

The European Union's Carbon Border Adjustment Mechanism: Protection or Contradiction of Human Rights as a European Value?

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Abstract—The Carbon Border Adjustment Mechanism (CBAM) is part of the European Green Deal's legislative package, aiming to prevent carbon leakage by imposing extraterritorial regulations. This article evaluates the CBAM's effectiveness as a global environmental measure and its potential conflict with human rights, a core value of the European Union. The study examines whether the EU's external actions, particularly through the CBAM, align with its internal human rights obligations, as per the Paris Agreement. The article contextualizes the CBAM within the EU's legal and political frameworks, focusing on its objectives of reducing carbon emissions and mitigating climate change. Special attention is given to the economic and social impacts on developing countries, whose exports may be significantly affected. It argues that the CBAM, as designed, clashes with principles of global justice by neglecting the right to development. Finally, recommendations are made for reconciling environmental policies with human rights commitments.

Index Terms—Carbon Border Adjustment Mechanism, Human Rights, values of the European Union, Paris Agreement, European Green Deal

I. INTRODUCTION

This The Carbon Border Adjustment Mechanism, abbreviated in English as CBAM (Carbon Border Adjustment Mechanism) — a term that will be used throughout this study — is part of the legislative implementation of the European Green Deal, known as the Fit for 55 package. This Green Deal can be defined as the collective effort of the Member States of the European Union (EU) through the Union's external policy, in fulfilling the commitment made with the signing and ratification of the 2015 Paris Agreement¹. This international treaty aims to limit global warming to a variation of less than two degrees Celsius². In the context of the EU's international relations, the CBAM introduced the extraterritorial application of European regulations, as goods imported from third

countries are also covered by it. However, it is important to note that the EU's environmental policy for controlling greenhouse gas emissions began many years ago.

Since 2005, the implementation of the Emissions Trading System (ETS) in the EU (as well as in Iceland, Liechtenstein, and Norway) has assigned a monetary value to CO₂ emissions associated with the production of certain goods within the EU. The EU-ETS operates on a "cap and trade" principle, meaning that industries covered by the system are granted a predetermined cap on greenhouse gas (GHG) emissions, expressed as emission allowances. Each allowance corresponds to the right to emit one ton of CO₂. Emitters are required to hold allowances for every unit of GHG they release, and companies have the option to buy and sell these allowances, with their price determined by the market. Annually, companies must surrender a sufficient number of allowances to fully cover their emissions; otherwise, they are subject to substantial fines.³

The allocation of EU ETS certificates was done by the states free of charge until the introduction of the CBAM. The goal of this public policy within the carbon market was to encourage companies to reduce their greenhouse gas emissions through investments in less-polluting technologies for their production chains. It was also aimed at preventing these companies from relocating their production to third countries due to the increased costs within the EU arising from compliance with the ETS. However, it was found that the free allocation of certificates was not sufficient to ensure that the price of carbon per ton remained high enough to incentivize companies to invest in emission-reducing technologies. In this context, the CBAM was introduced to impose a carbon price on certain products from industries with higher greenhouse gas emissions (cement, steel, aluminum, fertilizers, electricity),

¹ Council of the European Union, 'European Green Deal' (consilium.europa.eu, 20 December 2023). Available at: <https://www.consilium.europa.eu/en/policies/green-deal/> Accessed 8 February 2024.

² United Nations, 'Paris Agreement on Climate Change Aims for Long-term Environmental Stability' (<https://unric.org/en>, 16 April 2016). Available at:

<https://unric.org/en/paris-agreement-on-climate-change-aims-for-long-term-environmental-stability/> Accessed 8 February 2024.

³ European Commission, 'What is the EU ETS?' Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/what-eu-ets_en#eu-ets-legislative-framework Accessed 8 February 2024.

including imports, which mirrors the CO2 allowance price in the EU ETS.⁴

One of the main objectives of the CBAM is to prevent carbon leakage⁵, which is the relocation of production, and consequently greenhouse gas emissions, from a company in the European Union to third countries⁵ with less stringent climate regimes⁶. Another key objective of the CBAM is to serve as a mechanism for reducing greenhouse gas emissions globally⁷, as it also applies to products imported from third countries⁸.

One of the main objectives of the CBAM is to prevent carbon leakage⁸, which is the relocation of production, and consequently greenhouse gas emissions, from a company in the European Union. The study of the Carbon Border Adjustment Mechanism (CBAM) is, in fact, a multidisciplinary topic that intersects with issues of international trade, economics, and customs and fiscal regulations. For some authors, the conflict of the CBAM with the main rules of the WTO (Articles I, II, and III of the GATT) seems inevitable⁹. Furthermore, there are fiscal issues that need further clarification, such as the nature of the fee introduced by the CBAM and whether it could be classified as a tax¹⁰.

However, this article does not address the intersections with the aforementioned disciplines. Instead, it focuses on analyzing the external action of the European Union (EU) concerning its environmental policy from the perspective of human rights as a core European value, especially regarding the impact of the CBAM on third countries considered more vulnerable and the potential human rights violations arising from it. The study explores the legal and ethical implications of the CBAM and its repercussions on developing countries, emphasizing human rights in a global context of environmental policies. Due to its commitment to the Paris Agreement, the EU has pledged to adhere to the principle of common but differentiated responsibilities, which dictates that developed countries should lead in the fight against climate change, taking into account the needs of developing countries, particularly the most vulnerable. Since the carbon price aims to allocate mitigation costs based on the market and increase revenue for climate action, an international carbon pricing scheme compatible with this principle requires low-income and historically less-polluting countries to pay a lower price¹¹. This suggests that the EU may be violating the fundamental right to development, which is part of human rights. Given that human rights are fundamental values of the EU, the adoption of the CBAM may represent a violation of human rights on the international stage and thus of European values. Based on this issue, this research aims to answer the following question: to

what extent does the EU's implementation of the CBAM conflict with human rights as a value of the EU and with the right to global development? To address this, the legal and normative foundations that enabled the EU's implementation of the CBAM in the context of its external action are first evaluated, followed by an analysis of the legal nature of the international treaty of the Paris Agreement. Next, the right to development as a human right is presented, along with its different facets, as well as the principle of common but differentiated responsibilities in the Paris Agreement. Afterward, the collaboration of the EU with the UN on human rights and environmental policies is discussed, followed by an examination of the impact of the CBAM on developing countries. Finally, the potential conflicts of the CBAM with Human Rights are analyzed, and the conclusions are presented.

For the preparation of this article, a mixed-methods approach was adopted, combining research in scientific articles, documentary analysis, and the examination of select legal cases. Initially, an extensive search was conducted for online books and scientific articles in indexed journals, utilizing academic databases such as SSRN, Springer, Web of Science, and Elsevier, in order to obtain a comprehensive and up-to-date understanding of the impacts of the CBAM on more vulnerable developing countries. Concurrently, documentary research was carried out, focusing on Regulation 2023/956, relevant treaties and agreements of the European Union, including the TFEU, the Treaty on European Union, and the Paris Agreement. Attention was also given to agreements between the EU and African countries, particularly the Cotonou Agreement and its successor, the Samoa Agreement. Finally, an analysis of several cases from the Court of Justice of the European Union (CJEU) was undertaken to better understand the legal interpretations of soft law within the EU. This methodology enabled a thorough and well-founded analysis of the issues addressed, providing a robust basis for our conclusions and recommendations.

II. LEGAL FRAMEWORK

This section is divided into three subtopics. First, it examines the EU External Action: Competence and Objectives (2.1), exploring the legal and institutional frameworks that guide the EU's role in global affairs. Next, the Legal Nature of the Paris Agreement (2.2) is discussed, focusing on its legal status and its implications for the EU's climate policy. Finally, the section delves into The Use of Soft Law in the European Union: Implications in the International Context (2.3), analyzing the application of non-binding legal instruments within the EU and their impact on international relations.

⁴ Regulation 2023/956, Recital No. 20 and Annex I.

⁵ *ibid.*, Recital N °12.

⁶ Federal Ministry for Economic Affairs and Climate Action of Germany. Available at: <https://www.bmwk-energiewende.de/EWD/Redaktion/EN/Newsletter/2021/09/Meldung/direkt-account.html> Accessed 8 February 2024.

⁷ Regulation 2023/956, Recital No 15.

⁸ *Ibid.* Recital No 16.

⁹ See, in this regard, Gary Clyde Hufbauer, Jeffrey J. Schott, Megan Hogan, and Jisun Kim, 'EU Carbon Border Adjustment Mechanism Faces Many Challenges' (October 31, 2022). Peterson Institute for International Economics

Policy Brief 22-14. Available at <https://ssrn.com/abstract=4262951> Accessed 25 February 2024.

¹⁰ See, in this regard, Giulia Claudia Leonelli, 'Export Rebates and the EU Carbon Border Adjustment Mechanism: WTO Law and Environmental Objections', *Journal of World Trade* 56, no. 6 (2022): 963-984.

¹¹ Fausto Corvino, 'The Compound Injustice of the EU Carbon Border Adjustment Mechanism (CBAM)', *Ethics, Policy and Environment* (2023) 2

A. EU EXTERNAL ACTION: COMPETENCE AND OBJECTIVES

The European Union's external action is grounded in Article 21 of the Treaty on European Union (TEU) and aims, among other things, to protect European values as outlined in Article 2 of the TEU. This is established in paragraph 2 of Article 21 of the TEU, in points a) and d):

The Union shall define and pursue common policies and actions and shall seek to ensure a high degree of cooperation in all areas of international relations, in order to: a) Safeguard its values, fundamental interests, security, independence, and integrity; (...) d) Support sustainable development in the economic, social, and environmental fields of developing countries, with the primary aim of eradicating poverty¹².

The European values, as outlined in Article 2 of the TEU, are as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are shared by the Member States within a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity, and equality between men and women¹³.

The EU is committed to upholding these values not only within its territory but also in its relations with the rest of the world, while promoting, among other objectives, the sustainable development of the planet and the eradication of poverty¹⁴. Although this information is well-known, it is worth noting that the expression "rights of man" is equivalent to human rights. It is crucial to highlight the EU's competence as an institution with legal personality to conclude agreements with international organizations, as provided in Article 216(1) of the Treaty on the Functioning of the EU (TFEU). This is particularly relevant given that the signing and ratification of the Paris Agreement by the EU and its Member States (MS), which took place in April and October 2016, respectively, make this international agreement the legal basis for the EU's external action in proposing the CBAM. On the EU's internal level, Article 191 of the TFEU establishes the objectives of the EU's environmental policy, notably 'the promotion, at the international level, of measures to address regional or worldwide environmental problems, and in particular, to combat climate change'.¹⁵ The shared competence between the EU and the Member States in the field of environmental policy is also established in paragraph 4 and the final paragraph of the same article:

The Union and the Member States shall cooperate, within their respective competences, with third countries and competent

international organizations. The Union's forms of cooperation may be the subject of agreements between the Union and the interested third parties.

The provisions of the preceding paragraph shall not affect the Member States' ability to negotiate in international forums and conclude international agreements.¹⁶

The European Commission presented the CBAM proposal to the European Parliament based on Article 192(1) of the TFEU, which states: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt the actions to be undertaken by the Union to achieve the objectives referred to in Article 191.'¹⁷ In this regard, Martijn L. Schipper and Walter de Wit draw attention to the notable approval of the regulation under the ordinary procedure, without requiring a qualified majority, even though the CBAM introduced a levy on imports. According to Article 192, n° 2, a) of the TFEU: 'The Council, acting unanimously in accordance with a special legislative procedure, shall adopt provisions primarily of a fiscal nature'¹⁸. This approval is controversial, as the fundamentally fiscal nature of the CBAM cannot be excluded.

In conclusion, an analysis of the European Union's external action highlights its competence and objectives both at the internal and international levels. Internally, the EU aims to promote values such as human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, fostering a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity, and gender equality. Internationally, the EU seeks to cooperate with third countries and international organizations to safeguard these values and fundamental interests, while also supporting sustainable development in the economic, social, and environmental dimensions of developing countries, with the primary goal of eradicating global poverty. However, the controversy surrounding the approval of the CBAM regulation under the ordinary legislative process raises significant questions regarding its primarily fiscal nature and the adequacy of its legal basis.

B. LEGAL NATURE OF THE PARIS AGREEMENT

To provide a comprehensive analysis of the legal nature of the Paris Agreement, it is essential to consider the principle established in Article 26 of the Vienna Convention on the Law of Treaties: *Pacta Sunt Servanda*, which states that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'¹⁹ It remains to be determined whether the Paris Agreement qualifies as a treaty in the sense expressed by the Vienna Convention.

¹² Consolidated Version of the Treaty on European Union [2016] OJ C202/13, Article 21(2)(a) and (d)

¹³ Ibid. Article 2°

¹⁴ Ibid. Article 3° n° 5

¹⁵ Ibid. Article 109°, n°1

¹⁶ Ibid. Article 191°, n° 4

¹⁷ Treaty on the Functioning of the European Union. Article 192°, 1)

¹⁸ Ibid. Article 192°, n° 2, a)

¹⁹ Vienna Convention on the Law of Treaties. Article 26°

Since the first United Nations (UN) negotiations on climate change up to the current Agreement, the legal nature of the targets to be achieved has always been a point of contention among the contracting parties. The status of the United Nations Framework Convention on Climate Change (UNFCCC) as an international treaty, however, has been widely recognized and accepted, thereby making it *legally binding* under the Vienna Convention.²⁰ But what does *legally binding* mean in the context of an international treaty? To answer this question, it is essential to introduce certain key concepts. In public international law, a norm is considered *legally binding* when it establishes a legal obligation, creating a legal bond that compels a subject of international law to adopt a specific behavior towards others.²¹ This definition should not be confused with the term *legally enforceable*, which refers to the existence of procedural mechanisms aimed at ensuring that states fulfill their obligations.²² These methods include transparency and facilitation, as well as compliance and enforcement. Conversely, a legal norm may be considered binding but not legally enforceable if such mechanisms to support and ultimately ensure its application are absent. This is commonly observed in the context of international law.²³ This highlights the dichotomous approaches that polarize law into the categories of *hard law* and *soft law*. However, for some scholars, this binary and simplistic view is insufficient to explain the normative force of international environmental law, which operates along a spectrum.²⁴ According to Sandrine Maljean Dubois and others, it is possible to observe that in various norms considered *hard law*, the lack of precision with which they were drafted—either through overly generic terms or because they were not written in a manner that prescribes an obligation with accuracy—leads to the phenomenon of non-binding norms. Moreover, Daniel Bodansky emphasizes the important distinction between the legal character of a norm and its enforceability; courts can only apply legally constituted norms. Thus, enforceability depends on legal norms, but the binding nature of a norm does not depend on its enforceability.²⁵ He further clarifies the issue of precision in norms: ‘The more precise a norm, the more it restricts behavior. But legally binding norms can be very vague, while non-legal norms can be quite precise.’²⁶

A Based on the clarifications outlined above, we turn to the concept of the United Nations Framework Convention on Climate Change (UNFCCC), which comprises a series of treaties and decisions made during the Conferences of the

Parties (COP). Its primary objective is to promote adherence by States to the principle of no harm²⁷, which encompasses both the negative responsibility of a State to avoid causing significant harm across borders and the positive responsibility of a State to take measures to prevent activities that result in significant transboundary harm.²⁸ The Paris Agreement, as an integral part of the UNFCCC, is an international treaty in the form of a Protocol, although it retained the terminology of Agreement, and is subject to the norms of the Vienna Convention on the Law of Treaties. As such, it establishes obligations for the signatory States. It can be asserted that the central obligation established by the Paris Agreement is to ensure that States reduce and prevent activities causing transboundary harm due to excessive greenhouse gas emissions through what are referred to as *Nationally Determined Contributions* (NDCs). The question arises as to whether these obligations are obligations of conduct or of result. The International Law Association, in its Declaration of Legal Principles Relating to Climate Change, interprets an ‘obligation to ensure’ as a duty to ‘exercise due diligence to avoid, minimize, and reduce environmental and other harm.’²⁹ Indeed, the International Court of Justice (ICJ), in its advisory opinion on the threat or use of nuclear weapons, stated: ‘(...) The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.’³⁰

In a clear reference to the principle of non-harm, the court elaborates on the general obligation in the case under analysis as an obligation of conduct. Drawing an analogy to the Paris Agreement, given its objective and purpose, one can infer that it establishes an obligation of conduct concerning nationally determined contributions.³¹ In determining the obligation to prevent transboundary harm, it is crucial to consider the international commitments to cooperation, notification, and consultation. This interpretation aligns with the principles of good faith and good neighborliness in international law.³² In contrast, Professor Peter Lawrence argues that the use of soft law in essential elements of the Paris Agreement related to environmental impact reduction raises considerable concerns about its effectiveness, representing, in this sense, a possible weakness of the Agreement.³³ However, the same author acknowledges that the inclusion of soft law, and therefore non-binding norms, in the Paris Agreement was crucial for reaching

²⁰ Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 RECIEL 144.

²¹ Jean Salmon (ed.), *Dictionnaire de droit international* (Brussels: Bruylant, 2001) 629

²² Sandrine Maljean-Dubois, Thomas A Spencer and Matthieu Wemaere. ‘The Legal Form of the Paris Climate Agreement: A Comprehensive Assessment of Options’ (February 1, 2015) 2

²³ Ibid

²⁴ Ibid

²⁵ Ibid. (20) 143

²⁶ Ibid

²⁷ Benoit Mayer, ‘Construing International Climate Change Law as a Compliance Regime’ (2018) 7(1) Transnational Environmental Law 115

²⁸ Benoit Mayer, ‘Obligations of Conduct in the International Law on Climate Change: A Defence’ (2018) 27(2) RECIEL 133

²⁹ International Law Association, ‘Declaration of Legal Principles relating to Climate Change’, 2014

³⁰ International Court of Justice, ‘Legality of the Threat or Use of Nuclear Weapons’ (Advisory Opinion, 1996) ICJ Rep 226, [29]

³¹ Christina Voigt, ‘The Power of the Paris Agreement in International Climate Litigation’ (2023) 32 RECIEL 246.

³² Ibid.

³³ Peter Lawrence and Wong D, ‘Soft Law in the Paris Climate Agreement: Strength or Weakness?’ (2023) RECIEL 285.

consensus among states, and for this reason, he identifies it as a positive characteristic of the Agreement.³⁴ Christina Voigt, on the other hand, observes that most binding norms in the Paris Agreement are procedural in nature, requiring parties to submit specific information. The other norms, on the other hand, have a normative influence insofar as they can serve as a standard of care for other international norms and, we might even say, as a standard for national courts. The most important thing is that the standards of due diligence contained in the aforementioned agreement carry a ‘strong expectation’ of how the parties should behave.³⁵

Finally, the Paris Agreement marks a significant advancement in international environmental law, imposing binding obligations on the participating States and providing a framework to strengthen the global response to climate change. Through the analysis of the *Pacta Sunt Servanda* principle in the Vienna Convention on the Law of Treaties and the distinction between obligations of conduct and result, we have clarified the legal nature of the Agreement. Based on the analysis conducted, we conclude that the presence of soft law was an essential requirement for the existence and effectiveness of the Paris Agreement. The inclusion of non-binding norms played a crucial role in obtaining consensus among the signatory States. Although some authors defend the existence of concerns regarding the effectiveness of soft law in key aspects of the Agreement, in our view, the binding and procedural norms established in the Paris Agreement imply a significant expectation of compliance by the States. These norms not only set standards for other international norms but also outline clear guidelines for specific actions, reflecting a shared responsibility in mitigating climate change. Therefore, the interrelationship between soft law elements and binding norms in the Paris Agreement represents a balanced and essential approach to addressing global environmental challenges.

C. THE USE OF SOFT LAW IN THE EUROPEAN UNION: IMPLICATIONS IN THE INTERNATIONAL CONTEXT

The article 288 of the TFEU stipulates that recommendations and opinions are not binding. However, although not mentioned in the article, communications and so-called guidelines also form part of the soft law framework in European Law. In doctrine, the most widely recognized concept is perhaps that formulated by Francis Snyder, who defines soft law as ‘rules of conduct that, in principle, are not legally binding but may still have practical effects.’³⁶

It is observed that within the EU, the issuance of non-binding norms is mainly carried out by the European

Commission and in areas such as Competition Law and the implementation of public policies in various sectors. According to Clara van Damme, European soft law is distinguished into five main types: 1) interpretative guidance, 2) implementation guidance, 3) explanatory guidance, 4) technical guidance, and 5) the dissemination of best practices.³⁷ These various functions have an impact on the obligations of individuals, Member States (MS), and the EU itself as a legal entity. In this way, it can be said that the use of soft law in the EU is a governance tool used since its creation.

In the case of *Grimaldi*, the Court of Justice of the European Union (CJEU) recognized the legality of adopting non-binding acts by the Commission. The issue at hand was the adoption by Member States (MS) of a recommendation from the Commission to establish a European list of occupational diseases and the conditions for compensating their victims.³⁸ The Court decided that non-binding rules do not create obligations for individuals before national courts. However, it ruled that national courts should take soft law into account. In a later ruling, the CJEU stated that MS authorities have full discretion to decide on the adoption of soft law issued by the Commission, but must respect the principles of legitimate expectations and legal certainty.³⁹

It is also worth highlighting what the CJEU stated in Case C-526/14 (*Kotnik*). The Court referred to its established case law and asserted that when the Commission adopts guidelines and publicly announces them for application in specific cases, it limits its own discretion. Generally, the Commission cannot deviate from these guidelines without risking a violation of fundamental principles of law, such as equal treatment or the protection of legitimate expectations.⁴⁰

Despite the varied functions of European soft law, the principle of legitimate expectations cannot be disregarded, whether in the internal European framework or at the international level, as this author understands. This means that when the EU becomes a signatory to an international treaty—here emphasizing the Paris Agreement as the focus of this study—and provided that this treaty reflects a significant degree of alignment with its internal policies, such as environmental protection and human rights, a legitimate expectation arises for the fulfillment of this treaty by the European bloc. Furthermore, the doctrine of Ana Maria Guerra Martins on coherence and consistency as distinct principles present in the Treaties of Lisbon is also noteworthy. Consistency pertains to ensuring the absence of antagonism between European policies and also between the Member States (MS) and the EU. Coherence, on the other hand, focuses on a common, integrative approach aimed at achieving desired results shared by both the MS and the EU. The principle of coherence operates on two levels: horizontal coherence, which

³⁴ *Ibid.*

³⁵ Voigt (31)

³⁶ Francis Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ 56-1, *The Moderne Law Review* (1993) 32.

³⁷ Clara van Dame, ‘Guidance Documents of the European Commission: A Typology to Trace the Effects in the National Legal Order’ (2017) 7(2) *Review of European Administrative Law* 85.

³⁸ See C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407.

³⁹ See C-226/11, *Expedia Inc. v Autorité de la concurrence* ECLI:EU:C:2012:795.

⁴⁰ See C-526/14, ECLI:EU:C:2016:570, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, para 40.

addresses the harmony of policies within the EU as a whole, and vertical coherence, which concerns the logical connection of a specific policy at both the MS and EU levels.⁴¹

Regarding the EU's external action, the aforementioned Article 21(3) of the TEU highlights this principle, stating that the European Union ensures coherence between its various areas of external action and between these areas and its other policies.⁴² Based on this, in our view, when the EU undertakes an international commitment—even in the form of soft law—if such an agreement aligns with the bloc's external and internal policies, as is the case with the Paris Agreement, the EU becomes bound to fulfill the commitments assumed. This obligation arises from the TEU itself and the international treaty, under the risk of violating the principle of coherence as explained above.

From the analysis provided, we observe that the use of soft law instruments within the European Union has played a crucial governance role since its inception, encompassing a variety of functions that influence the responsibilities of individuals, Member States, and the EU itself. The jurisprudence of the Court of Justice of the European Union, as seen in the *Grimaldi* and *Konikt* cases, recognizes the importance of these instruments, even though they do not create direct legal obligations. Furthermore, the principles of coherence, both horizontal and vertical, established in the Lisbon Treaties, underscore the need for alignment between the EU's various areas of action, including its external policies, fostering an integrated and consistent approach. Thus, we argue that, although soft law does not have binding force as understood under general international law, its precise and consistent application is essential to ensure the coherence and effectiveness of EU policies, including its actions on the international stage. The bloc is bound by such commitments when its internal and external policies align with the soft law provisions in the international treaty. In our view, the application of European soft law extends to its external action, based on the principles of legitimate expectations and coherence. As such, it not only establishes itself as a governance tool from its inception but also influences international relations and the EU's compliance with commitments made on the global stage.

III. THE RIGHT TO DEVELOPMENT AS A FUNDAMENTAL RIGHT

This section will explore the concept of the right to development as a fundamental human right, focusing on its historical evolution and its connection to the Carbon Border Adjustment Mechanism (CBAM). Subsection 3.1 will address the historical background and relationship of the right to development with global environmental policies, while Subsection 3.2 will examine the principle of common but

differentiated responsibilities in the context of climate change and sustainable development.

A. HISTORICAL BACKGROUND AND ITS RELATIONSHIP WITH CBAM

The Right to Development is normatively based on the Universal Declaration of Human Rights, but it should not be confused with it. Its birth and maturation are directly linked to the geopolitical structures of the time, marked by the Cold War. In 1957, in a resolution of the General Assembly, the UN declared economic balance and social development as factors promoting world peace. This would become the embryo of the Right to Development. In 1968, at the Conference on Human Rights held in Iran, the UN made a connection between economic development and the realization of human rights. The following year, the Declaration on Social Progress and Development was published, mentioning the promotion of raising the material and spiritual standards of life for the members of a society. In early 1977, the Right to Development was established by Resolution 4(XXXIII) of the UN Human Rights Commission. Finally, in 1986, the aforementioned right was proclaimed and adopted by the UN General Assembly through Resolution 41/128, with the United States voting against it and the following countries abstaining: Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden, and the United Kingdom.⁴³ In this resolution, in its Article 1, the Right to Development was declared an inalienable human right. The document clarifies in its Article 3 the responsibility of states to create favorable national and international conditions for the realization of the right to development.⁴⁴

With the fall of the Berlin Wall and the dismantling of the Soviet Union, in a context of growing awareness of the disparities between the Global North and South, the demands for recognition of the Right to Development gained strength in the face of the worsening economic situation of the countries then known as the Third World.⁴⁵ The great instability of the international scenario was reflected in the preparatory work of the World Conference on Human Rights, held in Austria, which resulted in the 1993 Vienna Declaration. The significance of this document lies in the unanimous recognition of the Right to Development, as had been proclaimed in 1986.⁴⁶ This right, recognized as universal and inalienable, reflects the evolution of conceptions about the role of development in promoting human dignity and equality. Its enshrinement in the Vienna Declaration represented not only a normative milestone but also a paradigm shift in addressing development issues, highlighting the need for international cooperation and concrete actions to address challenges such as poverty and external debt.

⁴¹ Ana Maria Guerra Martins, *Os desafios contemporâneos à ação externa da União Europeia*, in *Lições de Direito Internacional Público II* (Almedina, 2018) 116.

⁴² Treaty on European Union (12) Article 21°, n° 3

⁴³ United Nations. Available at: <https://www.ohchr.org/en/development/milestone-events-right-development> accessed 20 February 2024.

⁴⁴ United Nations General Assembly, Resolution 41/128 (4 December 1986) art 3.

⁴⁵ José Augusto L. Alves, 'O Significado Político da Conferência de Viena sobre Direitos Humanos' (1993) 27(4) *Revista de Administração Pública* 171.

⁴⁶ *Ibid.*

The Right to Development (RtD) encompasses several aspects that reflect the complexity of human and social needs in a global context. These aspects include not only access to economic resources and opportunities, but also issues related to health, education, gender equality, environmental protection, and political participation. The breakdown of the facets of this right involves the understanding that development cannot be merely economic but must be holistic, addressing social, cultural, political, and environmental dimensions. Of great importance for understanding the RtD is the doctrinal debate regarding the subjects of this right: while some argue that it is a right to be claimed only by individuals, others advocate for its extension to States.⁴⁷ According to Villaroman, '(...) it is clear that the right to development, as conceived by the drafters of the Declaration, is both an individual human right to be enjoyed by every person and a collective right guaranteed to all peoples.'⁴⁸ We agree with this view, recognizing the RtD as a right also belonging to States, represented by the collectivity of their peoples. From this premise, we now move on to analyze the relationship between the RtD and the CBAM.

The CBAM, as proposed by the European Union (EU), aims to combat carbon leakage by imposing a carbon price on imported goods. While this mechanism intends to encourage global climate preservation actions, its implementation presents significant challenges and risks for the most vulnerable developing countries. This vulnerability stems, among other factors, from the proportion of their exports to the EU relative to their Gross Domestic Product (GDP). According to research conducted by Sigit Perdana and Marc Vielle, there are five countries with high vulnerability, where the share of energy-intensive industrial exports in relation to total exports to the EU exceeds 20%. Mozambique tops this list, with more than 56% of its exports in this category, followed by Zambia (47%), Tajikistan (28%), Armenia (24%), and Kyrgyzstan (21%).⁴⁹ Given this information, it can be concluded that the implementation of the CBAM could lead to a decline in exports of energy-intensive industrial products from the least developed countries to the EU market. The main issue arises because these countries often heavily rely on sectors such as mining, manufacturing, and agriculture, which can be classified as energy-intensive. By subjecting their exports to carbon pricing as outlined in the Regulation, the CBAM could make these industries less competitive in the EU market, resulting in reduced demand and, consequently, slowing economic growth in these countries, leading to higher unemployment and worsening poverty levels. This negative interference in the economies of these countries constitutes a clear disregard for the Right to Development.

Furthermore, the lack of exemptions or special considerations in the CBAM Regulation for the most

vulnerable countries exacerbates the adverse impacts. These countries often have limited resources and capacities to transition to cleaner production methods or invest in renewable energy technologies. As such, they may struggle to meet the requirements imposed by the CBAM, further hindering their economic development prospects. In our view, this disproportionate impact of the CBAM on the most vulnerable developing countries undermines the Right to Development, as enshrined in international law. The imposition of the CBAM on these countries' exports undermines their ability to fully realize this right, as individuals in these countries are placed at a disadvantage in contributing to and benefiting from economic and social development. Their access to global markets is limited, hindering their economic growth and perpetuating their dependence on unsustainable practices.

In conclusion, we believe that the implementation of the Carbon Border Adjustment Mechanism (CBAM) by the European Union poses a significant threat to the most vulnerable developing countries, especially Mozambique. The high dependence of these countries on energy-intensive industrial exports puts them at risk of facing adverse economic impacts with the application of the CBAM, while the lack of specific exemptions in the CBAM regulation further exacerbates these effects. This results in a clear violation of the Right to Development. Therefore, it is essential that measures be adopted to mitigate these impacts and ensure that these countries are not disproportionately harmed, allowing them to continue pursuing their development in a sustainable and inclusive manner. We will address these mitigation measures later.

B. THE PRINCIPLE OF COMMON BUT DIFFERENTIAL RESPONSIBILITIES

The origin of this principle, represented in English by the acronym CBDR-RC (Common but Differentiated Responsibilities and Respective Capabilities), lies in UN General Assembly Resolution No. 44/228 of December 22, 1989, which addressed for the first time the responsibility of countries that cause environmental damage, taking into account the proportionality of the damage caused and their respective capabilities. In 1972, the United Nations Conference on the Human Environment in Stockholm established in the first paragraph of its preamble that 'both aspects of the human environment, the natural and the man-made, are essential to human well-being'⁵⁰, and outlined for the first time in international environmental law the concept of common but differentiated responsibilities in Principle No. 12:

Resources should be made available to preserve and improve the environment, taking into account the specific circumstances and requirements of developing countries and any costs that may arise

⁴⁷ In favor of States as subjects of the RtD is, for example, Noel G. Villaroman. In opposition is Anne Orford.

⁴⁸ Noel G. Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (2010) 22 *Florida Journal of International Law* 306.

⁴⁹ Sigit Perdana and Marc Vielle, 'Making the EU Carbon Border Adjustment Mechanism Acceptable and Climate Friendly for Least Developed Countries' (2022) 170 *Energy Policy* 3.

⁵⁰ United Nations Conference on the Human Environment in Stockholm, A/CONF.48/14/REV, n° 1.

from incorporating environmental safeguards into their development planning, and the need to provide, upon request, additional international technical and financial assistance for this purpose.⁵¹

At the Rio Conference in 1992, this concept was reformulated by removing the expression "financial assistance" and replacing it with the words 'cooperate' and 'responsibility', which became Principles 6 and 7, the latter being worded as follows:

States should cooperate in a spirit of global partnership to conserve, protect, and restore the health and integrity of the Earth's ecosystem. Considering the different contributions to global environmental degradation, States have common but differentiated responsibilities. Developed countries recognize their responsibility in the international pursuit of sustainable development, given the pressures their societies exert on the global environment and the technological and financial resources they possess.⁵²

This new concept was well accepted by the international community and continues to this day. The principle of common but differentiated responsibilities is also present in the Paris Agreement, notably in its Article 2, paragraph 2, and in Article 4, as well as in the establishment of the Nationally Determined Contributions, abbreviated as NDCs. These were expressed in the COP 21 decision, which stipulates that each Party commits to 'prepare, communicate, and update successive Nationally Determined Contributions it intends to achieve' every five years.⁵³

But what is the purpose of this principle? As Ellen Hey and Sophia Paulini explain, this principle expresses a global partnership, linked to a commitment to cooperation, in which States assume different responsibilities based on their situation, particularly considering their present (and future) development needs, historical contribution to environmental degradation, current participation in the problem, and access to technological and financial resources.⁵⁴ We believe that CBDR-RC can also be seen, within the realm of international law, as the expression of the principle of equal treatment, enshrined in Articles 20 and 21 of the EU Charter of Fundamental Rights, insofar as it establishes an equality of situations, here related to the different levels of economic development achieved by countries over time. In contrast, the Charter addresses situations concerning individuals and 'non-discrimination on grounds of sex, race, color, or ethnic or social origin, genetic features, language, religion or beliefs, political or other opinions, belonging to a national minority, wealth, birth, disability, age, or sexual orientation.'⁵⁵

Based on the information provided above, the question to be answered is: how does the CBAM violate this principle? By applying a carbon price at the border, the CBAM extends the

internal rules of the European Emissions Trading System (ETS) to products imported from third countries. After the transition period ends on December 31, 2025, importers will be required to provide CBAM certificates, valued at the same price as the ETS allowances, to offset the emissions associated with products entering the European market. Now, as the purpose of the principle of common but differentiated responsibilities is to distinguish the obligations of developed and developing countries in sharing the common goal of environmental preservation based on their historical contributions to environmental degradation and access to technological and financial resources⁵⁶, what the CBAM is doing is treating countries in different stages of development identically, thus constituting a latent violation of the principle of common but differentiated responsibilities. Moreover, Professor Ellen Hey points out the mandatory nature of compliance with the aforementioned principle, as, unlike other environmental treaties where its presence and observance are classified as belonging to the category of soft law, in the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, this principle is necessarily binding, as it is present in both of these international treaties.

In conclusion, it is assessed that the principle of common but differentiated responsibilities, initially introduced in UN General Assembly Resolution No. 44/228 in 1989 and later enshrined in the Rio Conference in 1992 and the Paris Agreement, represents a global commitment to cooperation in which states undertake distinct obligations based on their development needs, historical contributions to environmental degradation, and access to technological and financial resources. This approach aims to promote equal treatment among countries, recognizing their different capacities and histories of contribution to the global environmental issue. However, we believe that the implementation of the CBAM, by applying a uniform carbon price at the border, violates this principle by treating countries at different stages of development equally, without considering their individual circumstances. Moreover, in our view, the presence of this principle in the UNFCCC and the Paris Agreement underscores its importance as a legally binding international commitment, highlighting the need to respect it within the context of global environmental policies.

IV. THE EU'S COLLABORATION WITH THE UN AND ITS CONSEQUENCES FOR FOREIGN POLICY

In this section, we will explore the European Union's collaboration with the United Nations and its impact on the EU's external policy. Specifically, we will examine the EU's commitment to multilateralism, the importance of sustainable development, and the financial mechanisms through which the

⁵¹ Ibid.

⁵² United Nations, A/CONF.151/26, Principle 7.

⁵³ United Nations, I/COP, paras 23-24.

⁵⁴ Ellen Hey and Sophia Paulini, 'Common but Differentiated Responsibilities' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2021) 3.

⁵⁵ Charter of Fundamental Rights of the EU, 2012/C 326/02, art 21°.

⁵⁶ Ellen Hey, 'Global Environmental Law' (November 22, 2009) 6

EU supports African nations in achieving these goals. Through this analysis, we aim to highlight how these efforts shape the EU's role in global governance and its adherence to international commitments.

A. THE EU'S MULTILATERALISM

The relationship between the EU and the UN has evolved over time, developing into a more formalized structure. This bond went beyond simple bilateral interactions between two separate entities and began to encompass cooperation in common political strategies, such as through the 2030 Agenda.⁵⁷ The main reason for this deepening of relations between the European Union and the UN lies in a shift in the EU's paradigm and strategy, which adopted multilateralism as a fundamental principle of a rule-based global order.⁵⁸

In reality, the EU's external action is a consequence of its awareness of the need to strengthen its capacity to act autonomously, which is not a recent discussion, as Niklas Helwig explains. The development of the discussion on strategic autonomy has been largely driven by three key events: the competition between major powers, such as the US and China, the rapid technological evolution driving digital transformation, and the increasing use of strategic interdependence. Additionally, the emphasis on defending European principles, including the protection of the climate, human rights, and data privacy, has also become more prominent.⁵⁹ In this context, the multilateralism adopted by the EU serves as a tool to achieve its goals.⁶⁰ However, in the politically charged international arena, where industrial and trade policies are immediately analyzed from a geopolitical perspective, EU policymakers have limited room to promote strategic autonomy without quickly entering into a reflective and cautious debate about alliance relations.⁶¹

The CBAM is certainly an expression of this policy aimed at expanding the EU's global influence and, in our view, a relatively quick means of financial recovery after the COVID-19 health crisis. As noted by the author mentioned above, the European bloc's main commercial strategy regarding cross-border carbon control lies in the connection between European values and the promotion of sustainability.⁶² However, this strategic multilateralism stance carries significant risks in the international order. Stewart Patrick highlights the risks associated with what he calls *ad hoc* or *à la carte* multilateralism.

This behavior was initially used by the United States after the Cold War and consists of coalitions of countries with similar affinities and interests aimed at resolving common

problems, operating in parallel with the UN⁶³. According to Stewart:

What is new is that many other powers—both established and emerging, large and small—have learned to play the same game. These trends have intensified in the context of Russia's invasion of Ukraine, deepening Sino-American geopolitical competition and increasing the alienation between rich and developing nations.⁶⁴

Beyond this issue of European strategic multilateralism with an impact on the global economy, in our analysis, we believe the EU is acting hastily by fully implementing the sustainability policy without adequately assessing the potential consequences both within the EU and beyond. This point is exemplified by the recent protests from European farmers against the rules established by the Green Deal, which mandate halving the use of pesticides and chemical fertilizers, allocating 25% of agricultural land for organic farming, and setting aside 4% of land as fallow. The sustainability proclaimed by the EU seems to have weak foundations even within the European bloc; how then can it be applied coercively, as is the case with the CBAM, on the international stage?

We thus conclude that the EU's closer relationship with the UN reflects the European bloc's adoption of multilateralism as a fundamental principle for a rule-based global order, using it as a tool to achieve common goals. However, the hasty implementation of policies, such as the CBAM, presents significant risks due to the lack of proper assessment of the consequences. On the other hand, the protests from European farmers against the rules of the Green Deal demonstrated the fragility of the sustainability framework within the EU. Therefore, it is essential to adopt a more cautious and consultative approach in policy formulation and implementation to ensure its effectiveness and acceptance, both internally and on the global stage.

B. SUSTAINABLE DEVELOPMENT: ITS FINANCING BY THE EU AND AFRICAN COUNTRIES

The Sustainable Development Goals (SDGs) were established in 2015 by the global community as part of the United Nations 2030 Agenda for Sustainable Development. In this context, countries around the world made a collective commitment to eliminate poverty, seek solutions for sustainable and inclusive development, ensure the human rights of all, and, in general, ensure that no one is left behind

⁵⁷ European Commission, 'Evaluation of the EU Cooperation with UN in External Action', September 2023, Volume I.

⁵⁸ *Ibid.* 13

⁵⁹ Niklas Helwig, *Strategic Autonomy and the Transformation of the EU Agenda for Security, Diplomacy, Trade and Technology*, Finnish Institute of International Affairs, Report April 2021/67, p. 16.

⁶⁰ Niklas Helwig, 'The EU's Strategic Multilateralism: Global Engagement in an Era of Great Competition' (2022) Finnish Institute of International Affairs Briefing Paper 347, 4.

⁶¹ Helwig (59) 17

⁶² *Ibid.*

⁶³ Stewart Patrick and Emma Klein, 'United Nations, Divided World' (Carnegie Endowment for International Peace, September 2023). Available at: <<https://carnegieendowment.org/2023/09/28/united-nations-divided-world-pub-90659>> accessed 22 May 2024.

⁶⁴ *Ibid.*

by 2030.⁶⁵ A set of 17 SDGs, accompanied by 169 related targets, was established to be achieved by the year 2030. These goals aim to address the global challenges faced by the international community and cover all aspects of sustainable development in a balanced and integrated manner.⁶⁶

The European Union and its Member States are the main providers of official development assistance at the global level.⁶⁷ However, the CBAM is a trade measure whose implementation discourse is based on environmental purposes.⁶⁸ The aim of this section is to discuss the existence of financial cooperation mechanisms of the EU related to sustainable development, especially those focused on African countries, which are classified as developing but are considered more vulnerable to the impact of the CBAM. The question to be addressed is: would the existence of these cooperation programs mitigate the impacts of the CBAM in these more vulnerable countries? To answer this, it is important to first note that the EU has two cooperation fronts with Africa: the partnership with the African, Caribbean, and Pacific (ACP) states, through the Samoa Agreement, and the Joint Africa-EU Strategy.⁶⁹ We believe it is relevant to briefly analyze these two cooperative frameworks, as well as Regulation (EU) 2021/947, which establishes the Neighborhood, Development and International Cooperation Instrument – Global Europe. Obviously, the answer will indicate a result, as a precise response would require an economic investigation, which is beyond the scope of this work.

The Cotonou Agreement, adopted in 2000, marked the partnership between the EU and the Organization of African, Caribbean, and Pacific States (OEACP). It had a duration of 20 years and was replaced in January 2024 by the Samoa Agreement, signed on November 5, 2023. According to information published on the webpage of the European Council and the Council of the EU, this agreement establishes common principles and encompasses the following six priority areas: democracy and human rights, sustainable economic development and growth, climate change, human and social development, peace and security, and migration and mobility. However, Jacques Berthelot⁷⁰ has voiced strong criticisms of the agreement. In his view, the EU violates WTO rules regarding the special and differential treatment to be granted to least developed countries.⁷¹ Furthermore, the author explains that the replacement of the European Development Fund (EDF) with the Neighbourhood, Development and International Cooperation Instrument (NDICI) – Global

Europe – resulted in a change to the financing of this budget, which will no longer be subsidized by Member States in addition to the EU Budget. In practice, considering Africa's population growth, this would imply a significant reduction in funding, which, according to him, would amount to only €3.40 per capita per year.⁷²

On the other hand, according to Maurizio Carbone, the Samoa Agreement places greater emphasis on and broadens the scope of the promotion of human rights, encompassing not only civil and political rights but also economic, social, and cultural rights, while surprisingly recognizing the right to development.⁷³ However, the author acknowledges that the EU has managed to separate the concept of the right to development from the provision of development assistance through the inclusion of the former EDF—later the NDICI—into its multi annual budget. He further notes that the inclusion of the SDGs in the agreement allowed the EU to convey the idea that the promotion of Economic, Social, and Cultural Rights in its external action should primarily be considered a political goal.⁷⁴

From the analysis of the Samoa Agreement, we initially highlight Article 50(2), included in Chapter 4 of Title 4, which addresses trade cooperation. In this provision, the Parties agree that trade cooperation will be conducted in accordance with the WTO-based multilateral trade system, with the aim of promoting free, fair, and open trade to achieve sustainable growth and development, particularly in OACPS member states.⁷⁵ Of particular importance for this topic are Articles 57 and 58 of the Agreement. These articles encapsulate the key objectives and commitments outlined in the Paris Agreement within this framework: the implementation of the United Nations Framework Convention on Climate Change (UNFCCC) and the limitation of the global average temperature increase to 2 degrees Celsius above pre-industrial levels, with an ideal target of 1.5 degrees Celsius, as set out in Article 57. Article 58 emphasizes the commitment to implement and monitor progress regarding the Parties' Nationally Determined Contributions (NDCs), taking into account their common but differentiated responsibilities and respective capabilities. However, at no point does this convention refer to the cross-border carbon mechanism or to possible compensations for African countries implementing an administrative framework capable of complying with CBAM legislation. Furthermore, no mention is made of the economic

⁶⁵ European Commission, 'Sustainable Development Goals'. Available at: <https://international-partnerships.ec.europa.eu/policies/sustainable-development-goals_en> accessed 20 April 2024.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Sabrina Robert-Cuendet, 'Un mécanisme d'ajustement carbone aux frontières compatible avec le droit de l'OMC: une gageure' (2022) 7 *European Papers: A Journal on Law and Integration* 240.

⁶⁹ European Parliament, 'Fact Sheets on the EU'. Available at: <<https://www.europarl.europa.eu/factsheets/en/sheet/180/africa>> accessed 20 April 2024.

⁷⁰ Full Professor at the University of Toulouse, who passed away in February 2023.

⁷¹ Jacques Berthelot, 'Mobilisation urgente contre la signature de l'Accord de Samoa succédant à l'Accord de Cotonou' (n.d.) 3.

⁷² Ibid.

⁷³ Maurizio Carbone, 'Beyond the Heaven–Hell Binary and the One-Way Traffic Paradigm: The European Union, Africa and Contested Human Rights in the Negotiations of the Samoa Agreement' (2023) 7.

⁷⁴ Ibid.

⁷⁵ Samoa Agreement, Article 50^o, n^o2.

implications or the impact of this mechanism on these countries.

In light of the above, it can be concluded that the relationship between the European Union (EU) and African countries regarding sustainable development, particularly in the context of the CBAM, is complex and multifaceted. While the Sustainable Development Goals and the Paris Agreement establish ambitious guidelines for addressing climate change and promoting global sustainable development, the implementation of these commitments faces significant challenges, especially concerning financing and international cooperation. The Samoa Agreement, which replaced the Cotonou Agreement, represents an important milestone in this dynamic, broadening the scope of human rights promotion and reinforcing commitments related to climate change. However, criticisms have been raised regarding the financing and practical viability of these agreements, particularly concerning the reduction of development funding from the EU. In our view, the European Union (EU) appears to have failed to apply its own values, as outlined in the Treaty on European Union (TEU), by not recognizing the economic differences between African countries and adapting them to the CBAM regulation. This lack of consideration may result in future difficulties for these countries in coping with a potential reduction in their exports, thereby undermining their efforts for sustainable development.

V. THE IMPACT OF CBAM ON DEVELOPING COUNTRIES IN LIGHT OF HUMAN RIGHTS

This section explores the implications of the Carbon Border Adjustment Mechanism (CBAM) on developing countries, particularly through the lens of human rights. It critically examines how CBAM affects the principles of equity and justice for the most vulnerable nations, analyzing whether this mechanism aligns with or contradicts the foundational values of the European Union (EU). Subsection 5.1 focuses on the equity challenges posed by CBAM, highlighting its disproportionate impact on countries with limited resources and capacity to adapt. Subsection 5.2 delves into potential conflicts between CBAM and the EU's commitment to human rights, questioning whether its implementation respects the EU's core values of fairness, solidarity, and international cooperation.

A. EQUITY AND JUSTICE FOR MOST VULNERABLE COUNTRIES

The implementation of the Carbon Border Adjustment Mechanism (CBAM) by the European Union raises significant questions regarding its impact on developing countries,

particularly from a human rights perspective. By seeking to internalize the cost of carbon emissions in imported goods, CBAM could have substantial effects on the most vulnerable economies, potentially exacerbating existing inequalities. This section examines how CBAM might influence equity and social justice in these countries, exploring its economic and social implications and assessing whether the principles of climate justice are being upheld.

Many developing countries rely on carbon-intensive sectors, such as steel and cement production, for their economies. The CBAM regulation refers to two policy approaches to addressing climate issues, namely carbon pricing and climate financing.⁷⁶ Proponents of this dual approach rely on two arguments. The first concerns the impossibility of allowing emissions compatible with their historical levels for countries that have historically contributed less to pollution, given that the worsening climate crisis has reached a critical stage.⁷⁷ The second argues that this standardization of carbon pricing, without considering historical emissions, would be offset by the commitment made by developed countries to climate financing.⁷⁸ Regarding this latter justification, it is worth noting that Recital No. 74 of Regulation 2023/956 states: ‘(...) The Union should continue to support those countries through the Union budget, in particular Least Developed Countries (LDCs), in order to contribute to ensuring their adaptation to the obligations arising from this Regulation.’⁷⁹ In our view, the lack of detail regarding the support mentioned reveals negligence in delivering the agreed-upon assistance.

Regarding the consequences of implementing the CBAM, these will occur in proportion to the exports of developing and least developed countries to the EU. However, from an economic perspective, this impact will be more significant for countries where such exports constitute a larger share of their GDP.⁸⁰ Based on this information, Magacho, Godin, and Espagne demonstrated that Mozambique is the most affected economy by the CBAM, as its aluminum exports to the EU account for 20% of its total exports. However, Mozambique is not the only country to feel the bitter effects of the CBAM. Zimbabwe and Cameroon in Africa, as well as Eastern European economies, particularly in the Balkans, have exports most exposed to this mechanism.⁸¹ From the perspective of potential socioeconomic impacts, the authors also consider the direct and indirect importance of the industries covered by the mechanism in creating well-paying jobs. In their investigation, they calculated the proportion of jobs and payrolls potentially affected by the CBAM among the EU's trading partners, aiming to identify the most vulnerable countries. Consequently, they found that Moldova, Mozambique, and

⁷⁶ Corvino (11) 3

⁷⁷ Ibid. 3

⁷⁸ Simone Tagliapietra and Guntram B Wolff, ‘Conditions Are Ideal for a New Climate Club’ (2021) 158 *Energy Policy* 3.

⁷⁹ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism. Recital No. 74

⁸⁰ Magacho G, Godin A and Espagne E, Impacts of CBAM on EU Trade Partners: Consequences for Developing Countries (Working Paper No 238, Agence française de développement 2022) 11.

⁸¹ Ibid. 2

Bosnia-Herzegovina are the three most exposed countries in socioeconomic terms.⁸²

Another important issue related to climate justice concerns the application of the principle of common but differentiated responsibilities, according to which the carbon price should differ for the most vulnerable countries, taking into account their economic capacities compared to developed nations. However, since the carbon price is defined in absolute rather than percentage terms, its uniform application to actors with differing capacities to contribute results in a proportionally greater burden on those with fewer resources for the same level of emissions.⁸³

Considering these findings, we understand that the implementation of the CBAM may also have implications for developing countries' access to clean and sustainable technologies, given that the promised assistance has not yet been properly detailed. If the tariffs make it more difficult for these countries to export carbon-intensive products to the EU, there may be fewer incentives to invest in clean and sustainable technologies. Therefore, it is crucial that the EU not only implements the CBAM but also fulfills its promises of financial and technological support to ensure that the principles of climate justice are upheld and that these countries can adapt to and mitigate the effects of climate change in an equitable manner.

B. CONFLICTS WITH HUMAN RIGHTS AS CORE VALUES OF THE EU

The European Union promotes sustainable development and human rights as core values of its identity. Initially, however, it must be considered that the 'values' mentioned in Article 2 of the Treaty on European Union (TEU) are, in reality, 'principles'—fundamental principles—of EU law.⁸⁴ Legally, a 'principle' refers to an essential and fundamental rule that, despite its broad scope, is binding.⁸⁵ Article 2 of the TEU presents a terminological confusion, as Korchenov aptly clarifies by using the example of the Rule of Law, which is clearly a 'principle' in the Charter of Fundamental Rights and thus has the status of primary EU law. Situating it among the 'values' in the TEU is therefore a manifest error.⁸⁶ It is also worth highlighting that the preamble of the Charter of Fundamental Rights states:

(...) the Union is based on the indivisible and universal values of human dignity, freedom, equality, and solidarity; it is founded on the principles of democracy and the rule of law. By establishing Union citizenship and creating an area of freedom, security, and justice, it places the human being at the heart of its actions.⁸⁷

The first point to be highlighted concerns the inconsistency in the EU's dual behavior. Internally, these 'European values' are defended and applied. However, in the EU's external actions, particularly regarding the CBAM, the same commitment is not observed, as the principle of common but differentiated responsibilities was not applied to the more vulnerable countries in the aforementioned regulation. The second aspect to be emphasized concerns the very argument presented by the Commission for the approval process of the CBAM. We argue that, specifically regarding the carbon border adjustment regulation, the EU acted contrary to its own code of conduct, which includes, among other principles, ethics and good conduct. In this way, ultimately, under the principle of subsidiarity, the Commission removed the possibility for intervention by the Council and the introduction of this new fiscal measure (which is still not clearly defined in the doctrine) and, consequently, from the Member States.

In this way, we believe that the CBAM conflicts with fundamental rights in the EU's external actions due to its disregard for the Paris Agreement in implementing the principle of common but differentiated responsibilities. It also conflicts, internally, ethically regarding the European Commission's actions in presenting an environmental justification, based on Articles 191 and 192(1) of the TFEU, rather than a fiscal justification, which would have been based on Article 192(2), for adopting the aforementioned legal measure, thus not using the correct legal basis as a way to 'simplify' the adoption of the intended measure.

Now, we turn to a specific analysis of the EU's external actions that conflict with human rights. The implementation of the CBAM directly impacts the trade and economy of the countries that export to the EU. Among these, the least developed African countries are likely to suffer the most profound implications. Research suggests that the African continent's Gross Domestic Product (GDP) will decrease by -0.91%, and there will be a drop in exports of various products to the EU.⁸⁸ As discussed earlier in section 3, the CBAM conflicts with the Right to Development (RtD), understood in both its collective and individual forms. With a cascading effect, the economic disruption caused by the European climate regulation in the most vulnerable African countries ultimately affects various sectors, and consequently, one could argue that it leads to a decrease in the economic capacity of a portion of the citizens in these countries, which runs counter to the right to human dignity, as a human right in international law.

From a legal perspective, the failure to apply the principle of common but differentiated responsibilities highlights the breach of the commitment made under the Paris Agreement, which results in a conflict with the Right to Development and,

⁸² Ibid. 15

⁸³ Corvino (75) 8

⁸⁴ Dimitry Kochenov, 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the European Union' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (University of Groningen Faculty of Law Research Paper 2016-28).

⁸⁵ A Jakab, 'Re-Defining Principles as "Important Rules" – A Critique of Robert Alexy' in M Borowski (ed), *On the Nature of Legal Principles* (2010) 145.

⁸⁶ Korchenov (84) 2.

⁸⁷ Charter of Fundamental Rights of the European Union, 2012/C 326/02, preamble.

⁸⁸ Andrew Gilder and Olivia Rumble, 'The Impact of the CBAM on African Economies and the Role of the AfCFTA' (SAIIA Policy Briefings, 23 April 2024).

consequently, contradicts the principle of human dignity, the foundation of fundamental rights. In addition to this main issue, we also invoke the conflict of the CBAM with the Right to Self-Determination, as outlined in Article 1(2) and Article 55 of the United Nations Charter. This right was emphasized in the post-decolonization context, which emerged after the Second World War. It is present in two important UN declarations: the Declaration on the Granting of Independence to Colonial Countries and Peoples (the 1960 Declaration) and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the United Nations Charter (the 1970 Declaration).⁸⁹ The 1960 Declaration states in its second point: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.'⁹⁰

The tariff imposed by the CBAM clearly affects the exports of its trading partners, especially the most vulnerable countries, producing in them the harmful effect of increasing economic dependence on more developed nations, thus contradicting the principle of self-determination. The CBAM, therefore, limits the ability of the most vulnerable countries to develop their economies according to their national priorities. This interferes with these countries' right to determine their economic and development policies, violating the right to self-determination. Furthermore, by failing to provide robust and well-defined support and financing mechanisms to help these countries adapt to and mitigate the impacts of the CBAM, the EU is exacerbating global inequalities, contrary to the principles of justice and equity that should govern international.

VI. CONCLUSION

The analysis of the CBAM in the context of the European Green Deal reveals its dual nature as both a trade and environmental policy, applying a carbon price to imported products such as cement, iron and steel, aluminum, fertilizers, and electricity. This extension of the EU's climate regulation beyond its borders raises concerns about its impact on human rights and global development, highlighting contradictions between the EU's internal policies and its external commitment under the Paris Agreement, particularly the principle of common but differentiated responsibilities, as the imposition of a uniform carbon price may disproportionately harm low-income and less industrialized countries.

In legal terms, the EU's external action, based on Article 21 of the Treaty on European Union, aims to promote values such as human dignity, freedom, democracy, and human rights, in alignment with supporting global sustainable development as outlined in Article 191 of the Treaty on the Functioning of the EU. The Paris Agreement, as a binding treaty, establishes obligations through Nationally Determined Contributions (NDCs) to reduce greenhouse gas emissions, although EU governance also depends on soft law instruments, recognized by the Court of Justice of the EU as not directly creating legal

obligations. Horizontal and vertical coherence between the EU's internal and external policies, as set out in the Lisbon Treaties, is essential to strengthen its internal governance and maintain alignment with global commitments.

The Right to Development (DaD) was also analyzed. It has been explored as a fundamental right since its formalization by the UN in 1986, encompassing economic, social, cultural, and environmental aspects. The Carbon Border Adjustment Mechanism (CBAM), proposed by the EU, presents significant challenges to the DaD by applying a uniform carbon price to imported products, especially for developing countries dependent on energy-intensive sectors. Furthermore, the lack of specific exemptions for these countries may amplify the adverse impacts on their economies, raising questions about the compatibility of the CBAM with principles of international equity. On the other hand, the principle of common but differentiated responsibilities, recognized in the UN Resolution and the Paris Agreement, aims to ensure equitable cooperation in the global environmental approach, taking into account the historical and current capacities of countries. However, the implementation of the CBAM may undermine this principle by treating countries at different stages of development in a uniform manner, without considering their individual circumstances.

The growing collaboration between the European Union (EU) and the United Nations (UN) was also explored in this study. Multilateralism was highlighted as a fundamental pillar of the EU's foreign policy. The evolution of this relationship includes the adoption of common strategies, such as the 2030 Agenda, reflecting a strategic shift by the EU to strengthen its capacity to act autonomously in the face of geopolitical competition and technological advancements. However, the implementation of the CBAM exemplifies the risks of this policy by imposing a uniform carbon price without considering global economic disparities. This is evident in the EU's relationship with African countries, particularly those in development, which face significant challenges in meeting the new regulations without adequate financial support. The Samoa Agreement replaced the Cotonou Agreement, expanding the EU's commitments to human rights and climate change, but it faces criticism for reducing funding for development.

Furthermore, the issue of the CBAM's impact on the most vulnerable countries was examined from the perspective of human rights and climate justice. It was shown that countries such as Mozambique, Zimbabwe, and Cameroon in Africa, as well as economies in Eastern Europe, are particularly vulnerable to the economic impacts of the CBAM due to the significant proportion of their exports destined for the EU. The analysis reveals that the uniform application of the carbon price can disproportionately burden countries with lower economic capacity, violating the principle of common but differentiated responsibilities. Furthermore, the lack of detailed and effective delivery of the financial support promised by the EU raises doubts about its effectiveness in

⁸⁹ Rumu Sakar, *International Development Law: Rule of Law, Human Rights and Global Finance* (2nd edn, Springer 2020) 161.

⁹⁰ Declaration on the Granting of Independence to Colonial Countries and Peoples, para 2 (UN, 1960)

mitigating these negative impacts. The transition to clean and sustainable technologies may also be hindered if developing countries face additional barriers to exporting to the EU due to the CBAM.

Finally, the conflicts between the CBAM and Human Rights were presented, especially from the perspective of the values that the EU promotes internally. The EU bases its identity on values such as human dignity, freedom, equality, solidarity, democracy, and the rule of law, as expressed in the Treaty on European Union and the Charter of Fundamental Rights. However, by implementing the CBAM, the EU faces criticism for not applying the principle of common but differentiated responsibilities, particularly concerning the most vulnerable countries. This approach disregards the unequal economic capacities of countries and could exacerbate global inequalities. Additionally, the implementation of the CBAM may negatively impact the Right to Development of the most vulnerable countries by reducing their GDP and exports to the EU, adversely affecting economic sectors and their capacity for autonomous development.

From a legal perspective, the CBAM conflicts with some fundamental human rights. The lack of proper application of the principle of common but differentiated responsibilities violates the commitment made under the Paris Agreement and, consequently, harms the right to development and human dignity. Furthermore, the CBAM may compromise the right to self-determination of developing countries by limiting their ability to freely determine their economic and development policies.

Given the identified limitations, we suggest that, for better coherence of the CBAM regulation with the EU's internal policies, the current climate financing be replaced by a robust commitment to transfer clean technology to vulnerable African countries. This commitment would not only help these countries mitigate the adverse economic impacts of the CBAM but also promote their long-term sustainable development, strengthening their technological capacities and increasing their resilience to climate change. The transfer of clean technology would include the adoption of renewable energy, energy-efficient technologies, and sustainable agricultural practices, tailored to the specific needs of each beneficiary country. This approach would not only respect the principles of climate justice but also foster constructive international cooperation aligned with global sustainability and carbon emission reduction goals.

It is worth noting that although there are already initiatives and agreements between the European Union (EU) and African countries addressing technology transfer, such as the Economic Partnership Agreement (EPA) between the EU and the countries of Africa, the Caribbean, and the Pacific (ACP), the central aim of this agreement is to facilitate trade. Moreover, even though there are other EU cooperation and financing programs designed to support sustainable development and technology transfer to African countries, the effective implementation of these agreements and programs may vary, and they do not always fully meet the specific needs of the most vulnerable countries in terms of access to and transfer of clean technology. Therefore, there is room to

improve and expand these initiatives, especially in light of the challenges posed by the CBAM and other climate measures that may negatively affect these countries.

Considering the challenges and impacts of the CBAM on African countries, especially Mozambique, a practical solution would be to establish a treaty between the EU and African countries, such as Mozambique, to facilitate the transfer of clean and sustainable technology. This treaty could be based on Article 6 of the Paris Agreement, which provides a framework for international cooperation, including technology transfer and capacity building. To ensure the effectiveness of this partnership, it would be essential to apply rigorous selection criteria. Mozambique should demonstrate not only clear needs for clean technology in sectors such as renewable energy, sustainable agriculture, and water resource management, but also a robust capacity to absorb and implement these technologies. Furthermore, Mozambique's commitment to climate goals and environmental policies would be crucial to justify the EU's technological support. The duration of this partnership should be long enough to allow for the development and consolidation of Mozambique's technological capacities. We believe that an initial period of 10 years could be reasonable, with periodic reviews for adjustments as needed, aiming to ensure long-term sustainable development.

The sectors benefiting from technology transfer would include renewable energy, sustainable agriculture, waste management, and sustainable transportation. These investments would not only help Mozambique address climate challenges but also promote inclusive economic growth and climate resilience, while respecting the principles of justice and equity that are fundamental to responsible and sustainable international relations. Thus, by adopting an approach based on cooperation and technology transfer, the EU could not only mitigate the adverse impacts of the CBAM but also strengthen its commitments to global sustainable development, contributing to a fairer and environmentally secure future for all involved.

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