survive Article I and Article III challenges, the EU must demonstrate that its CBAM preserves import neutrality and treats imports no less favorably than EU-produced goods.<sup>62</sup>

Despite these challenges, this Note argues the CBAM is consistent with the GATT because Article III of the GATT permits WTO Members to implement internal taxes or charges so long as imported products are not charged in excess of like products.<sup>63</sup> Article II.2 of the GATT further supports the permissibility of a border adjustment by clarifying that permissible internal taxes or charges under Article III do not violate tariff bindings under Article II.1.<sup>64</sup>

Article III.2 states:

[P]roducts of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to *internal taxes* or other internal charges of any kind in excess of those applied, directly or indirectly, to *like* domestic products.<sup>65</sup>

Article II.2 of the GATT states:

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product . . . a charge *equivalent* to an *internal tax* imposed consistently with the provisions of paragraph 2 of Article III in respect of the *like* domestic product . . .<sup>66</sup>

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59. GATT, *supra* note 57, at Article III.4 (emphasis added).

60. GATT, *supra* note 57.

61. Won-Mog Choi & Freya Baetens, *Like Products*, OXFORD PUB. INT’L L. (2020), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1756> [<https://perma.cc/JQ3P-9SCV>].

62. *See* GATT, *supra* note 57, at Article I–III.

63. GATT, *supra* note 57, at Article III.

64. *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*, WORLD TRADE ORG., [http://www.wto.org/english/docs\\_e/legal\\_e/07-2-1-b\\_e.htm](http://www.wto.org/english/docs_e/legal_e/07-2-1-b_e.htm) [<https://perma.cc/XJ2X-6LEP>] (last visited May 6, 2022); “The text of Article II:2, however, indicates that it is simply intended to clarify that the tariff concessions referenced in Article II:1 do not prevent States from imposing certain other types of charges on imported products, including border adjustment of internal taxes...” Matthew C. Porterfield, *Border Adjustment for Carbon Taxes, PPMs, and the WTO*, 4 U. PA. J. INT’L L. 1, 37 (2019), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1994&context=jil> [<https://perma.cc/A92M-QL57>].

65. GATT, *supra* note 57, at Art. III.2 (emphasis added).

66. GATT, *supra* note 57, at Art. II.2 (emphasis added).

The two-part test under Article III.2<sup>67</sup> thus requires the EU to demonstrate its CBAM is an indirect tax on “like products,”<sup>68</sup> and the CBAM does not impose a charge on foreign imports in excess of the charge imposed on domestically produced “like products.”<sup>69</sup> Successfully meeting these two requirements demonstrates the EU violates neither the *principle of most-favored-nation treatment*, as foreign imports are not discriminated against in relation to other foreign imports, nor the *principle of national treatment*, as imports are not discriminated against in relation to domestic goods. These two elements are assessed in the following sections.

#### A. THE CBAM IS AN INDIRECT TAX ON LIKE PRODUCTS

The first part of the two-part test under Article III requires that the CBAM is an internal charge, which may be demonstrated by establishing the CBAM is an *indirect tax* imposed on like products as opposed to a *direct tax*.<sup>70</sup> The strongest argument the EU may raise to support that its CBAM is an indirect tax is by pointing to the plain meaning of an “indirect tax” as defined in the Agreement on Subsidies and Countervailing Measures (“ASCM”).<sup>71</sup> The ASCM defines “indirect tax” as a tax on “sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and *all taxes other than direct taxes* and import charges.”<sup>72</sup> The ASCM defines direct taxes as “taxes on wages, profits, interests, rents, royalties, and all other *forms of income*, and taxes on the ownership of real property.”<sup>73</sup> The ASCM thus supports the proposition that the default tax status for an internal charge is an “indirect tax” unless proven to be a “direct tax” via demonstrating a charge on income or ownership of real property.<sup>74</sup> Though the ASCM is silent regarding whether calculating a CBAM based on inputs<sup>75</sup> is a direct tax, the ASCM does state that taxes on certain inputs are

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67. Irrespective of whether the EU’s CBAM is characterized as falling under Article II as a “customs duty” or Article III as an internal “tax” or “charge,” the CBAM is consistent with both articles and their respective GATT obligations. Jennifer A. Hillman, *Changing Climate for Carbon Taxes: Who’s Afraid of the WTO?*, Climate & Energy Policy Paper Series (July 2013), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=304&context=facpub> [<https://perma.cc/2GAJ-MURE>].

68. GATT, *supra* note 57, at Art. II.2 and III.2; Hillman, *supra* note 67.

69. GATT, *supra* note 57, at Art. II.2 and III.2; Hillman, *supra* note 67.

70. “[T]he WTO’s Agreement on Subsidies and Countervailing Measures (ASCM) defines ‘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.’ GATT (1995, 9 January), Agreement on Subsidies and Countervailing Measures, ADP/W/383, Note by the Secretariat, footnote 58.” Hillman, *supra* note 67, at n.13.

71. Agreement on Subsidies and Countervailing Measures (Apr. 15, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. N. 58 [Not reproduced in I.L.M.] [hereinafter ASCM].

72. *Id.* at n.58 (emphasis added).

73. Hillman, *supra* note 67, at n.14 (citing WTO-UNEP Report (2009), pp. 103) (emphasis added).

74. ASCM, *supra* note 71, at n.58 (emphasis added).

75. Inputs are how the product was created, as these means produce an externality cost the CBAM means to capture (e.g., whether steel was created with an electric arc furnace which does not emit a lot of CO<sub>2</sub> versus a blast furnace that does emit a lot of CO<sub>2</sub>). *Electric Arc Furnace vs. Blast Furnace*, STEEL SUPPLY, L.P. (Sep.

indirect taxes.<sup>76</sup> The CBAM may also belong to the “all other taxes” category under the indirect tax definition.<sup>77</sup> The CBAM being calculated on the cost of carbon emissions equivalent to that of the ETS<sup>78</sup> further suggests that CBAM charges are not a direct tax under the ASCM. The CBAM therefore would most likely overcome the first part of the Article II and Article III test.

#### B. THE EU’S CBAM DOES NOT IMPOSE A CHARGE IN EXCESS OF THAT IMPOSED ON DOMESTIC LIKE PRODUCTS

Once the EU has demonstrated CBAM is an indirect charge, CBAM critics must prove CBAM-regulated products are “like” domestic products.<sup>79</sup> If critics meet this burden, the EU must then demonstrate imported products are not charged in “excess” of domestic like products.<sup>80</sup>

##### 1. OPPONENTS OF THE EU’S CBAM BEAR THE BURDEN OF PROVING PRODUCTS ARE “LIKE”

Conveniently for the EU, it does not need to affirmatively meet the “like” requirement because the burden of proving the products are “like” rests on the party claiming the CBAM violates a substantive GATT provision.<sup>81</sup> Most likely, one of the BRICS nations will bring a claim before the WTO arguing the CBAM violates the most favored nation clause under Article I<sup>82</sup> and/or violates the prohibition of charging imported goods in “excess” of like domestic products under Article III.2.<sup>83</sup> Though the success of the EU meeting the second element of the two-part Article II and Article III test does not turn on whether the products are “like,”<sup>84</sup> the success of the claimant’s case does irrespective of what claim they bring before the WTO. For claimants to meet their burden of proof, claimants

11, 2020), <https://www.steelssupplylp.com/blog/electric-arc-furnace-vs-blast-furnace> [<https://perma.cc/HZ2-K-HPED>]; Hillman, *supra* note 67, at n.16.

76. “Inputs consumed in the production process are 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.” ASCM, *supra* note 71, at n.61.

77. See Hillman, *supra* note 67, at n.16.

78. Fit for 55, *supra* note 1.

79. See Appellate Body Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, ¶ 106, WTO Doc. WT/DS192/AB/R (adopted Nov. 5, 2001); Appellate Body Report, Korea – Taxes On Alcoholic Beverages, WTO Doc. WT/DS75/AB/R (Adopted Feb. 17, 1999); Appellate Body Report, Canada – Certain Measures Concerning Periodicals, Appellate Body, ¶ 473, WTO Doc. WT/DS3/7 (adopted July 1997); Japan – Alcoholic Beverages, Appellate Body, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Japan Alcoholic Beverages*]; Hillman, *supra* note 67.

80. Hillman, *supra* note 67.

81. Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses From India, ¶ 3-4, WTO Doc. WT/DS33/AB/R (adopted May 23, 1997).

82. GATT, *supra* note 57.

83. GATT, *supra* note 57.

84. Porterfield, *supra* note 64, at 37.

must overcome a four-factor<sup>85</sup> test for “like” products. The four-factor test is a demanding test to overcome because, as stated in *Korea – Taxes On Alcoholic Beverages*, the “notion of like products must be construed narrowly.”<sup>86</sup> The four-factor analysis will not be conducted in this Note as the CBAM is not yet implemented.

To make matters more challenging for claimants, the EU may attempt to establish the products are not “like,” which would cut the claimants’ legs out from under them. The EU could establish the products are inherently unlike one another because the process and production methods (PPM) of carbon-intensive versus non-carbon-intensive products render them different products.<sup>87</sup> However, such an argument runs contrary to the “product-based customs methodology enshrined in Article III.”<sup>88</sup> Yet, the Article III product-based customs methodology appears to run contrary to the finding in *United States – Cotton Yarn* where combed cotton yarn was not “like” combed cotton yarn.<sup>89</sup> Because it is unclear what the WTO may find persuasive, the EU may proceed with the argument that PPM renders products inherently unlike one another. For example, the EU could argue that non-carbon intensive produced steel is not like carbon-intensive produced steel because of their PPM despite the steel being indistinguishable in all other regards. While this Note does not explore the argument that different PPM results in products not being “like,” the EU may consider this argument in its final preparations for the implementation of its CBAM.

Thus, while the four-factor test does not weigh in favor of claimants seeking to overcome the burden of proving products are “like,” the PPM argument does not

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85. The four factors of the “like” test are as follows: (1) comparing “the physical properties of the products;” (2) considering “the extent to which the products are capable of serving the same or similar end-uses;” (3) considering “the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand;” and (4) examining “the international classification of the products for tariff purposes.” See *WTO rules and environmental policies: key GATT disciplines*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/en-vir\\_e/envt\\_rules\\_gatt\\_e.htm](https://www.wto.org/english/tratop_e/en-vir_e/envt_rules_gatt_e.htm) [<https://perma.cc/2PBD-38DY>] (last visited Jan. 5, 2022).

86. Appellate Body Report, *Korea – Taxes On Alcoholic Beverages*, ¶ 124, WTO Doc. WT/DS75/AB/R (Adopted Feb. 17, 1999); see, e.g., Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶ 105, 118, WTO Doc. WT/DS192/AB/R.U.S (adopted Nov. 5, 2001) (citing Appellate Body Report, *Japan – Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996)); Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, ¶ 205, 207, WTO Doc. WT/DS396/AB/R (adopted Jan. 20, 2012) (finding that products not found to be like are usually found to be “[d]irectly competitive or substitutable” products that have a high but imperfect degree of substitutability); Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶ 106, WTO Doc. WT/DS192/ AB/R; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, Appellate Body, ¶ 473, WTO Doc. WT/DS3/7 (adopted July 1997).

87. Robert Read, *Process and Production Methods and the Regulation of International Trade*, in: *THE WTO & THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES BETWEEN THE EUROPEAN UNION & THE UNITED STATES* 239, 245 (Ed-ward Elgar ed., 2005).

88. *Id.* at 245.

89. See Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶ 106, WTO Doc. WT/DS192/AB/R (adopted Nov. 5, 2001).

clearly weigh in favor of the EU. If the products are like, then the EU is must proceed to meet the second element of the two-part Article III test.

## 2. IMPORTED PRODUCTS ARE NOT CHARGED IN “EXCESS” OF EU LIKE PRODUCTS

If CBAM opponents successfully argue that imported products regulated by CBAM are “like” EU products, then the EU must prove that CBAM charges on imported like products are not “in excess” of charges applied to like EU products under Article III.2.<sup>90</sup> The EU likely meets this requirement by virtue of how the EU’s ETS presently functions and how the ETS will function alongside a fully implemented CBAM as proposed in Fit for 55.

First, the Article III.2 not “in excess” requirement is met by virtue of how the ETS presently functions because the charge placed upon imported products regulated by CBAM is derived from the EU’s ETS. As a cap-and-trade system, the ETS places a ceiling, or cap, on the quantity of GHG emissions annually emitted within the EU. The ETS ceiling is lowered each year, resulting in a reduction of the GHG emissions produced by the entities in the three ETS-covered sectors.<sup>91</sup> Currently, manufacturers or producers regulated by the ETS may either buy or receive free emissions allowances to use as needed, save for future use, or trade with another regulated entity.<sup>92</sup> Each allowance permits the production of one tonne of CO<sub>2</sub>.<sup>93</sup> The carbon permit price as of mid-November 2021 is over €65/tonne, steadily rising since 2017.<sup>94</sup> The sectors regulated by the ETS that face a domestic tax include the power and heat generation sector, aviation sector, and energy-intensive industrial sectors.<sup>95</sup> The ETS-regulated sectors overlap with those of CBAM as the CBAM covers the cement, iron and steel, aluminum, fertilizer, and electricity sectors.<sup>96</sup> Because the scope of the EU’s ETS is broader than that of CBAM’s narrower scope, all CBAM-regulated imported products find a like ETS-regulated EU product. Furthermore, all imports within the scope of CBAM find their EU-produced like counterpart faces the same charge because the CBAM uses the carbon permit price imposed on EU products to calculate the charge for imported products.

Second, the proposed implementation of CBAM in Fit for 55 precludes EU products from gaining an unfair competitive advantage through free allowances.<sup>97</sup> If the CBAM were implemented without the elimination of free

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90. GATT, *supra* note 57.

91. *Questions and Answers—Emissions Trading—Putting a Price on Carbon*, EUROPEAN COMM’N, [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_3542](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3542) [<https://perma.cc/J6AZ-FSYR>] (last visited Jan. 10, 2022) [hereinafter ETS Q&A].

92. *Id.*

93. CBAM, *supra* note 39.

94. *EU Carbon Permits*, TRADING ECON., <https://tradingeconomics.com/commodity/carbon> [<https://perma.cc/GB4G-JPLR>] (last visited Dec. 21, 2021).

95. ETS Q&A, *supra* note 91.

96. Fit for 55, *supra* note 1, at n.4; ETS Q&A, *supra* note 91.

97. Fit for 55, *supra* note 1, at Article 2.2.1.

allowances, the EU would violate Article III.2. Without eliminating free allowances or scaling them in proportion to the implementation of CBAM, imported products would face an equivalent tax to EU domestic products *de jure* but would *de facto* pay more than EU products—imported products would pay the carbon permit price under CBAM, but domestic products would receive free allowances under the ETS. To overcome this legal issue, the EU's Fit for 55 package presents three solutions: (1) as CBAM is gradually phased in, ETS free allowances will be phased out;<sup>98</sup> (2) foreign producers may limit their CBAM liability if a free allowance is provided to a domestic producer of a like product;<sup>99</sup> and (3) the EU will credit foreign producers for carbon pricing paid in the country of export.<sup>100</sup> Because the EU views itself as a “global climate leader” and hopes other countries implement carbon pricing measures, the EU seeks neither to increase the difficulty foreign producers face in producing low carbon emissions products nor to disincentivize countries from adopting carbon pricing for fear that domestic producers will pay two taxes.<sup>101</sup> By virtue of how the ETS functions independently and alongside the CBAM, the CBAM most likely meets the requirements under III.2.

Though the CBAM is likely consistent with Article III.2 of the GATT, the EU may face a catch-22. By crediting foreign producers for carbon pricing paid in the country of export, the EU may possibly be treating countries differently. Opponents of the CBAM may raise this argument to further their Article I violation argument, especially as only seven countries outside of the EU possess a carbon tax or ETS scheme since September 2021.<sup>102</sup>

For the purposes of the GATT, the differential treatment of even one country is one too many.<sup>103</sup> Should a WTO Member succeed in arguing that the EU violates Article I or Article III, or should the EU fail to meet the embedded two-element test of Article III, the EU will need to pursue an Article XX argument.

### III. THE CBAM IS PERMITTED UNDER AN ARTICLE XX EXCEPTION

Should the CBAM be a GATT inconsistent trade regulation,<sup>104</sup> the EU may seek an exception under Article XX by meeting two elements. The first element

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98. Fit for 55, *supra* note 1, at Article 4; Andrew Hedges, *Carbon Border Adjustments*, NORTON ROSE FULBRIGHT (Aug. 13, 2021), <https://www.projectfinance.law/publications/2021/august/carbon-border-adjustments/> [<https://perma.cc/QZ3S-VVXR>].

99. Fit for 55, *supra* note 1, at Article 4; Hedges, *supra* note 98.

100. Without this CBAM liability reduction, foreign producers in countries with an ETS scheme or carbon tax would be paying two taxes; first the foreign producer pays at home then they pay as they enter the EU. Fit for 55, *supra* note 1, at Article 4; *see also* Hedges, *supra* note 98.

101. CBAM Q&A, *supra* note 43.

102. *What Countries Have a Carbon Tax*, EARTH.ORG (Sept. 10, 2021), <https://earth.org/what-countries-have-a-carbon-tax/> [<https://perma.cc/L4YF-YNTS>].

103. GATT, *supra* note 57, at Article 41; Hillman, *supra* note 67, at 12.

104. The CBAM may not pass the requirements of either Article I, Article II or Article III because the CBAM may be found to (1) target producers opposed to products or favor its own domestic products or (2) discriminate against importers differently based on their country, violating the principle of most-favored nation.

the EU must overcome is demonstrating its CBAM fits an Article XX exception. The second element that must be overcome is meeting the requirements of Article XX's Chapeau.

Regarding the first element, the primary exception the EU should pursue is Article XX(b) and, in the alternative, Article XX(g). Article XX(b) grants an exception if the regulation is "necessary to protect human, animal or plant life or health" and Article XX(g) grants an exception if the regulation conserves an exhaustible natural resource in conjunction with restrictions on domestic production or production. Article XX(g) has been the primary exception WTO Members have sought.<sup>105</sup> However, as the globe is confronted with the ever-nearer dangers of climate change, an Article XX(b) argument may be the best new argument.

Regarding the second element, Article XX's Chapeau is the final barrier WTO Members must overcome to obtain an Article XX exception. The Chapeau aims to ensure all Article XX exceptions sought are made in good faith, meaning that Article XX exceptions protect legitimate interests under the specific Article XX exception claimed.<sup>106</sup>

The next section of this Note will proceed in three parts. Parts one through three will, respectively, assess the requirements necessary for the CBAM to obtain an exception under Article XX(b), Article XX(g), and overcome the Article XX Chapeau requirements.

#### A. ARTICLE XX(B) IS NECESSARY TO PROTECT HUMAN HEALTH AND LIFE

The CBAM must meet two requirements of Article XX(b) to successfully move forward with the Article XX Chapeau analysis. The first requirement is that the CBAM is within the scope of Article XX(b).<sup>107</sup> The second requirement is that the CBAM meets the "necessary" element of Article XX(b).<sup>108</sup> The EU may, and *should*, argue that its CBAM successfully meets the two requirements of Article XX(b) as it is necessary to protect the health and life of humans, animals, and plants. However, the EU should lead and primarily focus on how the CBAM protects human health and life because the EU is not solely seeking to convince

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105. See, e.g., Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US – Shrimp*].

106. GATT, *supra* note 57, at Article XX Chapeau; Hillman, *supra* note 67; Joost Pauwelyn, *Carbon Leakage Measures and Border Tax Adjustments Under WTO Law*, RE-SEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO, March 21, 2012, p. 26, 47 <http://dx.doi.org/10.2139/ssrn.2026879> [<https://perma.cc/6S2X-49X2>]; *WTO Rules and Environmental Policies: GATT Exceptions*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.htm#:~:text=The%20introductory%20clause%20of%20Article,disguised%20restriction%20on%20international%20trade%E2%80%9D](https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm#:~:text=The%20introductory%20clause%20of%20Article,disguised%20restriction%20on%20international%20trade%E2%80%9D) [<https://perma.cc/7RFQ-PY6A>] (last visited Mar. 22, 2022).

107. Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel, DS10/R-37S/200 (Nov. 7, 1990).

108. *Id.*



the WTO; the EU must also convince the international community that a CBAM is not a protectionist mechanism but a true (and the most powerful) measure to combat climate change. As climate change is a divisive topic among all nations,<sup>109</sup> audiences may find the human health and life argument more receptive, rather than the argument that a GATT violation of the size and scale of a CBAM is acceptable to, for example, protect polar bears or Sequoia trees. The remainder of this section will conduct an Article XX(b) analysis arguing CBAM is within the scope of Article XX(b) and is “necessary.”

The CBAM falls within the scope of Article XX(b) because it fundamentally aims to protect the life and health of EU citizens and humans around the globe. The WTO finds that GATT inconsistent trade regulations fall within the scope of Article XX(b) when technical evidence to support that the regulation protects human health and life is provided.<sup>110</sup> In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (“*Thailand – Restrictions*”), the Panel accepted that Thailand’s cigarette import restriction fell within the scope of Article XX(b) to protect human health because Thailand’s regulation was supported by evidence from the World Health Organization (“WHO”) that smoking cigarettes harms human health and is a danger to human life.<sup>111</sup> The EU may argue that, just as Thailand’s cigarette import restriction fell within the scope of Article XX(b) because scientific findings conclude cigarettes harm human health, the CBAM is also within the scope of Article XX(b) because current scientific findings confidently conclude climate change harms human health and life. The WHO has already recognized that climate change has detrimental effects on human health and will cause approximately 250,000 deaths between 2030 and 2050 if “business as usual” persists.<sup>112</sup> Further scientific findings from the 2021 IPCC confidently determine that climate change poses a present-day existential threat to human health and life.<sup>113</sup> Present illustrations of the dangers of climate change include extreme floods in Europe responsible for 125 deaths and 1,300

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109. Shola Lawal, *The World Needs to Quit Oil and Gas. Africa Has an Idea: Rich Countries First*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/09/climate/africa-fossil-fuel-gas-cop26.html> [<https://perma.cc/V98F-W6BE>]; Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/climate-deniers-117th-congress/> [<https://perma.cc/8HGE-4PP8>] (elected officials in US still do not believe in climate change).

110. Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, WTO Doc. WT/DS10/R-37S/200 (adopted Nov. 7, 1990).

111. *Id.*

112. Climate Change 2014 Mitigation of Climate Change, *supra* note 49; *Climate Change and Health*, WORLD HEALTH ORG., Oct. 30, 2021, <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> [<https://perma.cc/XC5M-54HJ>].

113. *Climate Change 2021: The Physical Science Basis*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Aug. 7, 2021 [hereinafter 2021 IPCC Report].

missing persons.<sup>114</sup> Because of the strong connection between climate change and extreme weather events within the EU,<sup>115</sup> the EU may confidently argue it adopted CBAM to protect the health and lives of EU citizens by mitigating and reducing the dangers of extreme weather events by reducing EU carbon emissions. The climate change mitigating benefits of the CBAM extend beyond the EU's borders, providing further support that the CBAM protects the health of EU citizens within the EU, EU citizens abroad, and human health around the globe generally. The EU likely is within the scope of Article XX(b), but meeting the “necessary” requirement will pose a greater challenge.

Whether a GATT inconsistent trade regulation is “necessary” depends on whether such inconsistent regulation is “unavoidable.”<sup>116</sup> In other words, an unavoidable regulation arises when there are no alternative options or alternative options are less GATT inconsistent. Demonstrating a GATT inconsistent regulation is “unavoidable” is a demanding element to meet and is only made more challenging because of the WTO Panel's creativity in providing viable alternative options.<sup>117</sup> In *Thailand – Restrictions*, the Panel found Thailand's cigarette import restriction was not “necessary” to protect human health because Thailand could comply with the GATT by banning all cigarette advertisements, or Thailand could adopt a nondiscriminatory regulation requiring complete disclosure of ingredients along with a ban on unhealthy substances.<sup>118</sup> Though the United States argued that banning cigarette advertisements vastly increases the difficulty for foreign tobacco industries to sell cigarettes in the country, the Panel found such GATT inconsistency was unavoidable and therefore necessary.<sup>119</sup>

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114. Henry Fountain, *Climate Change Contributed to Europe's Deadly Floods, Scientists Find*, N.Y. TIMES (Sep. 24, 2021), <https://www.nytimes.com/2021/08/23/climate/germany-floods-climate-change.html> [<https://perma.cc/K5HY-TQF4>]; *Europe Flooding Deaths Pass 125, and Scientists See Fingerprints of Climate Change*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/live/2021/07/16/world/europe-flooding-germany> [<https://perma.cc/RN3H-RZYT>]; see also Danielle Venton, *California Wildfires Killed 106 People Two Years Ago. Researchers Say the Smoke Killed 3,652*, KQED, Dec. 11, 2020, <https://www.kqed.org/science/1971666/california-wildfires-killed-106-people-two-years-ago-researchers-say-the-smoke-killed-3652#:~:text=According%20to%20official%20numbers%2C%20the%202018%20California%20wildfires%20caused%20106%20deaths.&text=Researchers%20from%20UC%20Irvine%20and,thousands%20of%20additional%20deaths%3A%203%2C652> [<https://perma.cc/US5C-V5RK>] (finding that extreme weather events abroad like wildfires in California are responsible for 106 confirmed deaths and 3,652 non-confirmed deaths likely resulting from the harmful air pollution of the fires).

115. When a dispute regarding the consistency of the CBAM under the GATT reaches the Panel, the EU will have several more contemporary examples of climate-change-induced extreme weather events.

116. See Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, WTO Doc. WT/DS10/R-37S/200 (adopted Nov. 7, 1990), [https://www.wto.org/english/tratop\\_e/dispu\\_e/gatt\\_e/90cigart.pdf](https://www.wto.org/english/tratop_e/dispu_e/gatt_e/90cigart.pdf) [<https://perma.cc/5XFH-5EQB>].

117. *Id.*

118. *Id.*

119. *Id.*

If the WTO can offer alternative measures to protect human health and life from climate change induced weather events,<sup>120</sup> the WTO may find that the CBAM is not an unavoidable regulation and therefore not necessary to protect human health and life. The EU can also expand its argument beyond extreme weather events to encompass the climate change induced dangers to human health and life from droughts, food- and water-borne illnesses, infectious diseases, and threats to mental health.<sup>121</sup> Such an expansion would in turn challenge the creativity of the WTO Panel as it would be more difficult to find a viable alternative consistent with the GATT.

Should the WTO Panel nonetheless succeed in presenting an option or find CBAM to be unnecessary on different grounds, the EU should argue that time is too scarce in the fight against climate change to pursue alternatives. The EU may reference its long history of climate policies to underscore that adopting and implementing successful climate policies to combat climate change is a time-consuming process that neither the EU nor the globe can afford. For example, it took nearly twenty years for the EU to (re)propose a carbon tax<sup>122</sup> and will take a minimum of four years to implement CBAM.<sup>123</sup> Meeting the “necessary” requirement of Article XX(b) will be a challenge for the EU but with the growing threat of climate change, the EU will be able to present a strong argument regarding the necessity of its CBAM.

If the CBAM is within the scope of Article XX(b) and overcomes the “necessary” element of Article XX(b), the EU may proceed to argue its CBAM meets the requirements of the Chapeau of Article XX. Should the EU fail to meet the requirements of Article XX(b), the EU may argue in the alternative that the CBAM meets the requirements of Article XX(g) as is discussed in the next section.

## B. ARTICLE XX(G) CONSERVING EXHAUSTIVE NATURAL RESOURCES

The CBAM must meet three requirements under Article XX(g): (1) the resource the inconsistent measure intends to conserve is an *exhaustible* resource, (2) the GATT inconsistent measure *conserves* the exhaustible resource, and (3) the GATT inconsistent measure places similar restrictions on domestically produced products.<sup>124</sup>

The EU may argue its CBAM intends to conserve several exhaustible resources—oceans, fresh-water sources, soil, animals, plants, etc.—the most strategic

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120. For example, the WTO could propose that the EU invest in infrastructure to protect its citizens from climate change or invest in better weather monitoring technology to better predict and prepare for extreme weather events.

121. *Climate Effects and Health*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/climateandhealth/effects/default.htm> [<https://perma.cc/4PKD-NKEA>] (last visited Jan. 12, 2022).

122. See Prahll & Hofmann, *supra* note 2.

123. CBAM Q&A, *supra* note 43.

124. See Pauwelyn, *supra* note 106, at 45–47.

of which is for the EU to argue clean air is *the* exhaustible resource the CBAM intends to conserve. The WTO held in *United States – Standards for Reformulated and Conventional Gasoline* that clean air is an exhaustible resource under Article XX(g) because clean air may be rendered unfit for humans, animals, or plants to breathe.<sup>125</sup> Because the EU presently possesses greater scientific evidence that carbon emissions are exhausting clean air than was available to the 1996 IPCC,<sup>126</sup> the EU will likely establish that clean air is an exhaustible natural resource.

Determining whether the CBAM is related to *conserving* the Earth’s clean air requires an examination of the CBAM as a “whole” through a “related to test.”<sup>127</sup> Such an evaluation requires the EU to demonstrate there is a “substantial relationship” between its CBAM and preserving the Earth’s clean air.<sup>128</sup> In previous WTO Appellate Body cases, a “substantial relationship” is demonstrated by illustrating the relationship is “a close and genuine relationship of ends and means.”<sup>129</sup> The EU may persuasively argue the CBAM has a close and genuine relationship to the end goal of preserving clean air because the CBAM was created to assist the EU in eliminating its climate-change-contributing GHG emissions *and* spurring other States to do the same.<sup>130</sup> After this special relationship is established, the EU has met this requirement.

The EU must also demonstrate its CBAM places *similar* restrictions on EU products and imported products. Unlike the “equivalent tax” requirement under Article II and Article III, this element of the Article XX(g) test only requires that imported products and domestic goods face “similar” restrictions.<sup>131</sup> EU domestic products that are “like” CBAM-regulated imported products face more than similar restrictions—the restrictions are equivalent—as the price of the CBAM charge derives directly from the EU ETS charge on domestic products. While it is highly probable the EU meets this requirement, the EU must next overcome the demanding requirements of the Chapeau under Article XX.

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125. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, World Trade Organization, ¶ 21, WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter U.S. – Gasoline Panel Report].

126. Such as the evidence presented in the 2021 IPCC report. 2021 IPCC Report, *supra* note 113, at 132.

127. Pauwelyn, *supra* note 106, at 45 (citing Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (“The chapeau of Article XX makes it clear that it is the ‘measures’ which are to be examined under Article XX(g), and not the legal finding of ‘less favourable treatment.’”)).

128. Pauwelyn, *supra* note 106, at 45.

129. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 136, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

130. Fit for 55, *supra* note 1.

131. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, World Trade Organization, ¶ 21, WTO Doc. WT/DS2/R (adopted May 20, 1996).

### C. ARTICLE XX CHAPEAU

If the CBAM satisfies either the Article XX(b) or Article XX(g) GATT exceptions, the CBAM must then overcome the Chapeau requirements of Article XX to obtain an exception for CBAM related GATT inconsistencies.<sup>132</sup> The Chapeau exists to block arbitrary *or* unjustifiable GATT inconsistent regulations and regulations that discriminate against the rights of WTO Members.<sup>133</sup> Previous WTO Appellate Body precedent has considered three standards when evaluating claims seeking to overcome the Chapeau of Article XX.<sup>134</sup>

First, is the GATT inconsistent measure engaging in *arbitrary* discrimination where the same conditions prevail? Second, is the GATT inconsistent measure engaging in *unjustifiable* discrimination where the same conditions prevail? Third, is the GATT inconsistent measure a disguised restriction on international trade? In assessing these three inquiries, the WTO attempts to strike a balance between “the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.”<sup>135</sup> Many Article XX exception applications die at this stage of the Chapeau’s analysis because WTO Members must demonstrate their measure meets *neither* form of discrimination to succeed, while the WTO need only find their measure meets one form of discrimination for the application to fail.

#### 1. ARBITRARY DISCRIMINATION

The WTO Appellate body’s arbitrary discrimination analysis in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*United States – Shrimp*”), provides insight into the factors the Appellate Body relies upon in assessing whether a trade regulation is “arbitrary discrimination” under the Chapeau.<sup>136</sup> The relevant factors include: (1) whether the trade regulation is rigid and inflexible,<sup>137</sup> (2) whether there is a negation of rights of WTO Members due to informal or casual procedures related trade regulation,<sup>138</sup> and (3) whether “minimum standards for transparency and procedural fairness in the administration of trade regulations” are met.<sup>139</sup>

The three factors in *United States – Shrimp* weigh heavily in favor of the CBAM. The CBAM is neither rigid nor inflexible because the CBAM factors into

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132. GATT, *supra* note 57, at Article XX Chapeau (“[M]easures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”).

133. See U.S. – Gasoline Panel Report, at 150; Pauwelyn, *supra* note 106, at 47–48.

134. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

135. *Id.* at 156 (emphasis in original).

136. *Id.* at 177.

137. *Id.* at 177.

138. *Id.* at 181.

139. *Id.* at 183.

its tax whether non-EU producers emit more or fewer carbon emissions than EU producers and whether non-EU producers face a carbon tax.<sup>140</sup> Moreover—unlike the U.S. trade regulation in *United States – Shrimp* that possessed informal and casual procedures that negated WTO rights and did not meet transparency or procedural fairness requirements—the CBAM builds upon the EU’s well-established ETS resulting in a formal, transparent, and fair administration of the CBAM.<sup>141</sup>

## 2. UNJUSTIFIABLE DISCRIMINATION

The WTO Appellate Body’s analysis in *United States – Shrimp* also provides insight into the two main factors the Appellate Body relies upon in assessing whether a trade regulation engages in “unjustifiable discrimination.”<sup>142</sup> The Appellate Body in *United States – Shrimp* found that the United States engaged in unjustifiable discrimination because it implemented an import prohibition without (1) engaging in serious negotiations with other WTO Members to garner concerted and cooperative efforts and (2) the United States adopted different “phased-in” periods for WTO Members to comply with its import prohibition.<sup>143</sup> Unlike the United States in *United States – Shrimp*, these two factors weigh in the EU’s favor.

First, the EU and other WTO Members have actively and consistently engaged in discussions and negotiations regarding how to address climate change issues and what responsibilities WTO Members may assume to resolve climate change issues since 1995 at the first United Nations Framework Convention on Climate Change (“UNFCCC”) Conference.<sup>144</sup> At the 26th UNFCCC,<sup>145</sup> the EU was a major leader in pushing progressive climate policies to combat climate change.<sup>146</sup> The EU’s efforts to invite other WTO Members to adopt progressive climate policies is reflected in the growing global interest in implementing carbon pricing initiatives via an emissions trading system or carbon tax as of 2021 around the globe at the regional, national, and sub-national level: 64 carbon pricing initiatives have been implemented, 45 national jurisdictions are covered by the initiatives

140. Fit for 55, *supra* note 1, at 12.

141. Fit for 55, *supra* note 1.

142. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 166, 174, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

143. *Id.*

144. *Berlin Climate Change Conference—March 1995*, UNITED NATIONS CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/conferences/past-conferences/berlin-climate-change-conference-march-1995#:~:text=UNFCCC%20Sites%20and%20platforms&text=The%20first%20UNFCCC%20Conference%20of, April%201995%20in%20Berlin%2C%20Germany> [<https://perma.cc/H9QB-A7W9>] (last visited Jan. 14, 2022).

145. Popularly known as “COP 26.” *What Does COP Stand For?*, N.Y. TIMES (Nov. 13, 2021), <https://www.nytimes.com/2021/11/13/climate/cop26-meaning.html> [<https://perma.cc/JX6V-A32L>].

146. *COP26: The Negotiations Explained—Paris Rulebook*, UN CLIMATE CHANGE CONFERENCE, 2021, <https://ukcop26.org/wp-content/uploads/2021/11/COP26-Negotiations-Explained.pdf> [<https://perma.cc/6JEN-LBTZ>].

selected, and 35 sub-national jurisdictions are covered by the initiatives selected.<sup>147</sup>

The EU can be further differentiated from the United States in *United States – Shrimp* because the EU will not adopt different “phase-in” periods for WTO Members to comply with CBAM.<sup>148</sup> Rather, the CBAM will gradually be phased in as its ETS free allowances are phased out.<sup>149</sup> The gradual phasing in of the CBAM will assist EU producers and foreign producers adjust to CBAM.

Though it appears from this analysis that the EU does not engage in unjustifiable discrimination, the EU will need to take special care to ensure it does not fail the Chapeau.

### 3. THE EU’S CBAM IS NOT A DISGUISED RESTRICTION ON INTERNATIONAL TRADE

Whether a trade regulation is a disguised restriction on international trade depends on the regulation’s “design, architecture and revealing structure” assessed by two major factors.<sup>150</sup> First, whether the structure of the regulation effectively requires mandatory implementation of the same measure by WTO Members. Second, whether the offending WTO Member aids countries reduce challenges arising from the regulation.<sup>151</sup> The CBAM does not require that WTO Members adopt its ETS or CBAM system, as the structure of the CBAM permits it to operate with consideration to other carbon pricing systems such as a carbon tax or emissions trading system.<sup>152</sup> The EU is also one of the largest contributors of public climate finance to developing countries<sup>153</sup> and will use a portion of CBAM-raised funds to aid those who are vulnerable to increased product prices within the EU due to CBAM.<sup>154</sup> The funds will be distributed to the low and low-middle-income households and transport users through the CBAM funded Social Climate Fund and Enhanced Modernisation and Innovation Fund.<sup>155</sup> Therefore, the EU has taken care to craft its CBAM so that its design, architecture, and structure do not result in protectionist methods that would violate this section of the Chapeau.

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147. *Carbon Pricing Dashboard*, WORLD BANK, <https://carbonpricingdashboard.worldbank.org> [https://perma.cc/9JEY-4A8Y] (last visited Jan. 14, 2022).

148. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 175-76, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

149. Fit for 55, *supra* note 1.

150. *WTO Rules and Environmental Policies: GATT Exceptions*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.-htm](https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.-htm) [https://perma.cc/C7E4-WMR6] (last visited May 6, 2022).

151. *Id.*

152. Fit for 55, *supra* note 1.

153. *International Climate Finance*, EUROPEAN COMM’N, [https://ec.europa.eu/clima/eu-action/international-action-climate-change/international-climate-finance\\_en#:~:text=The%20EU%20continues%20to%20support,6.9%25%20increase%20compared%20to%202018](https://ec.europa.eu/clima/eu-action/international-action-climate-change/international-climate-finance_en#:~:text=The%20EU%20continues%20to%20support,6.9%25%20increase%20compared%20to%202018) [https://permac.cc/S523-BFBE] (last visited Jan. 15, 2022).

154. Fit for 55, *supra* note 1.

155. Fit for 55, *supra* note 1.

Whether the EU can successfully defend against the inquiries of the Chapeau is yet to be determined, but this brief analysis demonstrates that the EU has several arguments it may consider and pursue.

#### IV. WHETHER LEGAL ETHICS HAS A ROLE IN IMPLEMENTING CARBON PRICING MEASURES

##### A. THEORETICAL FRAMEWORK FOR THE ROLE OF LEGAL ETHICS

Even if the CBAM were to overcome the hurdles of the GATT, meet its GHG emissions reduction goals, *and* spur other countries to adopt similar aggressive carbon pricing measures, how successfully can, and will, these measures be implemented outside the EU? In part, successful compliance<sup>156</sup> with a carbon pricing measure hinges on whether a State can accurately and consistently put a price on carbon emissions from domestic and foreign producers. While there is high confidence that the EU Member States and the international community will comply with the CBAM due to the EU's ETS proven capacity to accurately and consistently price carbon, such confidence and reassurance are not held by other States—such as the United States—who do not possess a carbon pricing framework like the EU.<sup>157</sup> Yet, reassurance is precisely what States may need before they commit to the long and arduous journey into the uncharted legal waters of adopting a carbon pricing measure. One potential channel for reassurance is increasing compliance through enforcing the rules of legal ethics against attorneys who fail to disclose that their clients have provided inaccurate GHG emissions reports.<sup>158</sup>

Attorneys violate their ethical obligations when they do not disclose inaccurate GHG emissions reported by their clients because inaccurate reporting violates carbon pricing legislation and thus violates a measure intended to protect human life and health.<sup>159</sup> France, Germany, the United States, and other States possess a variation of a rule of professional conduct that permits attorneys to disclose information protected under attorney client privilege if doing so prevents harm or death. In France this exception to client confidentiality is found in Article 434-1 of the French Penal Code,<sup>160</sup> in Germany this exception is found in § 138 (8) of

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156. Edith Brown Weiss, *Strengthening Compliance with Climate Change Commitments*, in COEXISTENCE, COOPERATION, AND SOLIDARITY 693, 695 (Holger P. Hestermeyer ed., 2012) (defining compliance as a term that encompasses implementation and enforcement, defining implementation as measures States take to make legislative measures take effect domestically, and defining enforcement as steps taken when violations of legislation occur).

157. A major strength of the CBAM is that the CBAM uses the EU's ETS system to consistently calculate the price of carbon emissions embedded in goods, while also working towards greater accuracy with time. Fit for 55, *supra* note 1.

158. For an in-depth analysis of the arguments climate activists may make in favor of using legal ethics in the United States, to ensure clients' GHG activities are not criminal or fraudulent, see Victor B. Flatt, *Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change*, 3 UTAH L. REV. 569 (2020).

159. *Id.* at 579–81.

160. Code pénal [C. pén.] (Penal Code) Art. 434-1 (Fr) [hereinafter French Penal Code].



the German penal code (the Strafgesetzbuch),<sup>161</sup> and in the United States this exception is found in Rule 1.6 of the American Bar Association's *Model Rules of Professional Conduct* ("Model Rules").<sup>162</sup>

Under these rules, when attorneys fail to disclose their client's inaccurate GHG emissions, attorneys are assisting their clients in hastening the rate of climate change<sup>163</sup> and therefore contributing to climate-change-driven phenomena that result in death or harm.<sup>164</sup> Having provided a theoretical framework for how legal ethics may be used to enforce carbon pricing measures, this section will address how such a framework may apply in practice.

## B. LEGAL ETHICS IN PRACTICE

Whether legal ethics may enforce carbon pricing measures in practice is contingent upon the strength of the rule of professional conduct that permits attorneys to disclose confidential information to prevent death or harm. Though France and Germany possess clear rules of professional conduct that permit such disclosure, this section will focus on the United States' Model Rule 1.6 because, unlike France or Germany, the United States does not benefit from the carbon pricing infrastructure present in the EU, the United States is the world's second largest GHG emitter,<sup>165</sup> and the novelty of a U.S. carbon pricing measure is likely to raise compliance concerns from both ends of the political spectrum—most notably from climate activists.<sup>166</sup> This analysis will be conducted from the perspective of a zealous climate activist to attempt to highlight the strengths of this argument before ultimately concluding that such an argument fails.

Model Rule 1.6(b)(1) states, "[a] lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes *necessary* . . . to prevent reasonably certain death or substantial bodily harm."<sup>167</sup> Rule 1.6(b) is an exception to client confidentiality under Rule 1.6(a), which forbids lawyers

161. Strafgesetzbuch [StGB] (Penal Code), § 138 (8), [https://www.gesetze-im-inter-net.de/stgb/\\_138.html](https://www.gesetze-im-inter-net.de/stgb/_138.html) [<https://perma.cc/LP9Z-JRHW>] (Ger.) [hereinafter German Penal Code]; *see also* *Aucare Dairy Pty Ltd v. Huang* [2017] FCA 746 (Federal Court in Australia found that attorney-client privilege did not apply to activities that were illegal such as fraudulent conduct and fraudulent communication with their lawyers).

162. French Penal Code, *supra* note 160, at Art. 434-1; German Penal Code, *supra* note 161, at § 138 (8); MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2018) [hereinafter MODEL RULES].

163. *See* 2021 IPCC Report, *supra* note 113; *see also* Flatt, *supra* note 158, at 571.

164. For example, climate-change-related death due to extreme climate-change-driven floods. Fountain, *supra* note 114.

165. The United States emitted 4.8 billion tons of CO<sub>2</sub> in 2017. *Greenhouse Gas Emissions by Country 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/greenhouse-gas-emissions-by-country> [<https://perma.cc/5FDA-L5UA>] (last visited Jan. 30, 2022).

166. The United States has never adopted a carbon pricing measure like a carbon tax or national cap-and-trade system. Alicia Doniger, *As Climate Change Policy Takes Shape, Will the United States Ever Put a Price on Carbon?*, CNBC (Nov. 15, 2021), <https://www.cnbc.com/2021/11/15/will-us-ever-put-a-price-on-carbon-as-part-of-climate-change-policy.html#:~:text=The%20U.S.%20is%20not%20one,to%20a%20low%20carbon%20economy.&text=The%20U.S.%20has%20considered%20carbon,products%20imported%20to%20the%20country> [<https://perma.cc/946E-952M>].

167. MODEL RULES R. 1.6(b) (emphasis added).

from revealing information related to their representation of their client unless lawyers have express or implied consent to do so.<sup>168</sup> The application of Rule 1.6 (b) will vary depending on the U.S. state where a legal ethics complaint is filed because each U.S. state possesses its own legal ethics standards and rules of legal ethics are not uniform across the United States.<sup>169</sup> However, despite the nuances amongst U.S. states, all legal ethics complaints likely must demonstrate: (1) that a client's inaccurate GHG emissions reports cause "certain death or substantial bodily harm," (2) the attorney was aware of such inaccurate GHG emissions reports, and (3) the attorney could have prevented such death or harm.<sup>170</sup>

First, to demonstrate that inaccurate GHG emissions reports cause "certain death" or "substantial bodily harm," climate activists will likely turn to scientific reports for support. Illustratively, the 2021 IPCC Report confidently states GHG emissions are hastening climate change, which is driving extreme weather phenomena that is substantially harmful and, in some cases, lethal to humans.<sup>171</sup> Climate activists may also point to commitments under international agreements like the United Nations Framework Convention on Climate Change and the Kyoto Protocol, requiring that States submit reports related to progress made to reach emissions reduction targets.<sup>172</sup> These international agreements demonstrate that the globe is taking concerted efforts to mitigate GHG emissions because of the threat climate change poses to all people around the globe. As climate change worsens and more scientific reports are produced, the link between GHG emissions and substantial harm or death will be more difficult to attenuate.

Second, it may not be difficult for climate activists to demonstrate that attorneys were aware of their client's GHG emissions activities because of the close relationship clients and attorneys share.<sup>173</sup> Conversely, the threat of such legal ethics complaints may incentivize clients to shield their GHG emissions activities from their attorneys, and attorneys may be incentivized to turn a blind eye to their client's GHG emissions activities. However, clients who shield their activities may find themselves venturing into fraudulent or criminal matters, and lawyers who turn a blind eye may face further legal ethics violations including the failure to perform their: duty to inquire into the interests of their client under Rule 1.13, duty to inquire under Rule 1.2(d), duty of diligence under Rule 1.3, and duty to avoid personal misconduct and avoid dishonesty under Rule 8.4(b)-(c).<sup>174</sup>

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168. MODEL RULES R. 1.6(a).

169. No uniform set of legal ethics exists across the United States as the ABA is not binding on U.S. states. Louis Parley, *A Brief History of Legal Ethics*, 33 FAM. LAW QUART. 637, 640-41 (1999), <https://www.jstor.org/stable/25740231> [<https://perma.cc/PUT5-DLWL>].

170. MODEL RULES R. 1.6, cmt. 6.

171. 2021 IPCC Report, *supra* note 113.

172. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162; *see also* Weiss, *supra* note 156, at 707.

173. Flatt, *supra* note 158, at 597-98.

174. *See* MODEL RULES R. 1.6, cmt. 6.

Because it is in the best interest of clients and their attorneys to work closely together through sharing information, climate activists may capitalize on this relationship to meet this second element.

Third, climate activists would need to demonstrate that an attorney could have “reasonably believed” that disclosing their client’s GHG emissions activities could prevent substantial harm and death *and* that such disclosure was “necessary.”<sup>175</sup> These two sub-elements embedded in Rule 1.6(b) will be challenging for climate activists to demonstrate because there are various alternative means that may be pursued to prevent inaccurate GHG emissions reporting and thus ensure compliance with carbon pricing measures to mitigate the dangers of climate change—none of which require violating client confidentiality. Alternative means of ensuring compliance may follow Edith Brown Weiss’ “Sunshine Method” where compliance is secured through exposing a non-compliant entity’s reputation to criticism for violations.<sup>176</sup> For example, GHG emitting entities may be subject to scrutiny from national reports, non-governmental organizations (“NGO”), on-site monitoring by governmental officials or NGOs, publication of violations, public and private sector monitoring, and media coverage to raise public awareness.<sup>177</sup> Because of these various alternatives, it will be difficult for climate activists to overcome the “necessary” element required for Rule 1.6(b).

### C. LEGAL ETHICS SHOULD NOT PLAY A ROLE IN ENFORCING CARBON PRICING MEASURES

Having conducted that analysis, I believe that legal ethics does not—and *should not*—play a role in “assisting” to implement a carbon pricing measure. Even if climate activists were to meet these three “elements,” a climate activist’s legal ethics claim mostly likely fails because Rule 1.6 solely states that attorneys “*may* reveal information relating to the representation of a client,”<sup>178</sup> not that they *must*. Similarly, even if Rule 1.6 could be interpreted by U.S. disciplinary boards to support climate activists’ argument that attorneys violate legal ethics by not disclosing their client’s inaccurate GHG emissions, such a decision would erode one of the bedrocks of the American practice of law and American legal ethics—client confidentiality. Confidentiality fosters trust between attorneys and clients, trust enables attorneys to accumulate more information, and information assists attorneys in zealously advocating for their client while also adhering to the many other Rules of Professional Conduct. Ultimately, even if climate activists have the best intentions, legal ethics does not and should not play a role in enforcing carbon pricing measures.

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175. MODEL RULES R. 1.6, cmt. 6.

176. Edith Brown Weiss, *Rethinking Compliance with International Law*, in *IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 134–65 (Eyal Benvenisti ed., 2004).

177. *Id.* at 146.

178. MODEL RULES R. 1.6(b) (emphasis added).

While the United States has not yet enacted a carbon pricing measure and no legal ethics complaints have been raised against an attorney related to GHG emissions, clients and their attorneys will benefit from preparing against these potential claims in advance.

### CONCLUSION

This Note has argued that the CBAM meets the EU's obligations under the GATT because the CBAM is a genuine climate-change-fighting policy measure and not a protectionist ruse. Section I of this Note provided the background to underscore the EU's sincere commitment to fighting climate change as evidenced through its legislative history and the economic rationale for implementing a CBAM. Such longstanding commitment demonstrates that the CBAM is not a sudden, unforeseen protectionist trade regulation but rather an expected, foreseeable policy proposal designed to combat climate change. The economic rationale—supported by most economists around the globe—supports the policy argument that the CBAM is the most cost-effective and cost-efficient means of combating climate change at the scale and speed necessary to prevent the worst effects of climate change.

Having established a foundation for the argument that the CBAM is a genuine climate-change-fighting policy measure and the most cost-effective and efficient means of combating climate change, Section II presented a potential path forward the EU may pursue to argue its CBAM is permissible under the GATT. The principal argument is that the EU is permissible under Article III of the GATT because the CBAM is an internal charge in the form of an indirect tax on imported products that is not in excess of that charged to like EU products. The CBAM is an indirect tax because the default status of internal charges under the ASCM is that of an "indirect tax." For the default status to be overcome, the CBAM would need to be a direct tax: a tax on manufacturers, producers, or their income. Moreover, the CBAM does not charge imported products "in excess" of "like" EU products because it is first uncertain whether CBAM-regulated products will be like. Whether products are "like" will depend on whether the WTO finds that the process and production methods of carbon-intensive versus non-carbon intensive products render them unlike. Even if products are like, CBAM charges are not "in excess" of domestic like products because charges are calculated by the same means as EU products—through the EU's ETS. Even if after all these efforts the EU fails to successfully argue that the CBAM meets its obligations under the GATT, the CBAM may still see the light of day if the EU can obtain an Article XX exception.

Section III considered the two primary Article XX exceptions the EU may pursue should the CBAM be found to violate the GATT. The EU may argue that the CBAM is within the scope of Article XX(b) because a carbon pricing measure like the CBAM is necessary to protect human life and health from the harmful

effects of climate change. Alternatively, or in addition to Article XX(b), the EU may argue that the CBAM conserves exhaustible natural resources (e.g., clean air, oceans, fresh-water, animals, and soil) in conjunction with restrictions on carbon emissions from EU productions. Section IV also outlined the elements within the Chapeau of Article XX that the EU must meet to survive the Chapeau: the CBAM is not arbitrary discrimination, is not unjustifiable discrimination, and is not a disguised restriction on trade.

Lastly, Section IV considered whether legal ethics may or should play a role in enforcing carbon pricing measures. In theory, legal ethics may play a role in enforcing carbon pricing measures because ABA Model Rule 1.6 permits lawyers to reveal their client's information if they believe doing so is necessary to prevent death or substantial bodily harm. Some attorneys may believe that their client's inaccurate greenhouse gas emission reports may cause death or harm because the inaccurate reporting is contributing to climate change and accelerating the Earth's already rapid approach to an irreversible tipping point. The attorney would also need to believe that by disclosing the inaccurate reporting, death and harm could be prevented. In practice, it is highly unlikely an attorney would succeed in violating attorney-client privilege by disclosing discrepancies between their client's actual opposed reported carbon emissions because the attorney believed doing so would prevent death and harm. Client confidentiality is a bedrock of American practice of law and legal ethics. In this scenario, it would appear that an attorney would be more motivated by their moral convictions rather than what the rules of legal ethics and client confidentiality require of them. Therefore, legal ethics does not and should not play a role in enforcing carbon pricing measures or "assisting" attorneys to do so under the guise of adhering to legal ethics.

What this Note has not addressed, and what may be the topic of future Notes, is: What should the EU and the world do if the CBAM fails? To prevent this inquiry, the WTO Appellate Body should construe Article XX broadly to ensure the CBAM may be implemented—should the CBAM violate substantive GATT provisions. Future Notes may argue that the WTO's primary mandate is to protect and further open trade,<sup>179</sup> but if climate change is left unchecked, the harmful effects of climate change will disrupt open trade, which runs contrary to the WTO's mandate.<sup>180</sup> Consequently, if climate change mitigation programs like the CBAM are struck down, countries will fear implementing their own aggressive carbon pricing regulations; however, aggressive carbon pricing regulations

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179. GATT, *supra* note 57.

180. A pertinent example is the disruption in supply chains due to climate change. Diana Olick, *Climate Change Will Disrupt Supply Chains Much More than Covid — Here's How Businesses Can Prepare*, CNBC (Aug. 19, 2021), <https://www.cnbc.com/2021/08/19/climate-change-supply-chain-disruptions-how-to-prepare.html> [<https://perma.cc/BK3T-5R74>].

are precisely what is needed to place the world on a trajectory away from warming beyond 1.5 degrees Celsius.<sup>181</sup>

Therefore, the WTO should interpret the GATT broadly when facing carbon pricing policies to ensure that countries take adequate action to contribute to the fight against climate change. Similarly, States must carefully craft carbon pricing measures to ensure their successful implementation without the need for legal ethics to play a role in their enforcement. How States may craft their carbon pricing measures is beyond the scope of this Note but is an avenue future legal scholars are sure to explore.

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181. 2021 IPCC Report, *supra* note 113 (warming above 1.5 degrees Celsius will result in irreversible climate change impacts on the environment, forcing the coming generations to face the worst effects of climate change).