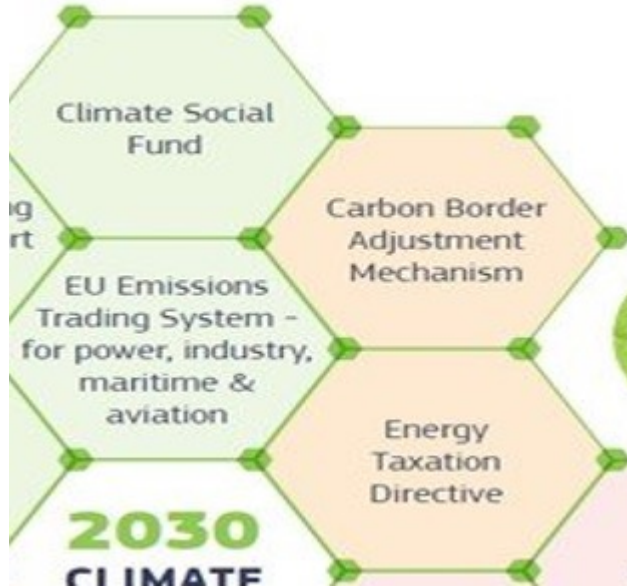


The EU's Fit for 55 Package: ins and outs of the new Carbon Border Adjustment Mechanism (CBAM)

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CBAM: Situation in Fit For 55



EUROPEAN GREEN DEAL

REACHING OUR
2030 CLIMATE
TARGETS



#EUGreenDeal

CBAM (Carbon Border Adjustment Mechanism) =

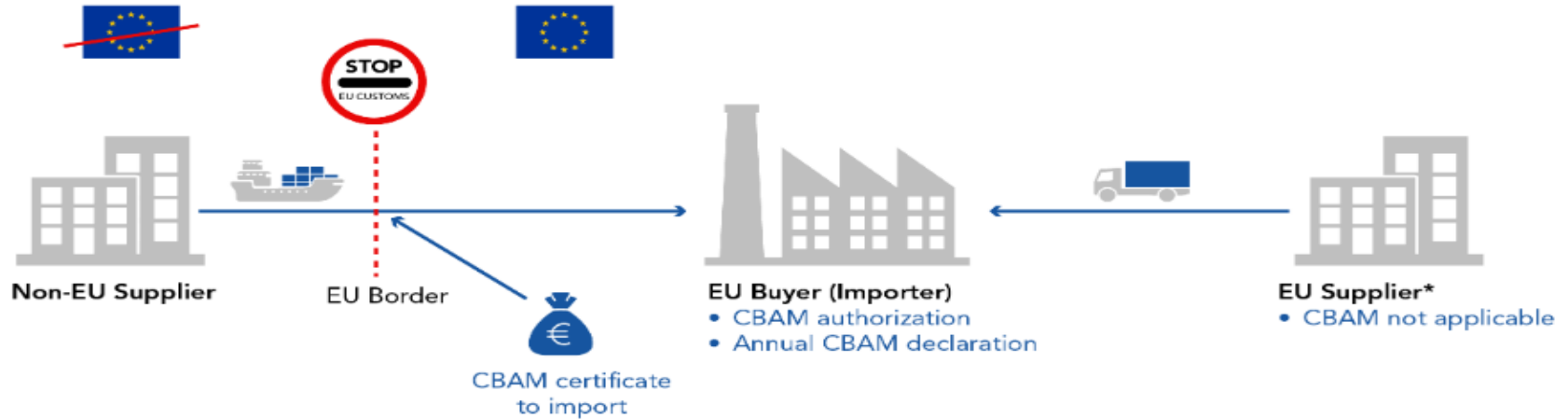
- CBAM = carbon tariff imposed by EU on import of carbon-intensive products
- Goal: prevent “carbon leakage”
- It will compare the *cost* of carbon in EU (through ETS and price) and *cost* of carbon elsewhere
 - not specifically CO2 emission itself or the political willingness in a country
- The difference must be paid via CBAM certificates
- It has a direct relation with the current EU ETS System, not at the least for reasons to avoid non-equal treatment under WTO rules
- It is a "world-wide" system, at least in the sense that it will lead to impact and questions on climate and trade policy in countries around the world

CBAM: Status

- Trilogue: On 14 December 2022, (European Commission,) European Parliament and the Council reached an agreement on the EU CBAM Regulation, known as the “compromise text” (16060/22, 14 December 2022)
- CBAM Agreement is a Regulation, not a Directive: consequences
- Final text to be formally approved by the Council and the Parliament
- Multiple implementing acts + delegated acts + review moments to be expected

CBAM: Method

EU Carbon Border Adjustment Mechanism simplified illustration



* Including goods originating from Iceland, Liechtenstein, Norway, and Switzerland
Source: The Conference Board, 2022

CBAM: Roll-out

- Transitional period (1 October 2023 - 31 December 2025): a CBAM *light* without consequences
 - Importers must report (light) on quantity of imported goods / total embedded GHG emissions in such goods, and carbon price paid in the country of origin
 - Quarterly = first deadline after Q4 2023 = around January 2024
 - Only direct emissions?
- After transitional period: CBAM in full force
 - Importers must purchase and surrender CBAM Certificates
 - Price of which will be equal to the carbon price paid by EU producers under the ETS rules (weekly carbon price under the ETS)
 - Annual declaration
 - Penalties for non-achievement

CBAM: Which goods will be impacted?

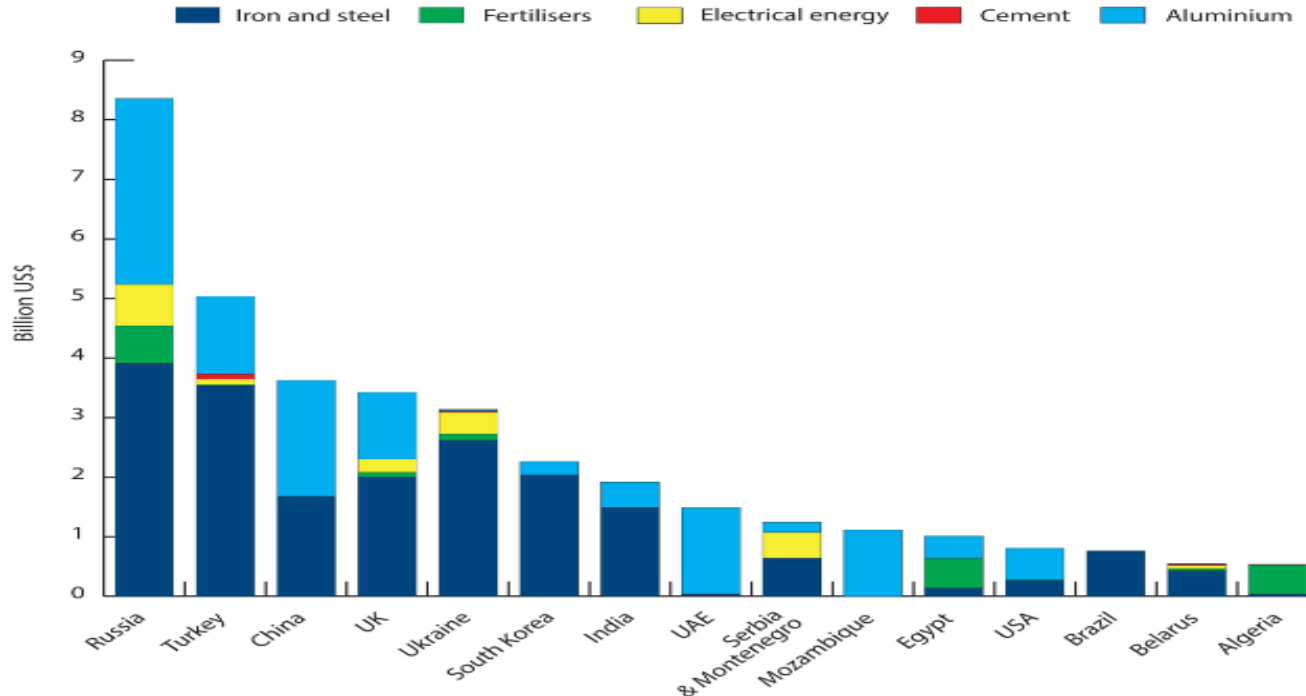
- Carbon-intensive & trade-exposed goods
- Goods will be listed in Annex to CBAM Agreement: (currently) cement, iron and steel, aluminium, fertiliser, electricity and hydrogen
 - Not (yet): organic chemicals, polymers, ceramics, paper, other ETS-covered goods
 - The hydrogen sector was not part of the European Commission's initial proposal, but was brought into scope by the European Parliament
 - Related with discussion on reliability of imported grey hydrogen

CBAM: Which goods will be impacted?

- Plus "some precursors" and a "limited number of downstream products" (*eg* screws and bolts and similar articles of iron or steel)
 - Not yet further detailed
 - Current wording as to indirect emissions: some will be covered after the transitional period + "under certain conditions" + in a "well-circumscribed manner"
- Assessment moment for scope extension by 2026 by European Commission:
 - Lobbying to be expected
 - But remember: the aim is to cover all ETS industry sectors by 2030

CBAM: Which countries will be most affected?

Chart 1: EU imports of products covered by proposed CBAM regulation from 15 most exposed countries, 2019

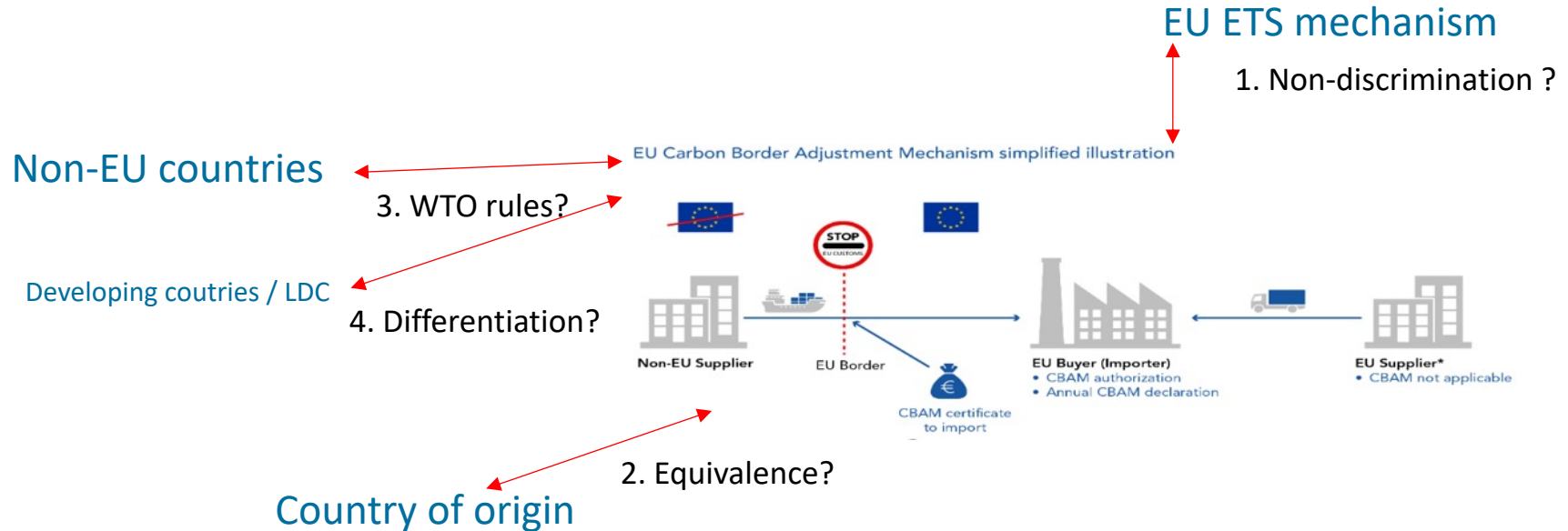


Source: www.cer.eu

CBAM: Effect for companies

- Companies will suffer carbon cost => share burden with supply partners => pass through to consumer (company)
- Additional administrative burden (reporting/buying CBAM certificates/proof of legislation in country of origin)
- More awareness as to cradle-to-grave trajectory of goods (and origin of actual emissions): what is the geographical composition of my product's emissions?
- Link with ESG

CBAM: Legal issues (selection)



CBAM: Legal issues

*"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.**"*

- 1. The **link** between introduction of CBAM and EU ETS free allowances phase out is crucial
 - Consequences as to non-discrimination and environmental protection argumentation vs. competitiveness measure claims

	2026	2027	2028	2029	2030	2031	2032	2033	2034
CBAM (%)	2.5	5	10	22.5	48.5	61	73.5	86	100
Free Allowance (%)	97.5	95	90	77.5	51.5	39	26.5	14	0

Source: European Parliament, "Climate change: Deal on a more ambitious Emissions Trading System (ETS)." Press release, December 18, 2022, <https://www.europarl.europa.eu/news/en/press-room/20221212PR64527/climate-change-deal-on-a-more-ambitious-emissions-trading-system-ets>.

CBAM: Legal issues

- **2. *Equivalence* and quantification**
 - Focus on pricing/cost, not on ambition/country targets/development/system/comparable incentives
 - Not everyone has a CO2 price in its country
 - Case by case or sectoral averages?
 - What if you're best of class?: No reward
 - Solutions? Sectoral reports / voluntary carbon price?
 - Risks for avoidance? Legitimate and illegitimate

Table 4: Global Emissions Trade

Jurisdiction	Carbon Price
EU ETS	\$87.30
California Cap-and-Trade Program	\$29.00
Regional Greenhouse Gas Initiative	\$13.46
China ETS	\$8.93
South Korea ETS	\$19.97

Source: "ICAP Allowance Price Explorer," International Carbon Action Partnership (ICAP), last updated September 30, 2022, <https://icapcarbonaction.com/en/ets-prices>; "Allowance Prices and Volumes," Regional Greenhouse Gas Initiative, 2023, <https://www.rggi.org/auctions/auction-results/prices-volumes>; "EU Emissions Trading System," European Commission, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en; "California Climate Policy Fact Sheet: Cap-and-Trade," Berkeley Law, <https://www.law.berkeley.edu/wp-content/uploads/2019/12/Fact-Sheet-Cap-and-Trade.pdf>; "Korea Emissions Trading Scheme," ICAP, <https://icapcarbonaction.com/en/ets/korea-emissions-trading-scheme>.

CBAM: Legal issues

- **3. WTO issues**

- Most-favored nation (concession made to one must be made to all)
- National treatment (no preferential treatment for domestic “like” goods over import)
 - EU: if more carbon intensive: no “like” goods
- Does CBAM fall under the exceptions against prohibiting taxes on imports? Equivalence to internal taxes, excl. environmental measure)
 - EU: tax paid by the importer will be equivalent to the cost of allowances EU producers will be forced to pay
 - EU: CBAM is a strictly environmental measure ⇔ direct link? Free allowances? EU budget 100% for environment?

CBAM: Legal issues

- **4. Least Developed Countries**

- Comparison with distinction in Kyoto and UNFCCC => reason to make a same distinction? (Kyoto and UNFCCC have evolved as well)
- Current text urges EU (only) to provide CBAM technical assistance to developing countries and states that financial support for decarbonization in those countries should come from the EU budget as well
- Proposals to recycle some CBAM revenue towards LDCs did not make it into the final agreement
- But: LDCs do not account for a substantial share of EU imports of covered commodities (but can be more successful in court?)

CBAM: Where are we heading to?

- Difference between first CBAM drafts and compromise text show where we are heading to:
 - Draft: only 4 sectors, focus on MS
 - now also hydrogen, and sub-products of the iron and steel + indirect emissions, focus on centralised role EC, postponing (1/1/23 to 1/10/23) + lots of disclaimers/ways out: revision by 2026 to extend the scope

CBAM : Regulatory / Legal buzzwords

- *Brussels driven*
- *ETS and CBAM: Communicating barrels*
- *Retaliation or adaptation?*
- *WTO / GATT / Inflation Reduction Act / ...*
- *Indirect emissions? Equivalence? Quantification?*

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- *Drawing on the expertise of the competition and trade departments, Fieldfisher's cross-disciplinary practice works with a strong mix of public bodies, energy companies and blue-chip multinationals on various regulatory and advisory mandates. Led by David Haverbeke and Wouter Vanderpe, the team routinely assists clients with power plant construction bids, wind and solar developments, and in proceedings before the various domestic and European courts. Haverbeke is an expert in energy market liberalisation measures, while Vanderpe regularly represents clients before the Belgian Council of State and European Court of Justice. (Legal 500, Edition 2022)*
- *"Wouter Vanderpe represents clients in energy sector disputes, with a client reporting that he has "a good grasp of the preliminary measures hearing – both commercially and in terms of litigation strategy." He also assists clients with power purchase agreements, co-operation agreements and energy performance contracts. In addition, Wouter Vanderpe advises clients on construction projects, energy sector regulations and subsidies issues." (Chambers, Edition 2022)*