



INSIGHT

THE EU AND CLIMATE CHANGE

edited by Charlotte Beaucillon and Benedikt Pirker

LEADING BY EXAMPLE, IDEAS OR COERCION? THE CARBON BORDER ADJUSTMENT MECHANISM AS A CASE OF HYBRID EU CLIMATE LEADERSHIP

EVA PANDER MAAT*

ABSTRACT: The Carbon Border Adjustment Mechanism (CBAM) is the most recent and assertive component of EU external climate policy. Whilst the CBAM has the potential to accelerate global climate governance, by demonstrating that Parties to the Paris Agreement can combat carbon leakage by means of border measures, it could simultaneously foster animosity and stall progress. Accordingly, the CBAM could either solidify or jeopardize the EU's long-recognized leadership position in global climate governance. This *Insight* therefore takes an in-depth look at the CBAM as a case of climate leadership. It assesses how the EU seeks to establish itself as a leader by merging methods from the exemplary, cognitive, and structural leadership types, whilst acting as a simultaneously economically and environmentally driven actor with high internal and external climate ambitions. This hybridity attests to the complexity of the CBAM, but also to the composite nature of EU climate leadership via unilateral measures. More specifically, the *Insight* brings attention to the close interrelation between exemplary and cognitive leadership in novel policy solutions, as well as the complementary role of structural leadership when there is no predetermined hierarchy between international norms. This role raises the question how sustainable EU climate unilateralism will be as the EU's economic clout, and hence its additional leverage, will decrease over time.

KEYWORDS: CBAM – climate leadership – unilateralism – Paris Agreement – carbon pricing – market conditionality.

* PhD Candidate, City University of London, eva.pander-maat@city.ac.uk.



I. THE CBAM AND EU LEADERSHIP THEORY

I.1. INTRODUCTION

The recent EU Commission Proposal for a Carbon Border Adjustment Mechanism (CBAM) has sent a shockwave through global climate and trade governance.¹ COP26² demonstrated that consensus on global carbon pricing is still far away. Accordingly, international partners have demonstrated both great interest in and opposition to the CBAM. This raises the question whether the CBAM might fortify or compromise EU climate leadership, which has historically been closely intertwined with global climate governance.

This *Insight* deploys canonical literature on EU climate leadership to explain the CBAM, whilst, in turn, the analysis may serve to further develop theory. It is innovative in two ways. First, as the EU would be the first global actor to adopt a carbon border measure, the CBAM is a welcome new case study of EU climate leadership via climate unilateralism. This *Insight* hence presents a novel contribution to this literature, which mainly proliferated around a decade ago. Second, it offers an early academic reflection on the CBAM, which has so far mainly been subject to economic assessments and policy papers.

The *Insight* is structured as follows. This first section recaps the present legal design of the CBAM and its capacity as a novel case of EU climate unilateralism. Subsequently, it gives a short appraisal of the types and objectives distinguished in EU climate leadership theory, and how the CBAM fits into them. The second section considers the CBAM as a case of exemplary and cognitive leadership. The third section assesses it as part of structural leadership. The fourth section evaluates how the EU's legislative objectives pertain to its capacity as a climate leader. The fifth section concludes.

I.2. THE CBAM: ASSERTIVELY COMBATING CARBON LEAKAGE

The CBAM aims to combat carbon leakage in the EU's Emissions Trading System (ETS). Carbon leakage takes place when climate policies in one region cause an increase in emissions in another. To prevent this, the CBAM creates a "notional ETS": a pool of emissions allowances which is separate from, but equal in price to the domestic ETS.³ Within selected sectors, EU importers will have to acquire CBAM allowances for their imported goods.⁴ As such, the CBAM does not directly create legal obligations for non-EU businesses. However, the price levied by the CBAM will be based on the individual emissions

¹ Proposal for a Regulation COM(2021) 564 final of the European Parliament and the Council of 14 July 2021 establishing a carbon border adjustment mechanism.

² The 26th Conference of the Parties (COP) under the United Nations Framework Convention for Climate Change.

³ Recitals 18-22 of the Proposal for a Regulation COM(2021) 564 final cit.

⁴ *Ibid.* art. 5.

of non-EU producers.⁵ The latter will be compelled to submit their emissions data: in the absence thereof, a punitive average sectoral benchmark will apply.⁶ Carbon prices which have already been paid in third countries can be discounted for: to this end, the EU can conclude agreements to recognize “equivalent” carbon pricing systems.⁷ Consequently, the CBAM is contingent on conduct and policy outside of EU territory. This contingency is a main source of opposition against the CBAM, as further explored in section two.

1.3. EU CLIMATE UNILATERALISM

The CBAM is a quintessential example of EU climate unilateralism, understood here to entail unilateral measures with external effects which set standards on emissions reductions. Whilst leadership literature has mainly focused on EU participation in international negotiations, climate unilateralism is a chief component of EU external climate policy.⁸ The main example thereof is the 2008 Aviation Directive, in which the EU sought to price the emissions of international flights arriving and departing at EU airports.⁹ The Directive was faced with intense opposition and boycotts by major partners and challenged before the CJEU.¹⁰ The EU eventually backed down and limited the scope of the ETS to intra-EU flights.¹¹ A multilateral agreement, albeit insufficiently progressive from the EU’s perspective, was eventually concluded.¹² The EU is still holding onto its unilateral leverage to promote the implementation and further development of this measure.¹³ The Aviation Directive has been the seminal point of reference in literature on the place of climate unilateralism in EU climate leadership. Over a decade later, however, the CBAM merits similar scrutiny in light of this literature, which will now be succinctly summarized.

⁵ *Ibid.* art. 7.

⁶ Based on the 10 per cent worst performing installations in the EU.

⁷ Arts 9 and 2(12) Proposal for a Regulation COM(2021) 564 final cit.

⁸ I Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Hart 2019); K Kulovesi, ‘Climate Change in EU External Relations: Please Follow My Example (or I Might Force You To)’ in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) 115.

⁹ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

¹⁰ Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864.

¹¹ R Elsworth and P MacDonald, ‘Aviation and the EU ETS: What Happened in 2012 During “Stop the Clock” (18 December 2013) Sandbag sandbag.be.

¹² N Dobson, ‘Maintaining the Pressure: The EU Leaves ICAO Hanging Despite “Historic” Emissions Agreement for Civil Aviation’ (19 March 2017) Renforce Blog blog.renforce.eu; International Civil Aviation Organization (ICAO), *Resolution A39-3 of 6 October 2016. Consolidated statement of continuing ICAO policies and practices related to environmental protection – Global Market-based Measure (MBM) scheme* www.icao.int.

¹³ Proposal for a Directive COM(2021) 552 final of the European Parliament and of the Council of 14 July 2021 amending Directive 2003/87/EC as regards aviation’s contribution to the Union’s economy-wide emission reduction target and appropriately implementing a global market-based measure.

I.4. EU CLIMATE LEADERSHIP: TYPES

The EU has been considered a leader in global climate governance ever since the United Nations Framework Convention on Climate Change (UNFCCC) was founded in 1992.¹⁴ This logically follows its legal mandate for internationally oriented climate policy in art. 191(1) TFEU. Leadership is defined in this *Insight* as being the “first” or “best in class”, meaning to spur progress in global climate policies.¹⁵ Effectiveness is not considered a defining criterion for displaying leadership.¹⁶

Various classifications of climate leadership have been coined in literature.¹⁷ This *Insight* follows the classification by Liefferink and Wurzel, who have synthesized much of this work.¹⁸ They distinguish, foremost, four main leadership types: *i) exemplary or directional* leadership relies on domestic policy and its “first-mover”, standard-setting advantage;¹⁹ *ii) cognitive or idea-based* leadership relies on disseminating novel ideas and regulatory solutions for policy problems; *iii) entrepreneurial or instrumental* leadership relies on negotiation strategies, coalition-building and agenda-setting. An adaptation is the characterization of the EU as a “leadiator”;²⁰ *iv) structural* leadership, contrary to the above, relies on “hard” power or material resources. In the case of climate, mainly economic power is relevant, whilst a relatively large percentage of global emissions can also constitute leverage. To create leadership, such power ought to be mobilized “in pursuit of collective goods”.²¹

¹⁴ Although with varying degrees of success. See among others H Walker and K Biedenkopf, ‘The Historical Evolution of EU Climate Leadership and Four Scenarios for its Future’ in S Minas and V Ntousas (eds), *EU Climate Diplomacy: Politics, Law and Negotiations* (Routledge 2018) 33; J Birger Skjærseth, ‘The European Commission’s Shifting Climate Leadership’ (2017) *Global Environmental Politics* 84; L Groen and A Niemann, ‘Challenges in EU External Climate Change Policy-Making in the Early Post-Lisbon Era: The UNFCCC Copenhagen Negotiations’ in PJ Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (TMC Asser Press 2011) 315; E Boyd, E Corbera and M Estrada, ‘UNFCCC Negotiations (Pre-Kyoto to COP-9): What the Process Says About the Politics of CDM-sinks’ (2008) *International Environmental Agreements: Politics, Law and Economics* 95.

¹⁵ R Underdal, ‘Leadership in International Environmental Negotiations: Designing Feasible Solutions’ in A Underdal (ed), *The Politics of International Environmental Management* (Springer 1998) 101.

¹⁶ D Liefferink and RKW Wurzel, ‘Environmental Leaders and Pioneers: Agents of Change?’ (2017) *Journal of European Public Policy* 951, 956.

¹⁷ RKW Wurzel and J Connelly, ‘Conclusion: Re-assessing European Union Climate Leadership’ in RKW Wurzel, J Connelly and D Liefferink, *The European Union in International Climate Change Politics* (Routledge 2016) 287; CF Parker and C Karlsson, ‘Climate Leadership’ in K Bäckstrand and E Lövbrand (eds), *Research Handbook on Climate Governance* (Edward Elgar 2015) 191, 192; M Grubb and J Gupta, *Climate Change and European Leadership* (Springer 2000); OR Young, ‘Political Leadership and Regime Formation: On the Development of Institutions in International Society’ (1991) *International Organization* 281.

¹⁸ D Liefferink and RKW Wurzel, ‘Environmental Leaders and Pioneers: Agents of Change?’ cit. 957.

¹⁹ RKW Wurzel, D Liefferink and D Torney, ‘Pioneers, Leaders and Followers in Multilevel and Polycentric Climate Governance’ (2019) *Environmental Politics* 1.

²⁰ K Bäckstrand and O Elgström, ‘The EU’s Role in Climate Change Negotiations: from Leader to “Leadiator”’ (2013) *Journal of European Public Policy* 1369.

²¹ RKW Wurzel, D Liefferink and D Torney, ‘Pioneers, Leaders and Followers in Multilevel and Polycentric Climate Governance’ cit. 9.

As widely recognized, these categories are not mutually exclusive. Leadership styles are combined in theory and in practice.²² This also accounts for the CBAM. As the first global actor to adopt a carbon border measure, the EU will, by definition, be an *exemplary* and a *cognitive* leader. Since the CBAM will condition EU market access, it will also automatically leverage economic power, creating *structural* leadership. Finally, instances of *entrepreneurial* leadership are displayed where the EU addresses the CBAM in multi- and bilateral settings.

Despite this hybridity, which will recur throughout the *Insight*, distinguishing ideal-type leadership styles has significant analytical value when dissecting individual instances of climate leadership. This *Insight* focuses on exemplary / cognitive leadership and structural leadership. It addresses exemplary and cognitive leadership in tandem, which is considered suitable to for novel regulatory solutions such as the CBAM, as will be explained below. The *Insight* does not assess entrepreneurial leadership in-depth. In the absence of concrete ongoing international negotiations, other leadership types are considered predominant in the CBAM's contribution to EU leadership. Whilst it would be interesting to assess the role of the CBAM in EU diplomacy, this assessment might be better suited for future empirical case studies (for example, of bilateral relationships such as the transatlantic).

1.5. EU CLIMATE LEADERSHIP: OBJECTIVES

Beyond leadership *types*, Liefferink and Wurzel base further specifications on actors' *objectives*. First, differentiating ambition levels yields four categories, which can be schematized as follows:²³

	Low Internal Ambitions	High Internal Ambitions
Low External Ambitions	Laggards	Pioneers
High External Ambitions	Symbolic Leaders	Pushers

A pivotal analytical distinction here is that between a pioneer, which coincidentally influences others as a by-effect of its high internal ambitions; and a pusher, which also has high external ambitions, *i.e.*, to spur third country climate policies. Second, the latter category is subdivided in constructive and conditional leaders. Constructive leaders are mainly motivated by environmental aims - they will adopt the measure regardless of

²² S Oberthür and C Dupont, 'The European Union's International Climate Leadership: Towards a Grand Climate Strategy?' (2021) *Journal of European Public Policy* 1095,1100.

²³ D Liefferink and RKW Wurzel, 'Environmental Leaders and Pioneers: Agents of Change?' cit. 954; table is by the author.

whether others follow them. By contrast, conditional leaders are mainly motivated by economic aims – they will only adopt the measure if others do so as well.²⁴ Section four of this *Insight* will interpret the CBAM in terms of these distinctions.

II. THE CBAM AS A CASE OF EXEMPLARY/COGNITIVE LEADERSHIP

Carbon border measures have long been debated in both policy and academic discourse.²⁵ However, they have not yet been implemented. The EU will thus necessarily set an example. Being the first in class, however, might not suffice to attract followers. For instance, it is noted that whilst the EU invariably had an exemplary function with its early adoption of an ETS, its ability to display leadership on emissions trading was flawed by difficulties to make the system effective.²⁶ The extent to which the EU's example will be followed hence partly depends on whether it can demonstrate 'how implementation problems can be solved effectively'.²⁷ The CBAM is thus a technical as much as a policy challenge.

Importantly, however, exemplary leadership entails not only defining the technicalities, but also the "normative standards of policy evaluation".²⁸ Such standards partly depend on the relation between the CBAM and international law. In defining this relationship, cognitive leadership is pivotal. Given the unresolved questions on the relation between carbon border measures and international law, the CBAM will necessarily represent the EU's answers to these questions. This *Insight* therefore considers exemplary and cognitive leadership in tandem, albeit without purporting that the two ideal types are not theoretically distinct or displayed in silo in other situations.

The fact that carbon border measures have not yet been implemented is unsurprising given their contentious position in international law. This controversy contains three main arguments. First, the jurisdictional reach over non-EU emissions can yield the allegation, which was also voiced against the Aviation Directive,²⁹ that the CBAM violates third countries' sovereignty. Second, the CBAM is considered incompatible with the bottom-up approach of the Paris Agreement, which leaves discretion on its implementation

²⁴ RKW Wurzel, D Liefferink and D Torney, 'Pioneers, Leaders and Followers in Multilevel and Polycentric Climate Governance' cit. 8.

²⁵ MA Mehling, H Van Asselt, K Das, S Droege and C Verkuil, 'Designing Border Carbon Adjustments for Enhanced Climate Action' (2019) AJIL 433; K Holzer, *Carbon-related Border Adjustment and WTO Law* (Edward Elgar 2014).

²⁶ D Torney, 'Follow the Leader? Conceptualising the Relationship between Leaders and Followers in Polycentric Climate Governance' (2019) *Environmental Politics* 167, 177, 182.

²⁷ M Haverland and D Liefferink, 'Member State Interest Articulation in the Commission Phase' (2012) *Journal of European Public Policy* 141, 184.

²⁸ K Dyson, *States, Debt and Power: "Saints" and "Sinners" in European History and Integration* (Oxford University Press 2014) 5.

²⁹ *Air Transport Association of America and Others* cit.

to the Parties' Nationally Determined Contributions (NDCs).³⁰ Moreover, the CBAM is seen to violate the Principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC).³¹ Third, several World Trade Organization (WTO) members consider the CBAM at odds with WTO law.³² These arguments point to several unresolved questions. For example, it is still debated in customary international law whether extra-territorial jurisdiction on climate could have a legal basis in the effects-based doctrine or the universality principle.³³ In addition, whilst the Paris Agreement compels Parties to draft ambitious NDCs, it does not define how assertive these may be in combating carbon leakage. Moreover, observing the CBDR-RC whilst respecting non-discrimination principles requires particular legislative caution.³⁴ The CBAM is the first regulatory experience with designing, adopting, and implementing carbon border measures. It will therefore invariably offer a cognitive contribution on resolving these questions.

Importantly, these questions also contribute to reluctance amongst Parties to the Paris Agreement to adopt carbon border measures. As such, carbon leakage can continue to hinder the adoption of sufficiently ambitious NDCs. This could thwart the achievement of the aims of the Agreement. With the CBAM, the EU tries to disseminate a potential solution on how, despite legal ambiguity, Parties can assertively combat carbon leakage. Its solution needs to be normatively convincing to ensure that international partners or bodies will not thwart the functioning of the CBAM. The EU must succeed at this to demonstrate that carbon border measures are part of the policy toolbox to implement the Agreement. In sum, exemplary leadership is contingent upon successful cognitive leadership.

This section argued that, in novel regulatory solutions such as the CBAM, exemplary and cognitive leadership go hand in hand. The EU seeks to simultaneously resolve a regulatory dilemma and function as a laboratory for legislative solutions. It is well-suited to make such a contribution – Wurzel and Connelly have linked the prevalence of cognitive EU climate leadership to its widely recognized regulatory power.³⁵ However, cognitive leadership has its limitations. In particular, it can take longer to have effect.³⁶ The current

³⁰ Paris Agreement to the United Nations Framework Convention on Climate Change of 12 December 2015, art. 4(2).

³¹ Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change hosted by India on 8 April 2021.

³² WTO Committee on Trade and Environment, Report of the Meeting held on 23 June 2021 of 3 August 2021, WT/CTE/M/72 18-20; WTO Committee on Market Access, Minutes of the Committee in Market Access 12 and 16 November 2020 G/MA/M/73 30-34.

³³ NL Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection Under International Law* (Bloomsbury 2021) 179 ff.

³⁴ MA Mehling and others, 'Designing Border Carbon Adjustments for Enhanced Climate Action' cit. 464.

³⁵ RKW Wurzel and J Connelly, 'Conclusion: Re-assessing European Union Climate Leadership' cit. 272.

³⁶ OR Young, 'Political Leadership and Regime Formation: On the Development of Institutions in International Society' cit. 298; see also cognitive leadership on the CBAM within the EU itself, respectively by the Commission in 2007 with the Future Allowance Import Requirement (FAIR); and France in 2009 and 2017 with the Carbon Inclusion Mechanism (CIM). For the remnants of the FAIR, see Communication COM (2010)

familiarity with carbon border measures in academic and policy circles might make the CBAM easier to propagate. However, as noted, views on its legal and normative legitimacy are deeply divided. The lack of hierarchy between international norms invites actors to offer their own interpretation of a balance between them. The question which interpretation will prevail will therefore necessarily be one of political economy. Its answer will be co-dependent on (economic) power relations. It is therefore unsurprising that the EU complements its directional and cognitive leadership with structural power, as will be explored in the subsequent section.

III. THE CBAM AS A CASE OF STRUCTURAL LEADERSHIP

The CBAM directly targets non-EU emissions. Its role in EU climate leadership is therefore not synonymous to the exemplary effects of other domestic climate policies. As outlined in section II.2, goods of non-EU businesses will increase in price upon their exportation to the EU, based on their embedded emissions. It may hence be perceived as exercising economic coercion.³⁷ Inherently, market access thus figures as leverage to achieve the aims of the CBAM.

This strategy is not novel in EU external relations. The EU's inclination to instrumentalize market access to achieve non-economic objectives has yielded it the designation "Market Power Europe" (MPE),³⁸ which was identified as structural leadership.³⁹ More specifically, the aforementioned Aviation Directive was theorized by Scott and Rajamani as "contingent unilateralism": an EU measure with reach over non-EU emissions, which is contingent upon the absence of a multilateral measure or "adequate" third country climate policy.⁴⁰ Contingent unilateralism is also presented as a turn towards structural power.⁴¹ Correspondingly, it is observed that the CBAM "goes beyond directional leadership. It does not only set an example that others might decide to follow but it also allows

265 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 26 May 2010, Analysis of options to move beyond 20% greenhouse gas emission reductions and assessing the risk of carbon leakage, para. 3.1.; Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, art. 10b(1)(b).

³⁷ VL Birchfield, 'Coercion with Kid Gloves? The European Union's Role in Shaping a Global Regulatory Framework for Aviation Emissions' (2015) *Journal of European Public Policy* 1276.

³⁸ C Damro, 'Market Power Europe' (2012) *Journal of European Public Policy* 682.

³⁹ D Torney, 'Follow the Leader? Conceptualising the Relationship between Leaders and Followers in Polycentric Climate Governance' cit.

⁴⁰ J Scott and L Rajamani, 'Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme' in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013) 209-210.

⁴¹ J Scott and L Rajamani, 'Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme' cit. 222.

the EU to enforce its carbon price on foreign products".⁴² Similarly, whilst Oberthür and Dupont include the whole Green Deal,⁴³ including the CBAM, amongst their version of exemplary leadership,⁴⁴ this version is expansive in that domestic policy instruments are reinforced with cognitive and structural leadership styles.⁴⁵

In line with these scholarly observations, structural leadership can strengthen the potential of the EU's exemplary role on the CBAM and speed up the normally incremental process of cognitive dissemination. If third countries follow the EU and adopt equivalent carbon pricing, they might do so not because they are convinced by the CBAM's exemplary effectiveness or normative logic, but because it is in their economic interest to prevent their exporting industries from being affected. The EU's structural power thus has significant added value. This is especially relevant when exemplary and cognitive leadership appear less effective due to the previously outlined legal and normative ambiguity on carbon border measures.

IV. PUSHING OR PIONEERING? THE CBAM IN OBJECTIVES

Having evaluated the CBAM as simultaneously displaying exemplary/cognitive and structural leadership *types*, the question is raised how the EU's *objectives* determine its climate leadership. The categorizations distinguished in section II.5, between pushing and pioneering and between constructive and conditional leadership, are now revisited in turn.

First, it may be noted that the EU has mainly alternated between pushing and pioneering, whilst it has also exhibited symbolic leadership in earlier phases. For example, in the 1990s, discrepancies between EU climate rhetoric at the international level and domestic energy policies were identified as an inhibiting factor to the EU's credibility in global climate governance.⁴⁶ Since the adoption of the ETS in 2003, however, the domestic climate policies of the EU have largely matched its external ambitions. The EU's current

⁴² A Pirlot, 'Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?' (2021) JEL 1, 24.

⁴³ Communication COM(2019) 640 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, of 11 December 2019, The European Green Deal.

⁴⁴ S Oberthür and C Dupont, 'The European Union's International Climate Leadership: Towards a grand Climate Strategy?' cit. 1108.

⁴⁵ *Ibid.* 1100.

⁴⁶ This credibility gap mainly prevailed in the 1990's, but is still cited as a relevant obstacle. AM Bocse, 'The European Union's New Climate Change Diplomacy: Innovating in Foreign Policy' in M Westlake, *The European Union's New Foreign Policy* (Palgrave Macmillan 2020) 195; K Biedenkopf and F Petri, 'EU Delegations in European Union Climate Diplomacy: The Role of Links to Brussels: Individuals and Country Contexts' (2019) *Journal of European Integration* 47; S Oberthür and C Dupont, 'The European Union's International Climate Leadership: Towards a Grand Climate Strategy?' 1104; S Oberthür and M Pallemarts, *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUBPRESS 2010) 53; S

emissions reductions pledge, encapsulated in the Green Deal and the “Fit for 55” package, is relatively very progressive – albeit still insufficient to keep temperature increase below 1.5 °C as per the Paris Agreement.⁴⁷

Consequently, the Commission is invariably driven by strong internal ambitions to adopt ambitious carbon pricing policies. Whilst implementing climate policies is a main priority, it is subject to domestic pressures, mainly from industry, to accompany these with carbon leakage measures. However, discontent over the environmental effects of the current mechanism to combat carbon leakage (free allowances) prevails.⁴⁸ In turn, carbon border measures are widely considered an effective or even ‘the most targeted’ measure to combat carbon leakage.⁴⁹ The intention to allocate CBAM revenue to the EU’s own budget represents another internal legislative objective,⁵⁰ albeit a secondary one.⁵¹ These internal objectives necessarily qualify the EU as a pioneer or a pusher. The distinction between the two depends on whether the CBAM has external objectives. The question thus presents itself whether the CBAM’s external effects are accidental or intentional.

On this question, it may be noted that Torney categorically identifies the external effects of market conditionality as accidental.⁵² More precisely, as formulated by Kelemen and Vogel regarding the Aviation Directive, “because the domestic political pressures would in any case have driven the European Union to act on greenhouse gas emissions, EU leaders clearly preferred to press other states to join them in the fight against climate change”.⁵³ This reading of the external effects of climate unilateralism as incidental would apply by analogy to the CBAM. Notwithstanding, it must be recognized that alongside

Oberthür and C Roche Kelly, ‘EU Leadership in International Climate Policy: Achievements and Challenges’ (2008) *The International Spectator* 35, 40.

⁴⁷ Climate Action Tracker, ‘Climate Target Updated Slow as Science Ramps Up Need for Action’ (15 September 2021) climateactiontracker.org.

⁴⁸ Preamble 10 of the Proposal for a Regulation COM(2021) 564 final cit.; European Court of Auditors, ‘The EU’s Emissions Trading System: free allocation of allowances needed better targeting’ (Special Report 18/2020); E Woerdman and A Nentjes, ‘Emissions Trading Hybrids: The Case of the EU ETS’ (2019) *Review of Law & Economics* 1; M Grubb and K Neuhoff, ‘Allocation and Competitiveness in the EU Emissions Trading Scheme: Policy Overview’ (2006) *Climate Policy* 7.

⁴⁹ In the Public Consultation on the CBAM, respondents (of which 55 per cent companies and business associations) generally considered current measures to combat carbon leakage insufficient with a view to the EU’s enhanced climate ambition, whilst they agreed that a CBAM would be effective to this end. European Commission, Summary Report Public consultation on the Carbon Border Adjustment Mechanism (CBAM) of 5 January 2021, Ref. Ares(2021)70541 3; S Dröge and others, ‘Tackling Leakage in a World of Unequal Carbon Prices’ (1 September 2009) *Climate Strategies* climatestrategies.org.

⁵⁰ Proposal for a Regulation COM(2021) 564 final cit. 10.

⁵¹ *Ibid.* cit. 46.

⁵² D Torney, ‘Follow the Leader? Conceptualising the Relationship between Leaders and Followers in Polycentric Climate Governance’ cit. 173.

⁵³ RD Kelemen and D Vogel, ‘Trading Places: The Role of the United States and the European Union in International Environmental Politics’ (2010) 43 *Comparative Political Studies* 449.

combating carbon leakage, incentivizing third country climate policies is an express objective of the CBAM.⁵⁴ In the words of Economy Commissioner Paolo Gentiloni, its main portfolio holder, it is meant “to exert political pressure on climate laggards to take action”.⁵⁵ It follows that the EU is driven by both high internal and external ambitions, which qualifies it as a pusher.

As an aside, it may be wondered whether the EU's external ambitions are to enhance compliance with the Paris Agreement, or to go beyond that. For example, Pirlot considers a CBAM based on equivalent carbon pricing contrary to the Agreement. She posits that the CBAM harbours an assumption that carbon pricing is necessary to implement the Agreement, an assumption which must be challenged - especially as the Agreement is based on differential implementation. She therefore argues that the objective of climate leadership with the CBAM is incompatible with the objective to foster compliance with the Paris Agreement.⁵⁶

Conversely, at least to the EU, climate leadership is synonymous to promoting Paris compliance. It is correct to point out the EU's assumption that carbon pricing is a necessary policy solution to implement the Agreement. It must also be recognized, however, that this assumption is widely shared: the World Bank estimates that to achieve the aims of the Paris Agreement, there must be a global carbon price at 50–100 dollars per tonne CO₂ by 2030.⁵⁷ Since May 2021, allowances in the EU ETS have been at that price level.⁵⁸ Accordingly, the EU is not exceeding necessary levels of ambition. This is without prejudice to the fact that the CBAM's alignment with the Paris Agreement would significantly improve if it were to take account of the CBDR-RC in its legal design, either via differentiated criteria or dedicated climate finance.⁵⁹

Second, as regards the distinction between constructive and conditional leadership, the aim is evidently not to adopt the CBAM only if others do. On the contrary, the EU insists a CBAM will only be necessary if others do not adopt similar climate policies. As stated by Climate Commissioner Frans Timmermans: “The more countries and regions adopt carbon pricing mechanisms [...], the less need there will be for adjustments mechanisms at the border, and that's what we're pushing for”.⁶⁰

⁵⁴ Recital 12 of the Proposal for a Regulation COM(2021) 564 final cit.

⁵⁵ European Parliament, Answers to the European Parliament: Questionnaire to the Commission-Designate Paolo Gentiloni, Commissioner-designate for Economy (October 2019) ec.europa.eu 7.

⁵⁶ A Pirlot, ‘Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?’ cit. 8-9; see also J Scott and L Rajamani, ‘Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme’ cit. 220.

⁵⁷ High-Level Commission on Carbon Prices, *Report of the High-Level Commission on Carbon Prices* www.carbonpricingleadership.org.

⁵⁸ Ember, *Carbon Price Viewer* ember-climate.org.

⁵⁹ Such provisions are currently lacking. Proposal for a Regulation COM(2021) 564 final cit. 19-21, 30.

⁶⁰ Global Counsel Conference, ‘Europe's post-covid recovery plans with Frans Timmermans. The Politics of Life After Covid’ (18 January 2021) Global Counsel vimeo.com (min. 8:10).

It might be posited, however, that the CBAM transforms the ETS into a conditional measure: the EU is happy to heighten the ambition of its domestic carbon pricing, but only if others adopt equivalent measures. If not, it will ensure that its domestic industry will not be disadvantaged. As such, the CBAM arguably displays a constructive leadership, driven by environmental aims, which harbours a conditional kind of leadership premised on an economic rationale.

This ambiguity is inherent to the dual nature of carbon leakage: its ‘waterbed effect’ has both an environmental and an economic dimension. Technically, the phenomenon refers only to the relocation of emissions, which can be considered a purely environmental issue. However, carbon leakage also has prevalent economic implications. Without any protection against carbon leakage, EU businesses would be at a disadvantage as compared to non-EU businesses which are able to sell their products on the EU market without being affected by ETS levies. In the long term, this may lead the onus of a particular industry and accompanying long-term investments to shift from the EU to other regions with laxer constraints. Carbon leakage is therefore inherently tied to a loss of competitiveness. Economic arguments feature in the EU rationale for a CBAM on various accounts.⁶¹ Frans Timmermans has gone so far as to state that “It’s a matter of survival for our industries”.⁶² Nonetheless, the EU is evidently intent to emphasize the environmental dimension of carbon leakage. For example, in its Proposal, the Commission explains the relevance of combating carbon leakage by noting that it “could result in an overall increase in global emissions”.⁶³ This emphasis is part of the EU’s cognitive leadership. The WTO-compatibility of the CBAM is jeopardized if non-environmental legislative objectives appear predominant, whereas EU seeks to convince its partners precisely that carbon border measures can be WTO-compatible.

Notwithstanding, it must be recognized that the easiest way to avoid carbon leakage would be to either abandon the idea of carbon pricing altogether, or to stick to a less assertive measure, such as free allowances. However, as noted, the deficient environmental effectiveness of that policy alternative leads the EU to propose a CBAM. In sum, the economic objectives of the CBAM are balanced out by its intrinsic environmental aims. The EU’s approach with the CBAM can thus be characterized as that of a hybrid constructive – conditional pusher.

⁶¹ Candidate for President of the European Commission Ursula von der Leyen, ‘A Union that Strives for More: My Agenda for Europe - Political Guidelines for the European Commission 2019-2024’ (July 2019) ec.europa.eu, 5; Opinion of the European Economic and Social Committee on ‘Carbon Markets: Emergence, Structuring and Challenges for European Industry’ (own-initiative opinion) (11 December 2020), para. 1.2.3.

⁶² Global Counsel Conference, ‘Europe’s Post-covid Recovery Plans with Frans Timmermans: The Politics of Life After Covid 3 months ago’ Global Counsel cit. (min. 17:40); C Hodgso, ‘EU Rebuffs US Concerns Over Carbon Border Tax Threat’ (31 March 2021) [Financial Times www.ft.com](https://www.ft.com); Carbon Pulse, ‘France’s Macron calls for EU-wide “just and significant” carbon price’ (26 September 2017) [Carbon Pulse carbonpulse.com](https://carbonpulse.com).

⁶³ Proposal for a Regulation COM(2021) 564 final cit. 1.

V. CONCLUSION

This *Insight* has shed light on climate unilateralism in EU climate leadership by focusing on the CBAM. It has qualified the CBAM as a case of hybrid climate leadership. In a display of primarily the exemplary/cognitive and structural leadership types, the EU is positing itself as a simultaneously constructive and conditional pusher.

The hybridity of these qualifications attests to the complexity of the CBAM, but also to the composite nature of EU climate leadership. The analysis has especially highlighted the close interrelation between exemplary and cognitive leadership in novel policy solutions, particularly when they are placed in grey areas of international law. Moreover, it pointed out that structural leadership has significant added value in the case of novel regulatory solutions, where a predetermined hierarchy between international norms is lacking. As such, the EU's regulatory power is reinforced with economic clout. Finally, the *Insight* brought attention to the intricately layered objectives of the CBAM, which are at once internal, external, economic and environmental.

Overall, if the CBAM attracts followers, it can solidify the EU's leadership position and inspire a leap forward in global climate governance. Alternatively, if opposition remains fierce and the EU is forced to retreat, it could come to represent a significant setback to EU climate leadership. The EU therefore needs all the leadership tools at its disposal. However, it is worth considering that as the relative size of the EU market and the EU's share in global greenhouse gas (GHG) emissions are set to decrease over the coming decades, so will its ability to rely on structural leadership. It might thus be wondered to what extent climate unilateralism can remain a relevant tool of EU climate leadership without market conditionality as additional leverage. Henceforth, the CBAM could prove to be one of the final opportunities for the EU to unilaterally steer global climate governance.

