

The European Carbon Border Adjustment Mechanism and the path to Sustainable Trade Policies: From ‘Coexistence’ to ‘Cooperation’

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Abstract

Long examined by the academic literature as a challenging technical-legal fiction with a strong geopolitical impact, border carbon adjustment is on its way to becoming a European reality. This Article provides an overview of the European legislative process with a comparison of the initial Carbon Border Adjustment Mechanism (‘CBAM’) project presented by the Commission in July 2021 with the positions formalised by the European Parliament and the Council in 2022. With a detour through the doctrine of international law and building upon the work of Professor Thomas Cottier on the concept of Common Concern of Humankind (‘CCH’) in international law, the Article examines the European CBAM, and more broadly, the recent multiplication of unilateral environmental initiatives with extraterritorial impacts, as a contextual transition from a logic of *coexistence* to a logic of *cooperation* in the field of environmental policies. It concludes on the necessity to design the European CBAM accordingly, by redistributing its direct revenues and developing open and inclusive cooperation frameworks, to accelerate this transition in the field of industrial decarbonisation.

Keywords: European Green Deal, Border Carbon Adjustment, Environmental Sustainability, Trade Policy, International Trade Law, International Cooperation

INTRODUCTION

As you read this, negotiators of the European Parliament, the Council and the European Commission are having trilogue discussions¹ on their common position

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¹ J Titievskaia and H Morgado Simões with A Dobrova Members’ Research Service, ‘EU Carbon Border Adjustment Mechanism: Implications for Climate and Competitiveness, Briefing’ (2022) *European Parliamentary Research Service (EPRS)*, PE 698.889, p 10.

for the design and implementation of the European Union's Carbon Border Adjustment Mechanism ('EU CBAM'). The idea of levying a carbon price on imports has been floating around Brussels for the past fifteen years. What is the original spark that made this project move so quickly up on the EU's political agenda? Laid bare by a youth that is aware, curious, and committed to the issue of climate change, this spark was effectively kindled by the people of Europe during the election of representatives in the European Parliament, a quinquennial democratic event. They have reshaped not only the popular legislative assembly that is the European Parliament but also the executive arm that is the Commission, whose investiture has been formally approved by the Parliament since the Maastricht and Amsterdam Treaties of 1992 and 1994.² The European elections of May 2019 marked a significant turning point in the political history of the European Union. They broke the traditional political alliance of a bipartisan centre-right/centre-left coalition (EPP-S&D) across the institutions and brought about a more diverse majority, with the liberals of the Renew group and, to a lesser extent, the Greens playing the role of 'kingmakers'. The mobilisation of a young electorate, which voted overwhelmingly for Green parties, also led to a contingent of Green MEPs being sent to the European Parliament on an unprecedented scale. The May 2019 elections sent a strong signal to both EU decisionmakers and the wider public that for younger generations, the legitimacy of the EU would be built on the ability of European decisionmakers to respond to environmental and social issues. Sometimes referred to as the 'green wave', this phenomenon has further established the EU as the relevant scale for dealing with environmental issues. This momentum was solidified in December 2019 with the Commission's unveiling of the European Green Deal³, one of whose key objectives is to make the EU climate-neutral by 2050. It has since been embedded in all EU policies, and trade policy is no exception. With

² Article 17(7) and (8) of the Treaty on European Union (TEU):

'7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

8. The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission'.

³ COM(2019) 640 final, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'The European Green Deal'*.

the signing of the EU-New Zealand Free Trade Agreement,⁴ a new generation of bilateral trade agreements is emerging, with more ambitious, sanctionable, and ‘tailored’ provisions on trade and sustainable development.

The new trade policy strategy⁵ presented by the European Commission on 18 February 2022 is based on three pillars: openness, sustainability, and assertiveness. Sitting at the crossroad of assertiveness and sustainability, the carbon adjustment mechanism at the EU borders has, in the space of a few years, become the symbol of a paradigm shift in the interaction between trade measures, market policies, and sustainability policies.

The idea of imposing a carbon price on imports is not new. The transition from a logic of ‘greening’ to the recognition of the primacy of environmental sustainability is only beginning to materialise. The increasing recognition in European trade policy of a ‘primacy’ of environmental sustainability is also reflected in the action plan presented by the Commission as part of its new approach to Trade and Sustainable Development (‘TSD’) in Free Trade Agreements (‘FTAs’). For the first time, the Commission is proposing the introduction of sanction mechanisms based on the provisions of the TSD Chapters,⁶ as well as the adaptation of these TSD provisions to the environmental challenges of the partners concerned, thereby taking up many of the recommendations made by the environmental research community.⁷

⁴ European Commission – Directorate General for Trade Press Release, ‘EU-New Zealand Trade Agreement: Unlocking Sustainable Economic Growth’ (30 June 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4158.

⁵ European Commission, ‘Trade Policy Review: An Open, Sustainable and Assertive Trade Policy’ (18 February 2021), https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159541.0270_EN_05.pdf.

⁶ COM(2022) 409 final, Communication from the European Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘The Power of Trade Partnerships: Together for Green and Just Economic Growth’, Action Points 19–20:

‘The Commission will:

Further strengthen the enforcement of TSD commitments in future agreements by proposing to EU trading partners to:

- a. Extend the general state-to-state dispute settlement compliance stage to the TSD chapter.
- b. Involve the DAGs in monitoring the compliance stage.
- c. Extend the possibility to apply trade sanctions in cases of failure to comply with obligations that materially defeats the object and purpose of the Paris Agreement on Climate Change or in serious instances of non-compliance with the ILO fundamental principles and rights at work.

The application of trade sanctions will follow the general state-to-state dispute settlement rules. Prioritise the enforcement of TSD cases based on the importance of the nature of the commitments at issue, the seriousness of their violation and the impact on the environment or workers’.

⁷ See E Blot, A Oger, and J Harrison, ‘Enhancing Sustainability in EU Free Trade Agreements: The Case for a Holistic Approach’ (Institute for European Environmental Policy, Policy Paper, 22 April 2022); E Blot, ‘IEEP’s Assessment of the New EU Trade and Sustainable Development Action Plan’ (*News, Institute for European Environmental Policy*, 23 June 2022); E Blot and M Kettunen, ‘Environmental Credentials of EU Trade Policy’ (Institute for European Environmental Policy, Policy Paper, 14 April 2022)

For its part, the EU CBAM comprises a set of characteristics that are both assertive and sustainable. Its impact is twofold: external and internal. It is an instrument that projects the European Union onto the international stage as a leading actor by broadening the spectrum of the EU's climate ambitions. It is likewise an instrument that seeks to preserve the integrity of sovereign decisions taken jointly by the EU-27; in this case, the increase of carbon pricing under the European Emission Trading Scheme ('ETS'), as well as the gradual reduction of free allowances for the highest emitting industries. As of now, the Commission and both co-legislators—the Council and the Parliament—have formalised their respective positions on the CBAM, with trilogues starting as early as summer 2022. While there is currently no European 'blueprint' for CBAM, the positions of the various institutions—and the sometimes complex legislative processes that contributed to their emergence—give some indication of the path that the European Union is about to take.

In this Article, I first set out to contextualise the emergence of a carbon adjustment scheme at the EU's borders and to summarise a little over a year's worth of political and institutional debates at the European level on this issue. In a second part dedicated to the international legal framework in which the CBAM is embedded, I suggest avenues for interpreting its compatibility with WTO rules and propose an analysis along the lines of the pioneering academic work by Professor Thomas Cottier, which proposes new sources of legitimacy in international law for unilateral measures with extraterritorial effects. With a detour through the doctrine of international law, we propose an examination of carbon adjustment at borders, and more broadly, the recent multiplication of unilateral environmental initiatives with extraterritorial impacts, as a contextual transition from a logic of coexistence to a logic of cooperation in the field of environmental policies. I conclude by situating the CBAM within a broader framework of climate justice and international acceptability, further highlighting the urgency of developing a new agenda for cooperation on industrial decarbonisation.

I. CBAM: A EUROPEAN STORY?

The European CBAM initiative constitutes the culmination of several decades of discussion—as well as disputes—at the European level on the issue of carbon taxation and its impact on high-carbon imports. It also represents the technical-political translation of an academic debate on what form a border carbon adjustment could take and its coinciding compatibility with World Trade Organization ('WTO') rules, a debate which began some ten years prior. After a brief recapitulation of the ideological and political development of the CBAM as a public policy instrument, I will discuss the main features of the positions presented and adopted by the Commission and the co-legislators (the European Parliament and the Council of the EU).

A. A Brief History of CBAM's Ideational and Political Trajectories

The Green Deal and its ramifications in sectoral policies mark the transition for the EU from a democratic signal to the technical-legal culmination of projects that had

been floating in the public debate for several years or even decades. On 14 July 2021, as Paris celebrated the symbolic storming of the Bastille Prison by revolutionary forces, a twenty-year-old French project was officially launched in Brussels.⁸ For the first time, and in response to a mandate from the European Council, the European Commission put forward a legislative proposal for a carbon adjustment scheme at the EU's borders. Long seen as an artefact of a protectionist trade agenda, carbon adjustment at the border found its place as part of a legislative programme to operationalise the EU's target of reducing emissions by 55% by 2030. The concept is neither new nor exclusive to the European Union. As early as 2007, in the context of its work on the second phase of the ETS, the Commission put forward an informal proposal for carbon adjustment at the EU's borders.⁹ In 2009, France too proposed a 'carbon inclusion' mechanism. These alternatives were swiftly rejected at the European level in favour of another system to combat carbon leakage: that of granting free allowances to the industries most exposed to international competition. A further proposal was introduced by France in 2016 for the cement sector and taken up by the European Parliament. Despite a positive vote in the Environment Committee, the proposal was finally rejected in plenary in favour, once again, of maintaining the free allowances system.

On the American front, California has already implemented a carbon adjustment on electricity imported from neighbouring states. This measure complements the introduction of a carbon price on electricity production in California. The US Congress has seen a series of initiatives¹⁰ on border carbon adjustment, sometimes in conjunction with federal carbon pricing plans. All these proposals failed to achieve a majority in Congress. Some of them included original and interesting social justice provisions, such as the introduction of a 'carbon dividend' to redistribute carbon pricing revenues to American households. At this stage, it is unlikely that a federal carbon pricing system will emerge in the US. The Biden administration already indicated that its preference is to use regulations and product standards to accelerate US industrial decarbonisation. The proposal put forward by Senators Chris Coons and Scott Peters¹¹ just five days after the release of the EU Fit-for 55 was the latest in a long line of failed proposals to introduce carbon pricing in certain industrial sectors at the federal level, supplemented by carbon dividend mechanisms. The Coons and Peters proposal was unique in that it sought to introduce a carbon adjustment at the border on certain high-emission products without establishing a carbon price at

⁸ Proposition de résolution européenne No 98 (2009–2010) portant sur le marché des quotas de CO₂ et le mécanisme d'inclusion carbone aux frontières (MIC).

⁹ Draft Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC (10 December 2007).

¹⁰ The most important are listed in P Lamy, G Pons and P Leturcq, 'GT3 - A European Border Carbon Adjustment Proposal' (*Europe Jacques Delors*, 2020), p 5.

¹¹ Office of Senator Chris Coons Press Release, 'Sen. Coons, Rep. Peters Introduce Legislation to Support U.S. Workers and International Climate Cooperation' (19 July 2021), <https://www.coons.senate.gov/news/press-releases/sen-coons-rep-peters-introduce-legislation-to-support-us-workers-and-international-climate-cooperation>.

the US level. Although highly debatable, this idea has nevertheless made its way into American political debate, which is far less concerned with the requirements of equivalence in tax and trade matters, and more generally interested in WTO compliance.

The European elections' green wave led to the Commission's proposal for a European Green Deal a few months later. Climate and the environment became even more central to European policymaking. The idea of a carbon adjustment at the EU's borders was brought back onto the agenda and made an appearance in the Commission's first communication on the European Green Deal.¹² CBAM's development must be seen in the context of a paradigm shift in European trade and market policy. It articulates two of the pillars of the new trade strategy presented by the European Commission: sustainability and assertiveness.

Shortly after the announcement of Europe's new climate ambitions under the Green Deal, European public policy initiatives (and particularly environmentalist institutes) took up the matter and emphasised the opportunity presented by the CBAM to speed up the transition out of the free allowance system. The question as to the pace of phasing out free allowances is a key point of contention. NGOs and environmental research institutes have continually insisted on the need to phase out the system of free allowances as quickly as possible,¹³ pointing out the windfall profits that it has generated for the most polluting industries and the adverse effects associated with free allocations, namely the disincentive to decarbonise.

In March 2022, in the midst of the French presidency, a Council agreement was reached on a general approach to the CBAM. While this approach formalised a common position on the structure and governance of the mechanism, it did not address its most contentious features, such as the pace of free allowances reduction or the destination of CBAM direct revenues. The pace was eventually addressed as part of the negotiations on the revision of the ETS during the Council on Environment which took place on 28 June 2022. The Council aligned with the Commission's 2026–2035 proposed timeline but called for an accelerating reduction rate.¹⁴ From December 2019 to May 2022, the lead committee on this subject—Environment, Health and Food Safety Committee—made progress in developing its position on

¹² 'Should differences in levels of ambition worldwide persist, as the EU increases its climate ambition, the Commission will propose a carbon border adjustment mechanism, for selected sectors, to reduce the risk of carbon leakage. This would ensure that the price of imports reflect more accurately their carbon content. This measure will be designed to comply with World Trade Organization rules and other international obligations of the EU. It would be an alternative to the measures that address the risk of carbon leakage in the EU's Emissions Trading System'. COM(2019) 640 final, note 3 above, p 5.

¹³ 'Additional Profits of Sectors and Firms from the EU ETS (2008–2019)' (*Carbon Market Watch*, May 2021), https://carbonmarketwatch.org/wp-content/uploads/2021/06/CE_Delft_Additional_Profits_ETS.pdf.

¹⁴ 'The CBAM factor shall be equal to 100% for the period between the entry into force of [CBAM regulation] and the end of 2025, and shall be reduced by [...] 5 percentage points each year from 2026 to 2028, by 7.5 percentage points each year from 2029 to 2030, by 10 percentage points each year from 2031 to 2032, [...] by 15 percentage points each year from 2033 to 2034 and by 20 percentage points in 2035 to reach 0% by the tenth year'. Council's General Approach on ETS, p 56.

CBAM. On 22 June 2022, the Parliament finally voted on a compromise text, half-way between the demands of the conservatives and those of the progressive group, initially carried by the rapporteur Mohammed Chahim.¹⁵

*B. A Comparison of the Mechanism's Main Features in the Proposals Made by the Commission, the Parliament, and the Council*¹⁶

Implementation timeline: The initial proposal made by the European Commission and confirmed by the Council's General Approach envisaged a gradual introduction over ten years (2025 onwards), after a three-year pilot phase from January 2023 to December 2025. On the European Parliament's side, after months of advancements made towards a swifter phase-out of free allowances, the Plenary lowered the ambitions of the ENVI Committee, ultimately stopping progress in its tracks. The initial 2028 deadline, which was proposed by the Rapporteur Mohammed Chahim in his draft report, was replaced by a 2030 deadline in the ENVI Committee vote in May. However, in an attempt to secure the tight progressive majority from the Committee vote in May, this was eventually replaced by a proposal to fully implement the CBAM by the end of 2032 and to postpone CBAM's starting date to 2026 instead of 2025. The political drama which took place during the June 8 Plenary session on the Fit-for-55 package led to a change of tide.¹⁷ During the discussions on the revision of the ETS, the vote on an amendment submitted by the EPP to postpone CBAM's starting date to 2028 and completely phase out free allowances by 2034¹⁸ ultimately led to the rejection of the whole ETS/CBAM/Social Climate Fund package by progressive groups (S&D, Greens-EFA, and the Left). The three political groups argued that in the context of climate change, no deal was better than a bad deal. On June 15, the EPP, S&D, and Renew Europe presented a new set of compromise amendments, which propose a new starting date in 2027 and a

¹⁵ COM(2021)0564 – C9-0328/2021 – 2021/0214(COD), *Carbon Border Adjustment Mechanism/ Amendments Adopted by the European Parliament on 22 June 2022 on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism* (ordinary legislative procedure: first reading), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0248_EN.pdf.

¹⁶ I presented a first version of this sub-section in the discussion paper prepared for the round table on CBAM during the Think 2030 conference held at Sciences Po Paris on 30 June 2022. See Green Trade Network, 'State of the EU CBAM after the French Presidency of the Council (January–July 2022): A Reality Check' (Think 2030 Discussion Paper, Institute for European Environmental Policy/IDDRI, forthcoming).

¹⁷ Z Weise, 'Key Climate Proposals Fail to Pass European Parliament - MEPs Refused to Adopt Positions on Key Files Following Conservative-Led Efforts to Water Them Down' (*Politico*, 8 June 2022), <https://www.politico.eu/article/key-climate-proposals-fail-to-pass-european-parliament>.

¹⁸ EPP's rapporteur on the revision of the European Emissions Trading Scheme (ETS), Peter Liese, proposed an amendment stating that 'the CBAM factor shall be reduced during a transitional period by 10% from 2028 until 2030 before being reduced by 17,5 percentage points each year to reach 0% by the end of 2034'. Source: <https://www.peter-liese.de/images/ETS.pdf>.

complete phase out of free allowances by December 31, 2032, which is further away from the initial climate ambition of the ENVI Draft Report. The vote on these amendments took place on June 22.

Sectoral and emission scopes: While both the Commission and the Council proposed to cover a first set of five Energy Intensive Trade Exposed ('EITE') sectors (steel, cement, electricity, fertilizers, and aluminium), the Parliament's ENVI Committee proposed to expand the scope to hydrogen, polymers, and organic chemicals. Similarly, while the Commission and Council's positions only called for the inclusion of direct emissions (with the possibility of including indirect emissions in the future), the ENVI Committee compromise text suggested an expansion of CBAM's emissions scope to include direct and indirect emissions for all above-mentioned sectors to begin with. Even if this adds more complexity to CBAM's implementation and the associated verification work, it could be highly relevant for some electro-intensive industries such as aluminium production.

Expanding CBAM's sectoral scope?: The possibility of expanding CBAM to all ETS sectors, as well as downstream sectors by 2030 as proposed by the European Parliament might contradict CBAM's underlying rationale: to avoid carbon leakage. The Commission and the Council are aligned on this issue and propose to extend the application of CBAM to other sectors only when a risk of carbon leakage can be demonstrated. As such, CBAM's expansion should always be based on clear evidence of carbon leakage risks and sectoral case-by-case assessments. Given the alignment of the Commission and Council positions on this specific issue, the European Parliament's proposal may not survive the upcoming trilogue renegotiations.

A centralised or decentralised system? The Commission and the co-legislators' positions differ on how the mechanism should be governed. The Commission had proposed a decentralised system, leaving it to the Member States to collect and verify emissions declarations as well as to sell CBAM certificates. In its final position, the Parliament called for a central CBAM authority financed by the (partial) revenues from CBAM and operating under the supervision of the European Commission. The Council supports an in-between approach which consists of maintaining the collection of declarations and the sale of certificates as the Member States' responsibility, but with the Commission providing support in managing the processes and platforms for processing this data.

External policy crediting: Among the three Institutions, there seems to be a consensus that the application of the CBAM should not result in crediting or exempting third countries based on the existence of non-price-based policies. Determining the equivalence of non-price-based policies such as low-emission standards—which can be decided and applied at different policy levels in third countries—would not only be fraught with technical challenges but could also lead to unjustified discrimination between the EU's trading partners.

Export rebates: as we see in the section on WTO compatibility, the proposal (exclusively by the European Parliament at this stage) to include export rebates at the outset of CBAM implementation raises a number of difficulties. These are

discussed in more detail below. The Parliament proposes that companies affected by the reduction in free allowances under the CBAM should be granted a surplus of free allowances equivalent to the emissions generated by their export-oriented production. The underlying idea, which is in line with requests from industry representatives, is to protect the competitiveness of European industries in affected countries. This proposal is complemented by a request from the Parliament to the Commission to undertake an analysis in two areas: firstly, on the compatibility of export rebates with WTO rules, and secondly on the feasibility of a ‘green export rebate’ system that would only be available for the best-performing 10% of industries.

Main features	Commission (July 14, 2021)	EU Council (March 15, 2022)	European Parliament (June 22, 2022)
Pace of free allowances phase-out	2026–2035	2026–2035	As voted on May 17: 2025–2030 As amended ahead of the June 8 Plenary: 2026–2032 As amended ahead of the June 22 Plenary and eventually voted: 2027–31 December 2032
Sectoral scope	Steel, cement, aluminium, electricity, fertilizers (assessment in 2026 for potential expansion)	Same as Commission’s proposal	5 sectors + hydrogen, polymers, and organic chemicals
Emissions scope	Direct emissions only (potential expansion in the future)	Same as Commission’s proposal	Direct and indirect emissions (emission from the production of electricity used in the production process)
Administration of the mechanism	Decentralised system (Member State competence)	Decentralised system with strong assistance from the Commission (common platform and digital processes)	Fully centralised system with a CBAM authority
Expansion of the mechanism	Strictly and only upon further evidence of carbon leakage risks in other sectors	Same as the Commission’s proposal	Expansions during the first review processes, with the aim of expanding CBAM to all ETS sectors as well as to downstream sectors in 2030.
Use of revenues	Most CBAM revenues will fall in the EU budget	Same as Commission’s proposal—while noting that this question should be tackled, but not in the CBAM regulation text	Vague language, but the EP position calls for a mobilisation of CBAM revenues for LDC’s decarbonisation.

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Continued.

Main features	Commission (July 14, 2021)	EU Council (March 15, 2022)	European Parliament (June 22, 2022)
Export rebates	None	None	- Inclusion of export rebates in the form of free allocations - Legal assessment of their WTO compatibility which would also explore the possibility of granting the top 10% of EU performers in terms of CO2 emissions the rebate

II. LEGALITY AND INTERNATIONAL ACCEPTABILITY: TWO VITAL CONDITIONS FOR THE SURVIVAL OF THE EUROPEAN CBAM PROJECT

In this second part, I explore two elements that the EU must inevitably take into account when developing the mechanism: the international legal basis on which to justify the implementation of the mechanism; and the international acceptability of this tool, which is highly dependent on solidarity in the administration and distribution of the mechanism's revenues.

A. *CBAM's Legal Basis in EU and International Trade Law*

The first step was to determine the legal category under which the CBAM falls. This work was carried out prior to the Commission's proposal. As seen in academic literature, the 2010s saw an upsurge in research on the technical and legal aspects of applying a carbon price to imports. The guidelines proposed by Cosbey, et al.,¹⁹ Condon and Ignaciuk,²⁰ and Cosbey, Droege, and Fischer²¹ serve as milestones. They will be the basis for many subsequent studies concerning the criteria to be respected in the design of border carbon adjustment policies. In particular, they identify exemption and equivalence requirements (policy crediting) together with the use of revenues as critical elements that deserve careful attention by policymakers. The

¹⁹ A Cosbey, S Droege, C Fischer, J Reinaud, J Stephenson, L Weischer, and P Wooders. 'A Guide for the Concerned: Guidance on the Elaboration and Implementation of Border Carbon Adjustment' (2012) *Stockholm: ENTWINED*, https://www.iisd.org/system/files/publications/bca_guidance.pdf.

²⁰ M Condon and Ignaciuk, 'Border Carbon Adjustment and International Trade: A Literature Review' (OECD - Working Paper, 2013).

²¹ A Cosbey, S Droege, and K Fischer, 'Developing Guidance for Implementing Border Carbon Adjustments: Lessons, Cautions, and Research Needs from the Literature' (2019) 13 *Review of Environmental Economics and Policy* 3.

academic and para-political (think tank) literature on the subject is rapidly expanding as the likelihood of an EU carbon adjustment at the borders is confirmed. As of 2019, Pascal Lamy, Geneviève Pons, and I have devoted several months of work to the development of a European CBAM ‘template’. Following dozens of interviews and months of reflection, we identified six main features,²² the vast majority of which were taken up and confirmed in the proposals of the Commission and the European Parliament. The Commission, fulfilling its delicate role of proposing legal and technically feasible approaches to the co-legislators, presented six instrument options in an annex to its proposal,²³ each falling into a different legal category. The Commission proposal identifies Option 4 as the most balanced according to a rational cost-benefit calculation, both for European industries and administrative structures, but also for the planet. Indeed, this weighting by the Commission also accounts for factors related to the environment (the real effect of CO₂ emissions on a global scale). It also factors in the mechanism’s international acceptability, partly dependent on the level of complexity of the envisaged declaration system which is one of the most direct costs of adaptation for third country producers.

This option would seem to satisfy the co-legislators, as both the Council and the Parliament have taken up the same elements. From the WTO’s standpoint, the EU’s CBAM is as much an interesting legal object as it is a new type of trade barrier (import restriction). However, the General Agreement on Tariffs and Trade (GATT, 1947)²⁴ permits unilateral restrictive measures on imports, provided that they do not constitute arbitrary and unjustified discrimination between goods deemed ‘like’ and thus do not represent a disguised form of protectionism.

1. Internal and external non-discrimination (Articles I and III GATT)

Article I of the GATT on the Most Favoured Nation principle (‘MFN’) prohibits measures that grant differential trade treatment to imported goods of different origins, but which are considered to be ‘like’. The similarity of products is assessed on the basis

²² See Lamy, Pons, and Leturcq, note 10 above:

1. A parallel system aligned with the EU ETS;
2. A Targeted launch on pilot products: electricity and cement;
3. Not a tax, but an EU own resource;
4. Fairness ensured by an independent agency;
5. Fairness ensured by an independent agency;
6. A ‘test’ period for negotiations and necessary exemptions (linking existing ETSs and offering preferential treatment for certain developing countries).

²³ COM(2021) 564 final / 2021/0214 (COD), *Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*.

²⁴ General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. A-11, 55 UNTS 194, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleI.

of four criteria: the product's characteristics; its end use; the qualification of the product in the schedule of Member States concessions; and the tastes and habits of consumers (if the product has the same consumer appeal). Article III of the GATT prohibits all regulatory and fiscal discrimination between imports and domestic products but allows for the levying of charges at the border in amounts equivalent to domestic taxes directly imposed on certain products. This means that on the one hand, no differentiated direct or indirect charges can be imposed on equivalent imports and, on the other hand, internal taxes on domestic products and imports must not favour domestic production.

2. *Environmental exceptions (Article XX GATT)*

Article XX of the GATT lists a series of exceptions to the rules of the above-mentioned articles. Paragraph b) of Article XX makes an exception for measures 'necessary to protect human, animal or plant life or health' and paragraph g) for measures 'necessary for the conservation of exhaustible natural resources'. The Chapeau of Article XX recalls that such measures must not constitute an arbitrary or unjustifiable discrimination between domestic products and imports and between imports of equivalent products, nor as a disguised restriction on international trade. On the issue of arbitrariness, the WTO Appellate Body in the *US-Shrimp* case emphasised the importance of equity and fairness in the implementation of a given measure.²⁵ Implementation should therefore be transparent and predictable and allow targeted industries to assert their rights and calculate the carbon content of their production. In its assessment of the legitimacy of these exceptions, the Appellate Body nevertheless underscored that sustainable development is now an objective of the WTO and that all its provisions must be interpreted in light of this principle.

3. *Practical implications*

Two schools of thought seem to be at odds on the issue of how to interpret the CBAM under WTO rules. The first considers that CBAM could be justified exclusively through the provisions of GATT Article III.4. In this case, CBAM would be deemed a 'regulatory adjustment', its justification being based primarily on the soundness of the equivalence system linking the price paid in the EU to the price applied at the border. This approach, however, requires the European legislature to be highly rigorous regarding the equivalence of treatment between domestic and imported goods, and therefore a strict equivalence at all levels between the cost borne by European producers under the ETS and the cost borne by importers. It also tends to favour the removal of the export rebates mentioned above, in particular because of the de facto advantage they give to European producers in boosting their competitiveness on international markets.

The exceptions in GATT Article XX also provide an avenue for the justification of carbon adjustment at the border, as far as its configuration makes it a purely

²⁵ *DS58: United States – Import Prohibition of Certain Shrimp and Shrimp Products*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm.

environmental instrument. On the issue of equivalence, a kind of ‘grey area’ has already been identified with respect to the European Parliament’s proposed inclusion of ‘export rebates’. While the EU CBAM may be compatible with international trade law, its existence is a reminder that in the absence of legal constraints or more explicit and actionable reciprocal commitments to combat climate change, some parts of the world are still slow to scale up their ambitions. In this respect, CBAM can be seen as a ‘way out’ approach against a backdrop of increased EU climate ambitions. However, in the interval between now and a net-zero global economy predicated on advanced industrial and technological cooperation, it is necessary to think of new sources of legitimacy for ‘border adjustments’, which are essentially transition mechanisms that are supposed to disappear as carbon pricing initiatives multiply across the globe.

B. The Principle of ‘Common Concern of Humankind’ as a New Source of Legitimacy for the Assertive and Sustainable Transformation of European Union Trade Policy

The pioneering doctrine initiated by Professor Thomas Cottier in his recent book *The Prospects of Common Concern of Humankind in International Law*²⁶ sheds new light on the international legal framework governing the handling of global issues. The study and use of the concept of CCH makes it possible to think about international law from the perspective of dynamics of unilateral and collective action in a fight against climate change that is increasingly ambitious. Thus, diverging from the status quo in trade discussions of the principle of common but differentiated responsibilities.

The main challenge here, is the lack of a clear definition on what the concept of common concern of humankind is, which at the same time increases its interpretative potential. As early as 1988, the United Nations General Assembly acknowledged that ‘climate is a common concern of mankind, since climate is an essential condition which sustains life on earth’.²⁷ CCH became a truly treaty-based notion via the 1992 UN Framework Convention on Climate Change (‘UNFCCC’).²⁸ In 1992, the Convention on Biological Diversity (CBD) states that ‘conservation of biological diversity is a common concern of humankind’. The term has been used on a regular basis since the 1990s to describe global challenges that require concerted action on an international scale and that cannot be solved by states alone.²⁹ In 2015, the Paris

²⁶ T Cottier (ed), *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press, 2021).

²⁷ GA Res 43/53, Protection of Global Climate for Present and Future Generations of Mankind (6 December 1988).

²⁸ Cottier, note 26 above, p 15.

²⁹ Ibid (cf p 18): ‘A group of legal experts was convened by UNEP 1990 to lay down the normative foundations for the 1992 Rio Conference. In its report it stressed the importance to balance rights of states with the interests of international community. To this effect the group invoked the concept of “common concern of mankind”’.

Agreement reiterated that climate change is a CCH because it is both universal and fundamental to the survival of the entire human race. To delineate Common Concerns of Humankind, three key characteristics are proposed by Soltau:³⁰ scale, severity, and irremediability of collective action:

- 1) ‘the interests concerned extend beyond those of individual states and touch on values or ethics of global significance’;
- 2) ‘threats to the interests concerned are marked by their gravity and potential irreversibility of impacts’; and
- 3) ‘safeguarding the interests involved requires collective action and entails collective responsibility’.

Thomas Cottier presents the concept of Common Concern of Humankind as a roadmap to revisit the doctrine of cooperation, treaty obligations, and extraterritorial effects of national law, in a unique way. He states that the concept allows for a transition from the traditional approach to international law—that of ‘coexistence’—to that of cooperation.³¹ What is missing in areas such as climate change, biodiversity protection, and marine pollution is a form of reciprocity, akin to the type found in international trade, market access, or investment agreements. As a result, the development of unilateral policies can be explained by the relative absence of plurilateral mechanisms.

In the Commission’s proposal presented in July 2021, the legal basis of the European Carbon Border Adjustment Mechanism is derived from Articles 191 and 192(1) of the Treaty on the Functioning of the European Union (‘TFEU’), which define the EU’s competencies in the field of climate change. Under Article 191 TFEU, ‘Union policy on the environment shall contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular, combating climate change’.

The main legal argument underpinning CBAM’s implementation lies in the pre-existing commitment from the Member States consistent with the UNFCCC’s commitments, and enshrined in the EU Climate Law,³² to achieve climate neutrality by

³⁰ F Soltau, ‘Common Concern of Humankind’ in C P Carlane, K R Gray, and R G Tarasofsky (eds.), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016), pp 202–13.

³¹ Ibid (‘CCH implies some kind of enhanced commitment and obligation to international cooperation’).

³² Regulation of the European Parliament and of the Council Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’).

2050. The Climate Law was published in the Official Journal on 9 July 2021 and entered into force on 29 July 2022. The EU Climate Law and the subsequent revision of the Union's main policy frameworks in the field of climate change produce immediate consequences, especially on future CO₂ emissions prices in the ETS. In this context, the EU's Carbon Border Adjustment Mechanism is meant to address the evident risk of carbon leakage—a displacement of CO₂-intensive industrial activities—stemming from the widening difference in pace and in ambitions between heterogeneous and uncoordinated climate policies across the world. Therefore, CBAM shall be regarded as a companion policy of the ETS revision, entirely focused on the preservation of integrity and efficiency of the EU's climate decisions, namely the increase of its Emissions Trading Scheme's emissions reductions target from 43% (compared to 2005) in the previous phase to 61% as proposed in the Commission's revision proposal.³³

The Commission's CBAM proposal then sits on key principles of subsidiarity and proportionality, ensuring that—consistent with the rules of the GATT, the EU CBAM will apply the exact same charge as the one paid within the European Union on CO₂ emitted during production processes. Its focus on a limited scope of highly trade-exposed, CO₂-intensive and for some of them strategic sectors, such as steel, cement, aluminium, and fertilisers, further confirms that the mechanism's fundamental aim shall not be to disrupt international discussions on climate or to step away from the Common But Differentiated Responsibilities principle but to address a challenge which is specific to a few industries, for which multilateral agreements on decarbonisation pathways will not see the light of day in a foreseeable future.

Article 55 of the United Nations Charter on International Economic and Social Cooperation establishes a duty to cooperate on a number of issues. It provides that: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

In view of the climate change emergency, as evidenced by recent heat waves across the globe and increasingly unmanageable forest fires, international law must be

³³ COM(2021) 551 final, Directive of the European Parliament and of the Council Amending Directive 2003/87/EC Establishing a System for Greenhouse Gas Emission Allowance Trading within the Union, Decision (EU) 2015/1814 Concerning the Establishment and Operation of a Market Stability Reserve for the Union Greenhouse Gas Emission Trading Scheme and Regulation (EU) 2015/757.

re-examined—as far as climate change is concerned—from the perspective of a ‘duty to act’ on top of the existing one of ‘duty to cooperate’.

In the fight against climate change, the international legal framework still needs ‘new sources for defining rights and obligations’.³⁴ The CCH offers an original legal framework for legitimising domestic measures put in place to address global issues and combat free riding in a context of slow-moving multilateral negotiations. Interpreting and assessing the legal integrity of carbon adjustment mechanisms against this theoretical framing within international law is a means for devising an ‘obligation to do homework’, to quote Thomas Cottier.

The CCH does not contest the primacy of national sovereignty in matters of territoriality and natural resource management. It does, however, allow for an extension of jurisdictional boundaries in assuming shared responsibilities,³⁵ which is exactly what carbon adjustment does at the border, by applying a price signal aimed at addressing a negative climate externality across value chains outside the EU.

In international trade law, this also raises the (very) contentious issue of processes and production methods (‘PPMs’). PPMs are extremely important and more and more accepted in the field of fighting climate change and avoiding carbon leakage. Attributing normative power to the CCH principle would enable us to move on to the next stage, which is assumed to follow the proliferation of environmental standards, carbon adjustments (or the will to introduce adjustments, in this context), and eventually structure cooperation obligations (Article 7 of the Rio agreement) on the protection and management of public goods. Consequently, the concept has a complementary twofold dimension insofar as it allows consideration of the legitimacy of unilateral policies with extraterritorial effects (from the perspective of strengthening cooperation), and, if necessary, mechanisms of solidarity and assistance between States.

At the European level, it may prove valuable to consider the proliferation of autonomous measures with extraterritorial effects in view of this concept of international law: the CBAM is a case in point, but so are the new rules on due diligence, which will soon be extended to a whole new range of transparency and reporting obligations along certain value chains, together with the rules that will cover sectors at high risk of deforestation. At times, such unilateral actions involving extraterritorial effects have sometimes been opposed by industry and/or third countries on the basis of the CBDR principle as set out in the Paris Agreement. Objections such as these emphasise the potentially ‘punitive’ aspect of these measures. Reverting to the concept of Common Concern of Humankind as a source of legitimacy in international law for autonomous measures aimed at achieving sustainable development goals (as suggested by Thomas Cottier) would help situate these measures for what they really are: necessary and legitimate in the first place, but (secondly) suboptimal and potentially harmful from a social and climate justice perspective in the absence

³⁴ Cottier, note 26 above.

³⁵ Which, as the author points out, is perfectly ‘commensurate with the principle *pacta sunt servanda*’. Ibid, p 64.

of cooperation. Ultimately, CCH brings to the foreground the treaty obligation of states to cooperate on matters of global concern.

C. The Challenges of Solidarity and International Acceptability in CBAM and Designing Complementary Measures

International trade and environmental law does not prevent the application of border carbon adjustment policies that extend beyond the borders of the initiating states. The question remains as to whether the CBAM should be consistent in its overall approach towards seeking exclusively environmental objectives.

In contrast, what emerges through the CBDR principle is a solidarity issue that needs to be factored into the design of adjustment mechanisms. Of these issues, one of the most important is the fair redistribution of revenues stemming from the EU's border carbon adjustment. It is more a question of interpretation of the international climate treaty framework than of international trade law rules. This section aims to highlight the extent to which trade, particularly the distributional effects of unilateral policies affecting international trade, is a social issue. From this observation, we conclude that it is essential to reposition carbon adjustments at the border within the classic sustainable development triptych: economics, society, and the environment. It is essential to ensure that CBAM is conceived as an exclusively environmental instrument rather than a fiscal or competitive instrument for two reasons. Firstly, because CBAM—like all unilateral measures—has distributional effects on consumer purchasing power and secondly, because it will be phased out once the EU's trading partners are equipped to implement their own carbon pricing systems.

From a legal point of view, the issue is complex. The European legislator is justified in its position that the CBAM Regulation cannot earmark CBAM's revenues. CBAM generates a new resource for the EU of its own and, as such, contributes to the EU budget. It is for other decision-making bodies to determine the new budgetary balances generated by the creation of this resource. However, there is one essential principle upon which many researchers agree: CBAM should not be conceived as a tax measure but as an environmental measure. As a result, the European legislator needs to clarify and act on how the revenues will be used, despite the legal and budgetary constraints mentioned above. Firstly, most of the additional revenue generated by CBAM's implementation will be obtained by cutting free allocations under the ETS. In the Commission's impact assessment annexed to its CBAM proposal of 14 July 2021, it is stated that for the option chosen (option 4), the CBAM will have generated EUR 7.1 billion in revenue via the auctioning of additional ETS allocations by 2030, and EUR 2.1 billion in direct CBAM revenue, ie certificates to be paid by importers for emissions generated in third countries.

The issue at stake is the latter category of revenues, which, if we follow a logic of equity, must somehow reach the countries where pollution is likely to be displaced, i.e. countries most vulnerable to climate change or, more broadly, countries that are the least advanced both in terms of economic development and decarbonisation of their industries.

The emphasis on the principle of solidarity ultimately illustrates the sub-optimal nature of unilateral measures with extraterritorial effects, not least the carbon adjustment mechanism at the EU's borders. It therefore must be accompanied by a set of peripheral measures for industrial cooperation, but also for climate diplomacy.

III. THINKING OF BORDER CARBON ADJUSTMENTS AS A STEPPINGSTONE TO A REVAMPED COOPERATION AGENDA

The EU's announcement to implement a CBAM has revealed a 'precursor disadvantage',³⁶ which is reflected in the need for the EU to prove that the mechanism would be compatible with international trade law and would not unfairly disadvantage developing countries. Others have raised the idea of an EU 'hybrid climate leadership',³⁷ that would partly translate into the reinforcement of commitments under the Paris Agreement. The most recent literature on the CBAM shows that, although it has not yet been implemented, the instrument is already producing positive incentives to pick up the pace for climate ambitions.³⁸

In the absence of pre-existing international coordination, there is a real risk that states will implement policies that are admittedly legitimate according to the CCH approach outlined in Part II, but potentially unfair or insufficiently redistributive. What is demonstrated by both the EU's internal legislative process and the questions it raises about compatibility with international law is the need for greater proactive engagement with the states concerned on the recognition and harmonisation of CO₂ emission reduction policies at the industrial level. As underlined in Section 2, there is also the question of solidarity, ie the mobilisation of additional resources generated by CBAM towards the most vulnerable economies and those least able to develop low-carbon industries in the short term.

On 28 June, G7 members confirmed their intention to progress towards the creation of a carbon club 'by the end of 2022'.³⁹ The 'climate club' replaces the 'climate alliance' that the government had developed a few months earlier. The text published following the G7 summit on 28 June indicates that this climate club would be structured around three pillars:

³⁶ P Lamy, G Pons, and P Leturcq, 'GT6 - Towards a European Carbon Border Adjustment Mechanism' (*Europe Jacques Delors*, 2021).

³⁷ E Pander Maat, 'Leading by Example, Ideas or Coercion? The Carbon Border Adjustment Mechanism as a Case of Hybrid Climate Leadership' (2022) 7 *European Papers - A Journal on Law and Integration* 55, <https://www.europeanpapers.eu/es/europeanforum/leading-by-example-ideas-coercion-carbon-border-adjustment-mechanism>.

³⁸ P Pauw, L Van Schaik, and G Cretti, 'The CBAM Effect: How the World Is Responding to the EU's New Climate Stick' (*Clingendael Institute*, 2022), https://www.clingendael.org/sites/default/files/2022-05/Alert_CBAM_effect.pdf.

³⁹ G7 Statement on Climate Club, Elmau, 28 June 2022, <https://www.g7germany.de/resource/blob/974430/2057926/2a7cd9f10213a481924492942dd660a1/2022-06-28-g7-climate-club-data.pdf?download=1>.

- 1) Advancing ambitious and transparent climate mitigation policies to reduce emissions intensities of participating economies on the pathway towards climate neutrality;
- 2) Transforming industries jointly to accelerate decarbonisation, (...) and expanding markets for green industrial products; and
- 3) Boosting international ambition through partnerships and cooperation to encourage and facilitate climate action and unlock socio-economic benefits of climate cooperation and promote just energy transition.

At the Think 2030 conference organised by IDDRI and IEEP at Sciences Po Paris on 29–30 June 2022, a panel of CBAM experts underlined the ‘vague’ nature of the document presented by the G7, which gives very little indication as to the practical nature of the club or how it will interact with the European CBAM (would potential exemptions be granted to club members?). The parallel endeavour accepted by the EU to work on defining the parameters of a climate club confirms that it is still trying to overcome what I have described as a ‘first-mover disadvantage’.⁴⁰ The challenge is a big one for the EU in the sense that, in the absence of a price and/or global initiative on industrial CO₂ emissions, it must pave the way for international acceptance of an ‘adjustment paradigm’. The phenomenon is part of a new wave of globalisation, which tends to integrate negative externalities—be they environmental, social, or ethical—into international trading procedures. The dynamics of carbon adjustment must, however, be combined with other instruments for cooperation, which will promote greater levels of supply and demand for low-emission products. The underlying objective of climate diplomacy, which relies on tightening import restrictions according to environmental sustainability criteria in order to stimulate international standards should not be overlooked. It is therefore of the utmost strategic importance that CBAM does not come across as punitive on the one hand and unfair on the other. For this reason, many CBAM researchers agree that if the climate club were to be created, it should not lead to carbon adjustment exemptions decided arbitrarily between certain members, which would exceed the initial framework of exemptions and/or crediting provided for in the CBAM regulation (always determined according to the principle of objective equivalence between carbon pricing systems).

By proposing a three-tier distinction between normative clubs, bargaining clubs, and transformational clubs, Mehling et al.⁴¹ has recently demonstrated how the format and substance of the club are intrinsically linked. The range of possibilities extends from formal and normative treaties to simple intergovernmental discussion forums on industrial decarbonisation.

The merit of the proposed G7 climate club is that it formalises a process that was at risk of being carried out peripherally in the context of other international treaties or arrangements. The recent conclusion of the Global Arrangement on Sustainable Steel

⁴⁰ Lamy, Pons, and Leturcq, note 36 above.

⁴¹ M Mehling, H Van Asselt, S Droege, and K Das ‘The Form and Substance of International Cooperation on Border Carbon Adjustments’ (2022) 116 *AJIL Unbound* 213.

and Aluminium⁴² between the EU and the US is an example of the very real risk of states agreeing on bilateral exemptions from reciprocal adjustment measures. In exchange for a reduction of the so-called ‘Trump tariffs’ (Section 232 tariffs) on EU steel and aluminium, the EU has agreed discuss with US counterparts on the emissions reductions prospects of these sectors and work together on the development of a common methodology to assess the embedded emissions of traded steel and aluminium. Developing bilateral preferential frameworks to ‘green’ and reinforce trade in certain goods between the EU and the US is exactly the type of solution that was recently proposed by two US academics Todd N. Tucker and Tim Meyer, which was immediately and appropriately denounced by my colleague David Kleimann.⁴³ The risk of such behaviour is threefold and of varying magnitude depending on the circumstances: the non-compatibility of bilateral systems with international trade law; the undermining of unilateral carbon adjustment policies; and the consolidation of a two-tiered climate and trade diplomacy. With some countries being unable to assert individual efforts and thus unable to be exempted from carbon adjustment, they could be tempted to strengthen partnerships with the ‘lowest bidders’, such as China or India.

As Hermwille, et al. point out, the club offers opportunities for technical cooperation and new public-private partnerships on the decarbonisation of certain key sectors.⁴⁴ The club could thus aim to influence demand, similar to the Clean Energy Ministerial’s Industrial Deep Decarbonisation Initiative led by the UN Industrial Development Organization (‘UNIDO’).⁴⁵ The objective is to strengthen public-private sector partnerships on industrial decarbonisation.

Cooperation in the field of border carbon adjustment, as well as the whole regulatory environment on industrial decarbonisation remains largely undeveloped. However it is fast becoming a central research topic and will allow new ideas to emerge so that the aforementioned transition from coexistence to adjustment and finally to cooperation can be made as quickly and inclusively as possible.⁴⁶ For the time being, what is still lacking is an independent third party to ensure that the necessary consultation takes place between players to establish common standards and guidelines on border adjustments and possible exemptions. This is what

⁴² European Commission Press Release ‘Joint EU-US Statement on a Global Arrangement on Sustainable Steel and Aluminium’ (31 October 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5724.

⁴³ D Kleimann, ‘Guest Post: The Worst of Two Worlds: Why the US Blueprint for a Transatlantic Climate Club Authored by Todd Tucker & Tim Meyer Must Be Binned Immediately’ (International Economic Law and Policy Blog, December 2021), <https://ielp.worldtradelaw.net>.

⁴⁴ L Hermwille, et al., ‘A Climate Club to Decarbonize the Global Steel Industry’ (2022) 12 *Nature Climate Change* 494, <https://doi.org/10.1038/s41558-022-01383-9>.

⁴⁵ Industrial Deep Decarbonisation Initiative (Clean Energy Ministerial and UNIDO, 2021), <https://go.nature.com/3kSKnu4>.

⁴⁶ Mehling, Van Asselt, Droege, and Das, note 41 above; A Shawkat, A Cosby and O Sartor, ‘International Climate Cooperation for Energy-Intensive Industry: A (Realistic) Proposal’ (*Agora Industry*, 2022).

Pascal Lamy, Geneviève Pons, and I referred to as a ‘comparability forum’,⁴⁷ which would lay the foundations for an intergovernmental discussion on the equivalence of carbon pricing systems and ensure harmonisation of the technical environment surrounding their implementation. By strengthening technical assistance and public-private partnerships, we could accelerate the dissemination of low-carbon technologies and more generally, share best practices in carbon accounting.

CONCLUSIONS

Long examined by the academic literature on international relations and climate change as a challenging technical-legal fiction with a strong geopolitical impact, border carbon adjustment is on its way to becoming a European reality, with effects that will be felt at the international level. The sudden momentum of the political calendar on CBAM in May and June 2022 has resulted not only in the position formalisation of the three institutions involved in the legislative process (Commission, Council, and European Parliament), but also in the announcement by G7 countries of their intention to create a climate club parallel to the measure by the end of 2022. After several years of scrutiny by WTO law experts, it is now clear that the final version of the EU CBAM will be compatible with international trade law. Nonetheless, questions remain as to its acceptability, arising from two main areas of uncertainty: the use of revenues, and the back roads the EU has chosen to take with certain partners by moving forward on plurilateral (G7) or bilateral (US) initiatives for the mutual recognition of some standards, the impacts of which are still indeterminable. Based on Thomas Cottier’s pioneering work on the concept of Common Concern of Humankind in international law, we propose an ‘optimistic’ reading of border carbon adjustments as legitimate instruments (so long as they effectively pursue an environmental objective) for accelerating the transition from coexistence to cooperation in industrial decarbonisation policy. As emphasised by Pascal Lamy, Geneviève Pons, and I in 2021, the EU bears a heavy burden by working in trilogue on a first-ever border carbon adjustment of this magnitude. Its success depends on the EU’s ability to design a socially fair instrument through the mobilisation of its resources, and the strengthening of cooperation around the issues of development and industrial decarbonisation.

⁴⁷ Lamy, Pons, and Leturcq, note 36 above.