
WEBINAR

# *The EU's Green Deal and a "Carbon Border Tax" -An overview of EU Policy and WTO Challenges*

JULY 30, 2020, 1-2 p.m. ET

Speakers: Martin Seyfarth, Naboth van den Broek and Matthias Wissman

# Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
- Offering 1 CLE credit in California and New York*
- The webcast is being streamed through your computer, so there is no dial-in number. For the best quality, please make sure your volume is up and other applications are closed. If you experience a delay or get disconnected, press F5 to refresh your screen at any time
- For additional help with common technical issues, click on the question mark icon at the bottom of your screen

**WilmerHale has been accredited by the New York State and California State Continuing Legal Education Boards as a provider of continuing legal education. This program is being planned with the intention to offer CLE credit in California and non-transitional credit in New York. This program, therefore, is being planned with the intention to offer CLE credit for experienced New York attorneys only. Attendees of this program may be able to claim England & Wales CPD for this program. WilmerHale has been approved as a Colorado Certified Provider, as recognized by the Colorado Supreme Court Continuing Legal and Judicial Education Committee. We will apply for Colorado CLE if requested. The type and amount of credit awarded will be determined solely by the Colorado Supreme Court. New Jersey grants reciprocal credit for programs that are approved in New York. We can also issue Connecticut credit for this program. All attendees, regardless of jurisdiction, will receive a uniform certificate of attendance that shows the states in which the program was approved. Attendees requesting CLE credit must attend the entire program. CLE credit is not available for on-demand webinar recordings.*

# *Speakers*

**Martin Seyfarth**
Partner
WilmerHale

**Naboth van den Broek**
Partner
WilmerHale

**Matthias Wissmann**
Senior International Counsel
WilmerHale

- **Background**
- Potential Scenarios for a CBAM
- WTO/Trade Issues
- Procedure & Political Dimensions

# *The CBAM is Part of the Green Deal*

- The overarching goal is to achieve climate neutrality in the EU by 2050 without impeding the competitiveness of Europe’s economy. Thus, economic growth shall be decoupled from resource use.
- As an intermediate step, the EU’s greenhouse gas emission reductions target for 2030 shall be increased from currently 40% to then 50% or 55% compared with 1990 levels. The Commission’s proposal currently is in the consultation phase.

## *Competitive and Environmental Context*

- EU has domestically one of the largest carbon dioxide emitting sectors world-wide plus it is the world's largest net importer of CO2 as embodied in traded goods and services.
- EU feels its policy must meet both levels: EU-related CO2 emissions emitted inside the EU and outside the EU.
- Challenge: Prevent climate dumping. Carbon leakage identified as competitive and environmental risk.

- Background
- **Potential Scenarios for a CBAM**
- WTO/Trade Issues
- Procedure & Political Dimensions

# Potential Scenarios for CBAM

No specific design for a CBAM is known yet. Insider tell that high-level disagreements (both on EU and on national level) exist even on the basic designs.

Several options have, however, been discussed amongst experts.

# *Potential Scenarios for CBAM*

## Features include:

- Applicable to imports of goods to the EU
- Scope of application: imports from certain sectors in the beginning in the first phase of a CBAM; subsequent extension of the scope of application
- Challenge is to find an adequate level to assess the carbon content of products

# *Potential Scenarios for CBAM*

## Scenario 1: Carbon Border Tax on Goods Imported to the EU

- Current EU systems remain in place
- New levy on imported products of carbon-intensive sectors
- Tax may vary by sector (which would allow reductions for foreign producers that prove sufficient environmental performance)

**SCENARIO 1**

# *Potential Scenarios for CBAM*

## Scenario 2: EU-Wide Carbon Tax

- Transformation of the EU Emissions Trading System (EU ETS) into a carbon tax that would be imposed on **both domestic producers and importers**

**SCENARIO 2**

# *Potential Scenarios for CBAM*

## Scenario 3: Extend the ETS to European Importers

- The EU ETS would be extended to **EU companies that import** goods into the EU.
- Such domestic companies also would need emissions allowances.

**SCENARIO 3**

# *Potential Scenarios for CBAM*

## Scenario 4: Extend the ETS to Foreign Producers

- The EU ETS would be extended to **foreign producers that export** to the EU.
- For example, foreign producers would have to acquire “virtual” emissions allowances.

SCENARIO 4

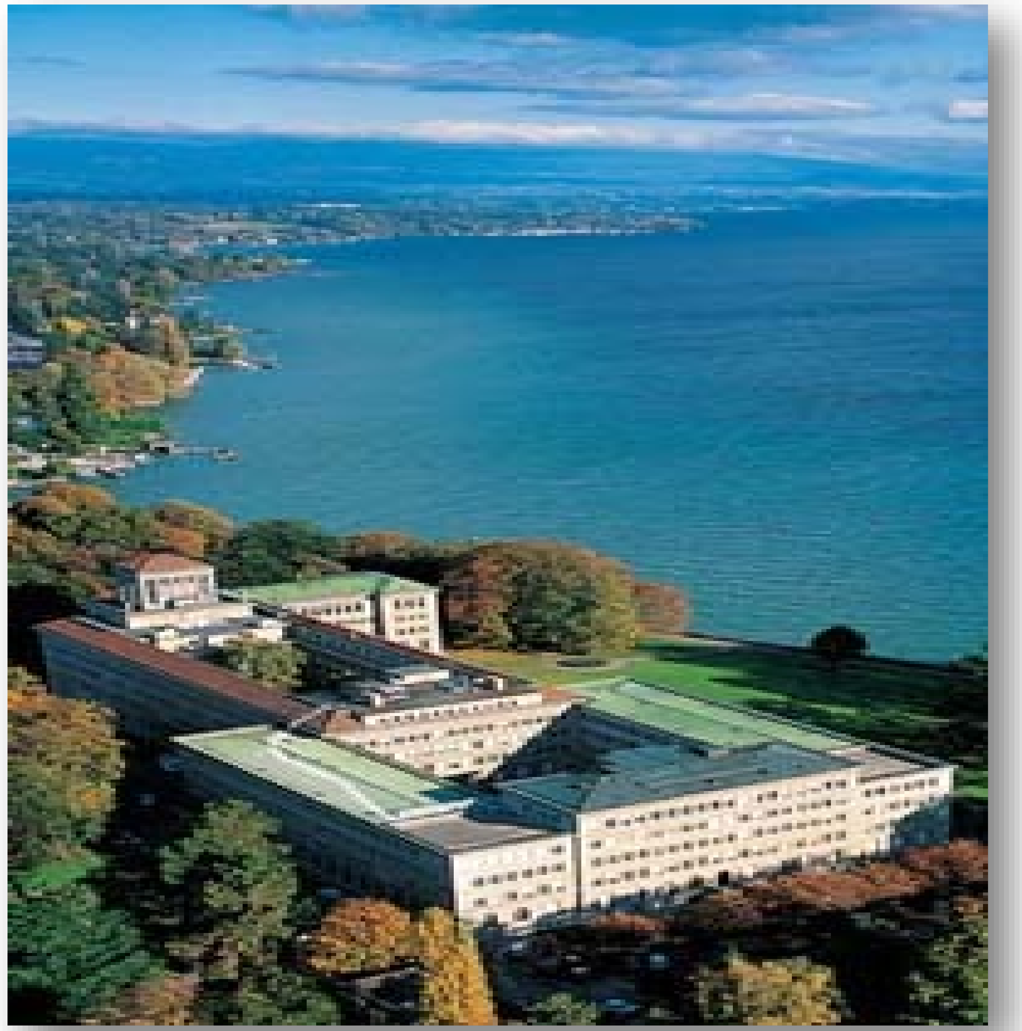
# *Alternatives to a CBAM*

- Alternatives to a CBAM may include
  - Reimbursement for EU companies to compensate for the higher prices
  - Reimbursement for the higher power-costs for energy-intense sectors
  - Further incentives for EU companies to produce/import less carbon-content goods (rather than levying taxes)
  - Global pricing on CO2 for emissions-/trade-intensive sectors
- Instead of/in addition to imposing levies in import, a CBAM may also come with an exemption/a rebate of carbon costs when certain EU products are exported – which would raise additional concerns under WTO law.

- Background
- Potential Scenarios for a CBAM
- **WTO/Trade Issues**
- Procedure & Political Dimensions

# *The World Trade Organization*

- International Organization based in Geneva
- Set of international agreements between States governing international trade, regulation, and other government action
- State-to-State dispute settlement body that is not afraid to deal with politically sensitive issues (environment, public health, national security)



# *Relevant WTO Rules*

- **GATT**
  - Most Favored Nation: Treat imports from all countries the same (Art. I)
  - National Treatment: Treat imports no worse than domestic products (Art. III)
  - Prohibition on import restrictions (Art. XI)
- **Subsidy Agreement (SCM)**
  - “Actionable” subsidies
  - “Prohibited” (export) subsidies
- **Environmental Exceptions**
  - GATT Article XX
  - No SCM equivalent

# *WTO-Consistency of a CBAM Import Measure*

- Under Arts. III and I of the GATT, Imported and domestic "Like Products" and "Like Products" from different third countries must be treated the same.
  - Snag #1: Product or "Production Process"?
  - Snag #2: Art. XI GATT (general prohibition of import restrictions that effectively keep certain imports out of the domestic market)
  - **<u>Conclusion</u>: a CBAM import measure is very likely to violate Arts. I, III, and/or XI of the GATT**

- Art. XX of the GATT allows for a defense based on environmental or "resource conservation" grounds, …… but this is accompanied by a detailed test of whether the measure is not in fact structured as a restriction on trade.
  - Is it really the best way to achieve the objective?
  - Does it properly account for other countries' behavior?
  - How "unilateral" is it?
  - Did the imposing country try to achieve an international solution first?

# To Determine if a Measure Can be Justified under Article XX GATT, the Devil really will be in the Detail

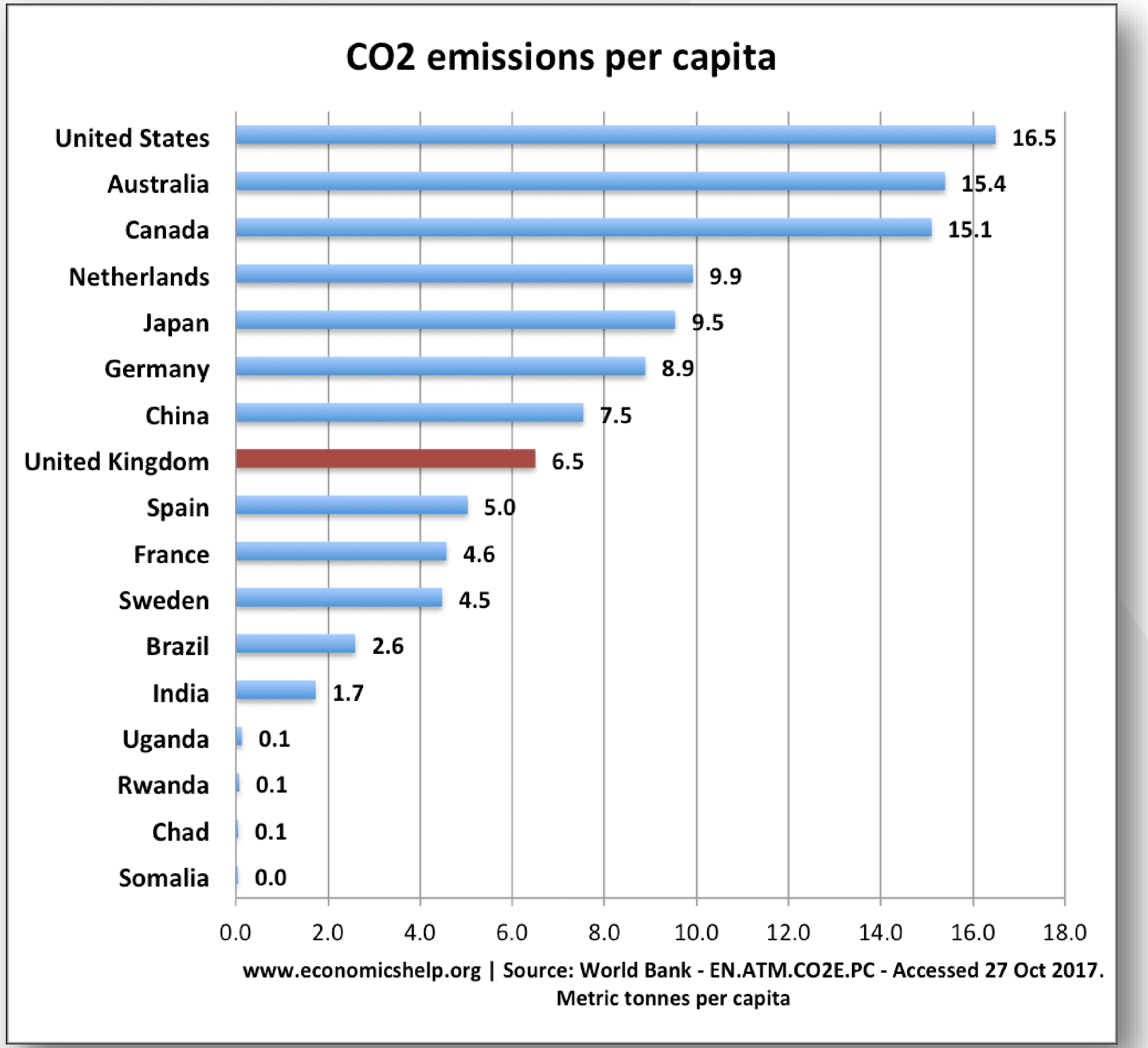
- How will "equivalency" be determined?
  - What if a country meets CO2 reduction targets but does not have a carbon tax or other pricing mechanism in place? And what if the reverse were true?
  - What if a country invests heavily in climate-related innovation (through public and private sources), but does not regulate or price carbon in the same way?
  - Do we measure only at the country-level, or at sub-regional levels? (E.g., Poland v California)
  - What does a company need to do to "prove" lower carbon content/higher CO2 reduction efforts? (Cf. REACH)
  - How do we treat developing countries and LDCs?
- How will carbon content be calculated?
  - How do we account for inputs/raw materials/supply chain emissions?
  - What about transportation?
  - How do we account for offsets?
  - Industry-wide or company- or product-specific?
  - Amount of work, effort, and expertise required on the part of government agencies involved?
- What "price" will we apply to imports?
  - Setting a common/equivalent carbon "tax" will be much easier than setting an equivalent import price for the more variable cost of ETS allowances.
- Are adjustments genuinely meant to prevent carbon leakage, or are they competitiveness measures
  - It is very hard to avoid harmful statements by politicians and others.
  - Are we in fact imposing "retaliation" against aggressive trade behavior or failure to meet desired Paris or other climate objectives by other countries (e.g., the US)?
  - Or trying to make up for our failure to get China and others to make more significant commitments in the Paris Agreement?

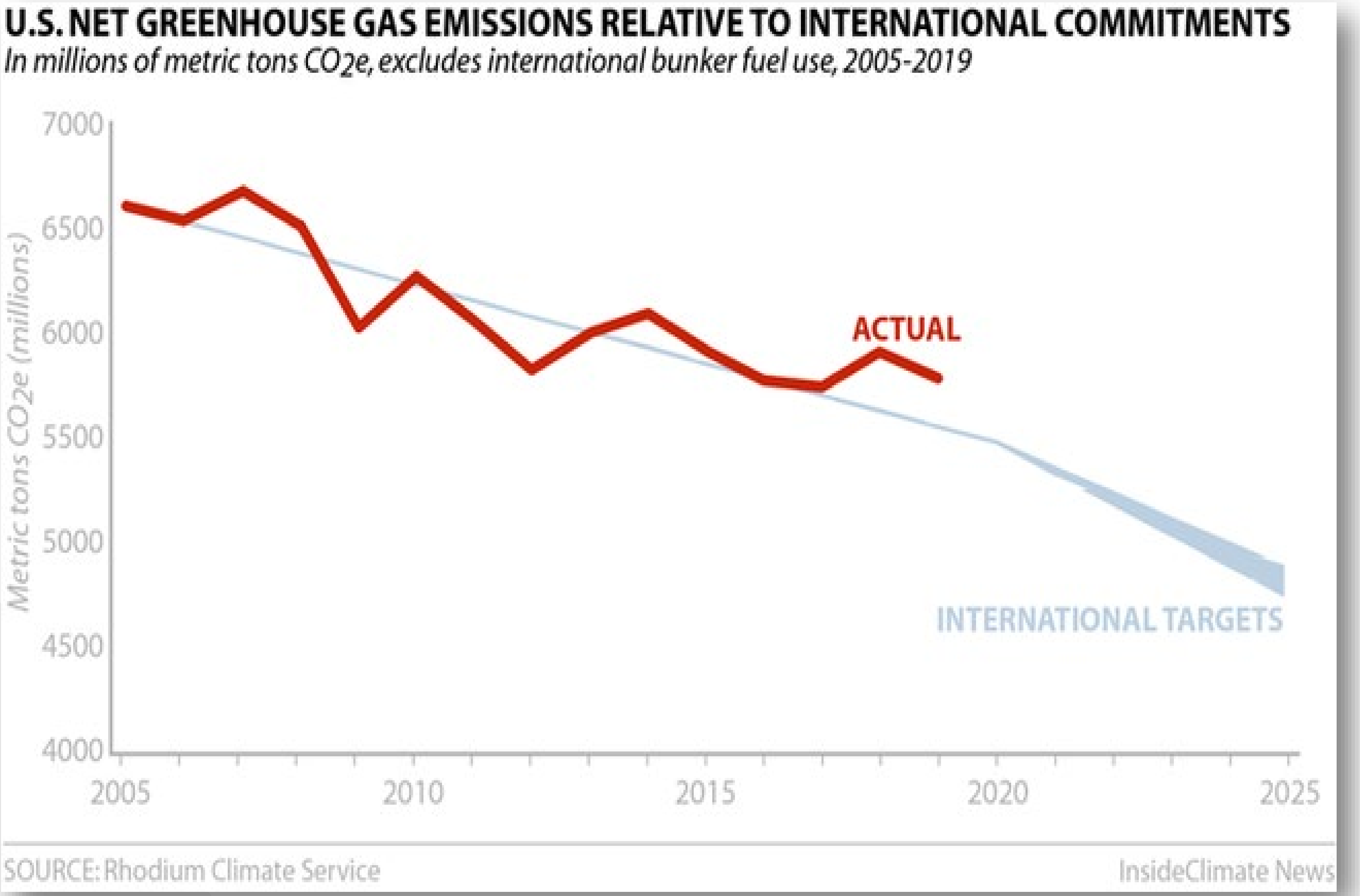
# *Example 1: 2009 Study of Carbon Intensity of Wine*

- If you live in New York your options, best to worst, are:
  1) Bordeaux, France (which are shipped via ship) = 136 g of CO2 equivalent (11% of weight)
  2) Santiago, Chile (also sent by ship) = 181 g of CO2 equivalent (15% of weight)
  3) Sydney, Australia (ship, again) = 409 g of CO2 equivalent (33% of weight)
  4) Napa, California (driven by truck) = 2000 g of CO2 equivalent (160% of weight)
- And if you live in Los Angeles California:
  1) Chilean wines = 227 g of CO2 equivalent (18% of weight)
  2) Californian or Australian wines = 272 g of CO2 equivalent (22% of weight)
  3) French wines = 1364 g of CO2 equivalent (110% of weight)

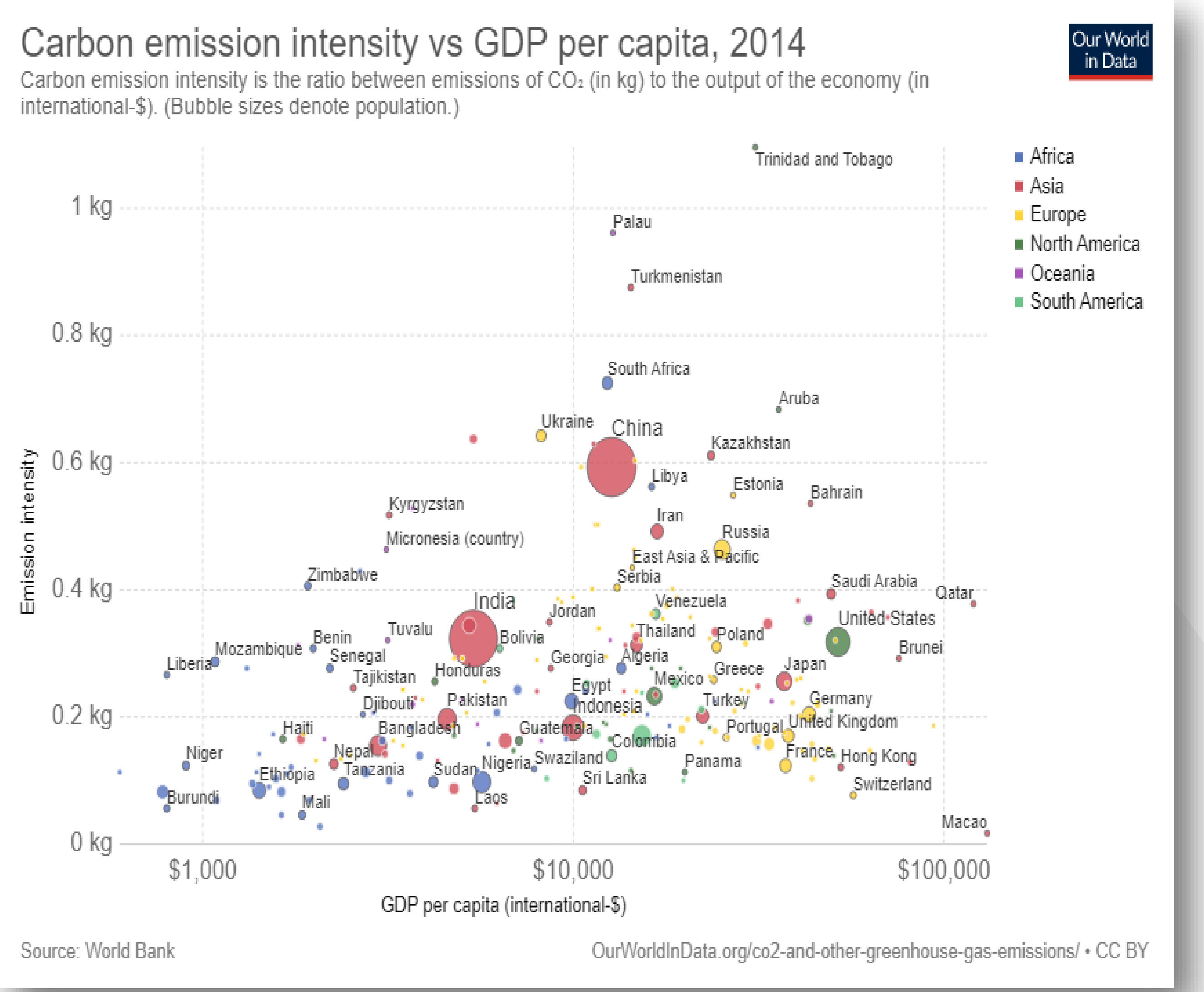

https://www.treehugger.com/files/2009/04/ship-or-truck-makes-all-the-difference-in-wine-carbon-footprint.php

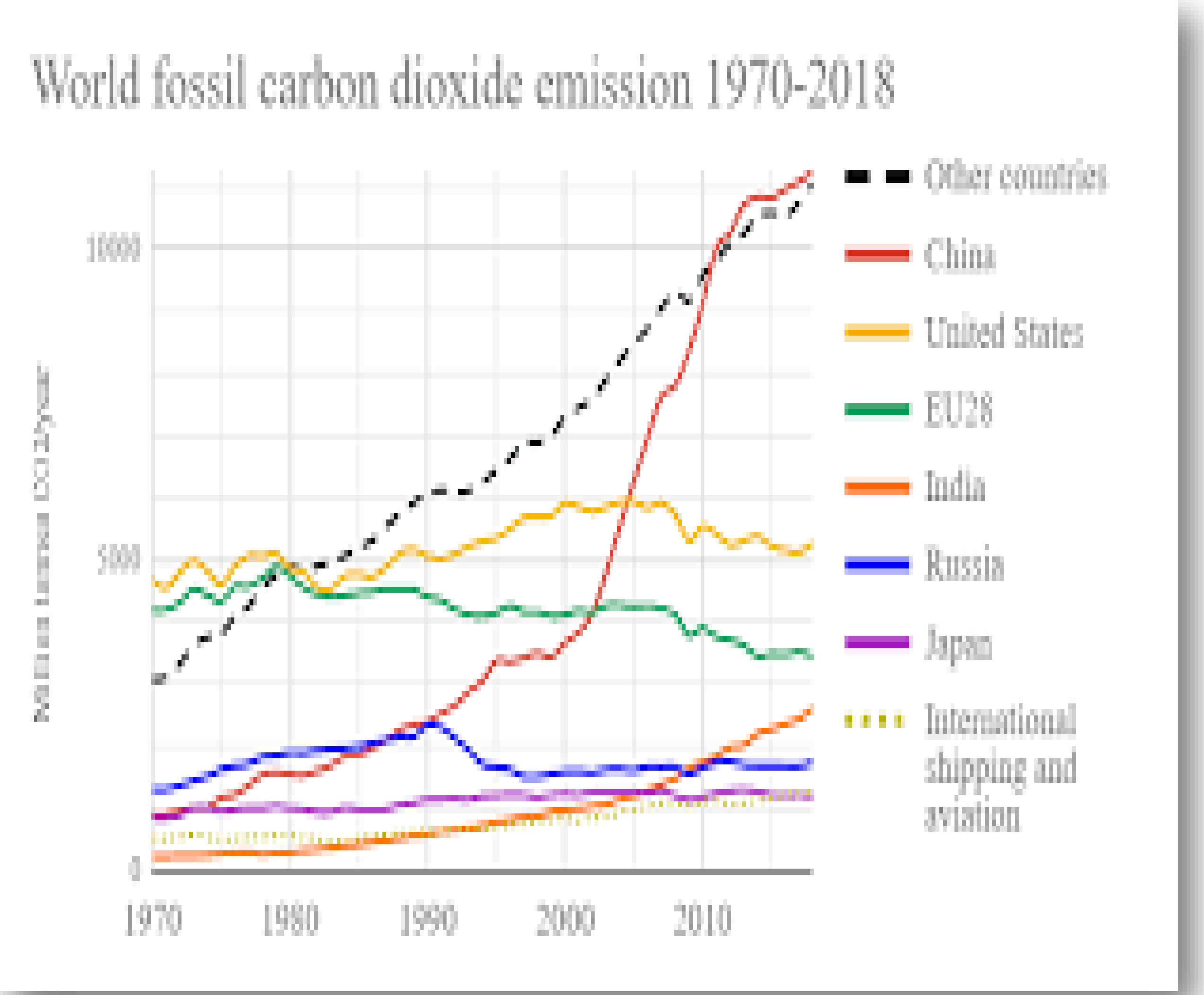
# *Example 2: Comparing Global Emissions*



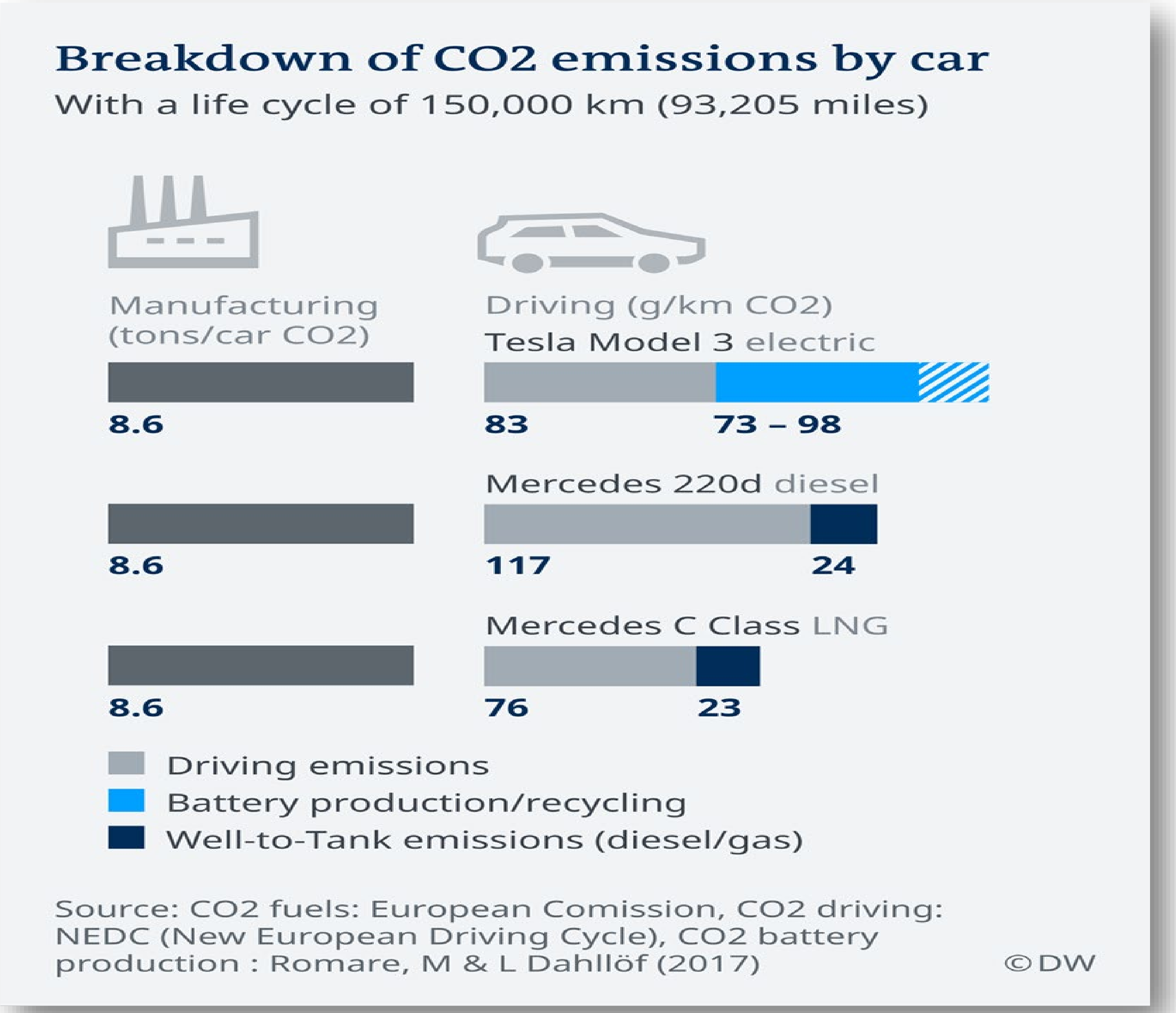
# Example 3: Comparing Global Emissions



# *Example 4: The Electric Vehicle Life-Cycle Emissions Debate*

- The Union of Concerned Scientists has calculated that:
  - Manufacturing a mid-sized EV with an 84-mile range results in about 15 percent more emissions than manufacturing an equivalent gasoline vehicle. For larger, longer-range EV´s that travel more than 250 miles per charge, the manufacturing emissions can be as much as 68 percent higher.
- Other factors includes: electricity mix heavily affects CO2 emissions from car use; environmental impact of lithium mining; average life expectancy of a vehicle; recycling of vehicle/batteries; etc.



# *WTO-Consistency of an Export Exemption/Rebate*

- In addition to taxing imports, it will be critical from a competitiveness and carbon reduction perspective, to exempt or rebate exports.
- The SCM Agreement includes a *per se* prohibition of export subsidies – this includes export exemptions or rebates/free allowances upon exportation.
- The SCM Agreement does include some limited exceptions from this prohibition for indirect taxes (i.e. VAT-type export exemptions).
- There is also a so-called “Expert Report on Border Tax Adjustments.”
- There is no Art. XX GATT “environmental exception” equivalent.

**Our own detailed legal analyses have shown that an EU-wide carbon tax that would apply to any product used or consumed within the EU, would have the best chance of being justifiable under WTO Subsidy rules**

- Background
- Potential Scenarios for a CBAM
- WTO/Trade Issues
- **Procedure & Political Dimensions**

# *Procedure and Political Dimensions*

## 1. Things have already startet

- CBAM introduction at the latest by **1 January 2023**
- The EU Commission's plans for a CBAM is very much driven by President *von der Leyen*, Commissioner for the European Green Deal *Timmermans*, and Competition Commissioner *Vestager*. Trade Commissioner *Hogan* is internally known to be reluctant to a CBAM, while Economy Commissioner *Gentiloni* seems supportive.
- 224 stakeholders commented during the inception impact assessment period (March 2020)

# *Procedure and Political Dimensions*

## 2. Next Stage: Public Consultation

- Launched last week and will be **open until 28 October 2020**
- Consultation is targeting **all stakeholders**, namely national administrations in the EU and in the rest of the world, businesses, trade associations, NGOs, workers associations and trade unions, consultancies, think tanks, research and academic institutions.
- Addressed to all sectors most notably to **energy intensive industries** and related economic activities

# *Procedure and Political Dimensions*

- **Stakeholder opportunities**:

  The Public Consultation is a crucial period

  - to understand the overall situation
  - forge alliances
  - to get in touch with the political actors (including, for example, the Directorate-General CLIMA)
  - to develop further many more short-, mid- and long-strategic aims

# *Procedure and Political Dimensions*

## 3. Commission's Adoption of the Proposal for a Directive

- Planned for the first semester of 2021
- **Stakeholder opportunities**: Before the Proposal is adopted, stakeholders should remain in touch with the key players (Commissioners, DGs etc.).

# *Procedure and Political Dimensions*

## 4. Addressees of the Proposal and Opportunities to Influence

- The final Proposal is forwarded simultaneously to other participants in the EU's multilevel legislative procedure:
  - the European Parliament
  - Council
  - and national parliaments
- **Stakeholder opportunities:** Interested stakeholders should have established working relationships to these actors before the Proposal. This way, the institutions involved may reflect the stakeholder´s position in their own statement.

# *Procedure and Political Dimensions*

## 5. Further Steps

- First Reading in Parliament
- First Reading in Council

# *Thanks for your attention!*

**Martin Seyfarth**
Partner, WilmerHale
Martin.Seyfarth@wilmerhale.com
Tel: +49 30 20 22 6430

**Naboth van den Broek**
Partner, WilmerHale
Naboth.vandenBroek@wilmerhale.com
Tel: +32 2 285 49 21 / +1 202 247 3267

**Matthias Wissmann**
Senior International Counsel, WilmerHale
Matthias.Wissmann@wilmerhale.com
Tel: +49 30 20 22 6426