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GREENING GLOBAL TRADE: REASSESSING GATT ARTICLE XX IN LIGHT OF MODERN CLIMATE CHALLENGES

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Abstract

In order to meet their climate obligations under frameworks like the Paris Agreement, countries are increasingly implementing environmental trade policies as the global climate crisis worsens. These policies include carbon border adjustments, import restrictions on high-emission goods, and green subsidies. Many of these policies, however, run the risk of going against fundamental WTO principles, such as market access and non-discrimination under the General Agreement on Tariffs and Trade (GATT). Although the scope and interpretation of Article XX of the GATT are still up for debate, it provides general exceptions that permit members to defend specific trade-restrictive practices on the basis of environmental concerns.

With a primary focus on clauses (b) and (g), which pertain to the protection of life and conservation of natural resources, this paper critically examines the evolving role of GATT Article XX as a legal tool for striking a balance between trade liberalization and climate action. It also examines how WTO dispute settlement bodies have interpreted these exceptions in important environmental cases like US—Shrimp, US—Gasoline, and EC—Seal Products. Using this jurisprudential lens, the paper considers whether Article XX as it stands now provides enough policy space for ambitious climate-based trade regulations.

The paper evaluates whether climate-centric policies are compatible with Article XX, reviews proposals for legal reform or reinterpretation to better align trade rules with the global climate agenda, and further analyses emerging issues that frequently prevent otherwise legitimate environmental measures from passing WTO scrutiny, such as claims of "green protectionism" and the intricate application of the chapeau clause. In the end, this study makes the case that although Article XX provides a solid foundation, states may need to adopt a more adaptable, climate-conscious interpretation or even specific reform in order to achieve their environmental objectives without violating their trade obligations. Balancing economic interests with environmental sustainability is the key to the future of global trade governance.

Key Words: GATT, Environment, Climate Change, Trade Liberalisation, Tariffs, WTO

1. Introduction

Climate change has evolved from a remote or theoretical issue to a pressing worldwide emergency that cuts across national boundaries and legal jurisdictions. States have been forced to reevaluate their domestic and international policies due to the increasing severity of environmental degradation, the frequency of climate-related disasters, and the urgent need to attain carbon neutrality. Trade has grown in importance as a weapon in the fight against climate change as a result of this changing policy shift. Countries are now implementing trade-related environmental policies like sustainability-linked product standards, subsidies for renewable energy, and prohibitions on high-emission products with carbon border adjustment mechanisms (CBAM). Despite having their roots in valid climate concerns, these policies have generated a lot of legal discussion because they may be in violation of international trade standards, particularly those established by the GATT.¹

By lowering trade barriers and prohibiting discrimination among member states, the GATT—a pillar of the multilateral trading system and now part of the World Trade Organization's (WTO) legal framework, aims to advance free and fair trade.² The Most-Favoured-Nation (MFN) clause (Article I) and the National Treatment principle (Article III) are two fundamental GATT provisions that mandate WTO members to treat imported goods equally to domestic ones and to provide all members with equal trade advantages.³ Although these guidelines are crucial for avoiding economic protectionism, they may directly clash with environmental policies that differentiate products according to their sustainability profile, production processes, or carbon footprint.⁴

Article XX of the GATT contains a crucial balancing provision that allows for general exceptions in order to manage such conflicts between trade liberalization and non-trade public interests. It permits member states to enact otherwise GATT-inconsistent policies as long as

¹ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; United Nations Framework Convention on Climate Change art. 3(5), May 9, 1992, 1771 U.N.T.S. 107.

² Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

³ GATT 1947, *supra* note 2, arts. I, III.

⁴ Joost Pauwelyn, Carbon Leakage Measures and Border Tax Adjustments Under WTO Law, in *Research Handbook on Environment, Health and the WTO* 448–452 (Geert Van Calster & Denise Prévost eds., 2013).

they are required to accomplish particular goals, like preserving finite natural resources (Article XX(g)) or safeguarding the health or life of people, animals, or plants (Article XX(b)).⁵ The chapeau, a stringent introductory clause, governs these exceptions, stating that they cannot be implemented in a way that amounts to "arbitrary or unjustifiable discrimination between countries" or "disguised restriction on international trade."⁶ Because of its two-tiered structure, Article XX serves as both a gatekeeper and a gateway for trade policy related to climate change.

The United States—Gasoline, United States—Shrimp, Brazil—Retreaded Tyres, and EC—Seal Products are just a few of the historic cases involving environmental and health measures in which WTO dispute settlement bodies have interpreted Article XX over the years.⁷ The limits of what constitutes a valid exception under Article XX and the procedures used by the chapeau to guard against abuse of the exceptions have been put to the test in these cases. The application of Article XX to contemporary climate policies, particularly those arising from international commitments like the Paris Agreement, is still unclear and understudied, despite this expanding body of jurisprudence.⁸ Important questions are brought up by the dynamic and changing nature of trade regulation related to climate change: Does Article XX impose unduly strict restrictions on essential environmental innovation, or can it allow for aggressive climate action? Is there a need for change, or is the current interpretation of Article XX adaptable enough to handle upcoming climate challenges?

The purpose of this paper is to evaluate GATT Article XX's significance in the current climate crisis. It investigates whether Article XX permits WTO members to pursue climate goals through environmental measures related to trade without violating their multilateral trade commitments. The following research questions are addressed in the paper by examining WTO case law, doctrinal discussions, and new state practices:

- (1) How much does Article XX of the GATT justify trade policies based on the environment and climate change?
- (2) Is there sufficient policy room for bold climate action under the current interpretation of

⁵ GATT 1947, *supra* note 2, art. XX(b), (g).

⁶ *Id.* art. XX *chapeau*

⁷ See Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996); Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007); Appellate Body Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).

⁸ Markus W. Gehring & Marie-Claire Cordonier Segger, *Sustainable Development in World Trade Law* 153–158 (Kluwer Law Int'l 2005); Thomas Cottier et al., *The Challenge of Reconciling Climate and Trade Regimes, in International Trade Regulation and the Mitigation of Climate Change* 3–24 (Thomas Cottier et al. eds., 2009).

Article XX?

(3) How has the application of Article XX in environmental contexts been influenced or limited by WTO jurisprudence?

(4) In light of the urgency of climate change, does Article XX require revision or reinterpretation?

This study intends to add to the expanding conversation on trade and climate governance by addressing these issues. It makes the case that although Article XX gives environmental exceptionality a legal foundation, its current interpretation might not be enough to address the intricate and pressing needs of climate adaptation and mitigation. In order to preserve both environmental integrity and the stability of the multilateral trading system, the paper concludes that a more climate-responsive interpretation of Article XX is required.

2. Climate Change and Trade: An Emerging Legal Intersection

The relationship between global trade and climate change has grown in importance as a legal, economic, and geopolitical issue in recent years. As a worldwide externality, climate change necessitates coordinated policy responses and group efforts. The free flow of investments, goods, and services is frequently impacted by the instruments used to accomplish environmental goals, such as carbon pricing, green subsidies, and regulatory standards.⁹ Trade policies with environmental justifications are becoming more popular as nations seek more aggressive decarbonization policies to fulfil their obligations under the Paris Agreement. These include restrictions on plastics and chemicals, prohibitions on high-carbon imports, product-specific environmental labelling, and Carbon Border Adjustment Mechanisms (CBAMs).¹⁰

Despite being essential for protecting the environment, such actions might be in opposition to current WTO regulations. The WTO legal framework places a strong emphasis on minimal trade distortions, transparency, and non-discrimination.¹¹ Policies that distinguish between goods according to their production methods run the risk of breaking the Most-Favoured-Nation (MFN) and National Treatment commitments under Articles I and III of the GATT,

⁹ See generally Richard S.J. Tol, *The Economic Effects of Climate Change*, 23 *J. Econ. Persp.* 29, 30–32 (2009); Aaron Cosbey et al., *Developing Country Interests in Climate-Related Border Tax Adjustments*, Int'l Inst. for Sustainable Dev. 5–6 (2012), https://www.iisd.org/system/files/publications/climate_border_tax_adjustments.pdf.

¹⁰ European Commission, *Proposal for a Regulation Establishing a Carbon Border Adjustment Mechanism*, COM (2021) 564 final (July 14, 2021); see also World Economic Forum, *Plastics and the Environment: A Legal Overview* (2020), <https://www.weforum.org/reports/plastics-and-the-environment-a-legal-overview>.

¹¹ GATT 1947, *supra* note 2, arts. I, III.

particularly if those production methods are carried out in foreign countries. Additionally, trading partners may view unilateral environmental regulations as covert protectionism, which could result in trade disputes and retaliatory measures.¹²

However, environmental concerns are not disregarded by the WTO legal framework. The goal of sustainable development and the necessity of preserving the environment are both expressly acknowledged in the Preamble to the Marrakesh Agreement. The main legal clause that enables WTO members to defend trade restrictions imposed for health or environmental reasons is Article XX of the GATT. However, the complexity and urgency of climate action have not kept pace with the evolution of this balancing mechanism.¹³

More legal flexibility within the trade regime is needed as environmental regulations - from supply chain traceability to emissions-based product standards, become more complex. But historically, the Appellate Body and WTO panels have interpreted GATT provisions, including Article XX, in a conservative and text-bound manner. Climate-conscious states now face a legal conundrum: pursue aggressive environmental regulation and risk WTO challenges, or compromise on ecological ambition to remain trade-compliant. This inflexibility has caused friction between climate goals and trade compliance.

In the post-Paris world, where climate commitments are increasingly incorporated into national economic policies, including trade strategies, this tension is heightened. Designing trade-compliant environmental policy and making sure that trade law changes to support, not impede, global sustainability initiatives, is now the legal challenge rather than having to choose between trade and the environment. Because of this changing legal environment, it is not only a doctrinal issue but also a practical necessity to interpret and amend Article XX.

3. Legal Framework and Interpretation of Article XX GATT

Article XX of the GATT 1947 offers a small but important set of general exceptions that allow WTO members to adopt measures that may otherwise violate core trade disciplines, so long as those measures serve specific policy objectives and are not applied abusively. This allows WTO members to reconcile the goals of trade liberalization with legitimate policy concerns

¹² Joost Pauwelyn, Carbon Leakage Measures and Border Tax Adjustments Under WTO Law, in *Research Handbook on Environment, Health and the WTO* 448–452 (Geert Van Calster & Denise Prévost eds., 2013).

¹³ Marrakesh Agreement Establishing the World Trade Organization pmb., Apr. 15, 1994, 1867 U.N.T.S. 154.

like environmental protection and public health.¹⁴

A. Structure of Article XX: The Dual-Layered Test

Article XX consists of two essential components:

1. A list of specific policy-based exceptions (subparagraphs (a) through (j)), which justify departures from GATT obligations for reasons such as public morality, protection of health, or conservation of natural resources.
2. A “chapeau” (introductory clause), which imposes additional safeguards by prohibiting measures that are applied in a manner constituting: Arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or A disguised restriction on international trade.¹⁵

This two-tiered structure establishes a legal test wherein a member must first substantiate its measure under one of the listed exceptions, and then demonstrate that the measure is applied fairly and consistently under the chapeau.¹⁶

B. Clause (b): Protection of Life or Health

Trade restrictions are allowed under Article XX(b) if they are "necessary to protect human, animal, or plant life or health."¹⁷ According to WTO jurisprudence, a measure must:

- Be necessary (i.e., there must be no reasonably available alternative measure that is less trade-restrictive and still achieves the objective);
- Be based on scientific evidence or risk assessments; and
- Be designed to achieve the stated objective (i.e., protection of life or health).¹⁸

This provision has been used in cases pertaining to public health, hazardous materials, and food safety. It is also becoming more and more pertinent to climate-related policies that try to reduce pollution or health risks associated with environmental degradation.¹⁹

¹⁴ General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]

¹⁵ Id. art. XX *chapeau*.

¹⁶ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R 115–122 (Oct. 12, 1998).

¹⁷ GATT 1947, *supra* note 1, art. XX(b).

¹⁸ Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/AB/R 170–174 (Mar. 12, 2001).

¹⁹ Robert Howse, *The World Trade Organization and the Environment: Legitimacy, Democracy and Community in the International Trading System*, in *The EU and the WTO* 232, 236–237 (Gráinne de Búrca & Joanne Scott eds., 2001).

C. Clause (g): Conservation of Exhaustible Natural Resources

Measures * "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" are permitted under Article XX(g). Since it only requires that the measure be "related to" the conservation goal rather than "necessary," this clause has been interpreted more loosely than (b).²⁰

Crucially, the Appellate Body has acknowledged that "exhaustible natural resources" encompass not only limited resources like minerals but also living resources like fish and even non-renewable environmental goods like clean air.²¹ This change in interpretation has made it possible to use Article XX(g) in climate-related contexts, like emissions control and carbon reduction initiatives.

Nonetheless, a crucial prerequisite under this clause is the requirement of even-handedness, which means that restrictions must be applied to both domestic and imported goods.²² When climate policies fail to impose comparable domestic constraints or disproportionately affect foreign producers, this aspect frequently becomes controversial.

D. The Chapeau: Preventing Abuse of Exceptions

If a measure fails the chapeau test, it may be overturned even if it meets the requirements of subparagraphs (b) or (g). The purpose of the chapeau is to prevent members from abusing exceptions to further protectionist goals, as the WTO's Appellate Body has underlined time and again.²³

In the US—Shrimp case, for example, the Appellate Body determined that although the U.S. measure to protect sea turtles was justified under Article XX(g), it violated the chapeau because it was implemented unilaterally and discriminatorily.²⁴ This decision emphasized that the WTO is concerned with the implementation of environmental trade policies, not just their enactment.

²⁰ Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R 20 (Apr. 29, 1996).

²¹ *Id.* at 14–17; see also Appellate Body Report, US—Shrimp, *supra* note 3, 131.

²² US—Gasoline, *supra* note 8, at 20.

²³ Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R ¶¶ 224–226 (Dec. 3, 2007).

²⁴ US—Shrimp, *supra* note 3, 177–186.

E. Balancing Trade and Climate Goals

Environmental exceptions are allowed under Article XX, but the bar for interpretation is still high. When creating climate-based trade policies, states must strike a balance between scientific rigor, necessity, proportionality, and non-discrimination. In light of contemporary climate mitigation techniques like carbon pricing and climate-based import standards, the clause has not been substantially reinterpreted. This ambiguity begs the question of whether Article XX, in its current form and interpretation, can accommodate the changing needs of climate governance.

4. WTO Jurisprudence on Environmental Exceptions

The extent and boundaries of Article XX of the GATT have been significantly shaped by World Trade Organization (WTO) jurisprudence, especially with regard to environmental measures. The WTO's Appellate Body has developed a sophisticated interpretive framework that strikes a balance between the risk of protectionism and the legitimacy of environmental protection through a number of historic cases. This section examines the key rulings that have influenced the application of the chapeau and the developing interpretation of Article XX(b) and (g).

A. United States—Gasoline (1996)

In the United States, Standards for Reformulated and Conventional Gasoline, the country established rules to limit gasoline pollution by enforcing distinct requirements for both imported and domestic goods.²⁵ Brazil and Venezuela contested these rules, claiming that they went against GATT Article III's national treatment principle.

According to the Appellate Body, the U.S. measure failed the chapeau test even though it was covered by Article XX(g) because it dealt with the conservation of finite natural resources. Unjustified discrimination had occurred when the US gave domestic refiners preferential treatment over foreign refiners. This case was important because it validated the use of Article XX(g) for environmental purposes by confirming that clean air is an exhaustible natural resource. But it also made it clear that a measure's application strategy, not just its goal, must adhere to WTO standards.²⁶

²⁵ Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US—Gasoline*

²⁶ *Ibid*

B. United States—Shrimp (1998)

India, Malaysia, Pakistan, and Thailand filed a dispute alleging that the United States' ban on the import of shrimp from countries that did not use turtle-excluder devices to protect endangered sea turtles was discriminatory. The Appellate Body determined that the measure was provisionally justified under Article XX(g) because it related to the conservation of an exhaustible natural resource, but it failed the chapeau because the United States had imposed the ban in a unilateral and inflexible manner failing to adequately negotiate with affected countries or provide technical assistance.²⁷

This case has since become a touchstone for striking a balance between trade and environmental concerns within the WTO framework, reinforcing the notion that environmental objectives are legitimate but that multilateralism and procedural fairness are crucial in their implementation.

C. Brazil—Re-treaded Tyres (2007)

In order to lessen the risks to the environment and human health posed by tire waste, Brazil banned the importation of retreaded tires. Under the terms of the GATT, the European Communities contested the prohibition.

Although Brazil's measure was deemed "necessary to protect human, animal or plant life or health" under Article XX(b) by the WTO Appellate Body, it failed the chapeau because it permitted certain imports under a separate agreement with Mercosur countries, which led to arbitrary discrimination.²⁸

The case made it clear that selective application can render a measure invalid under the chapeau, but perfect consistency is not required for a measure to be considered necessary under Article XX(b). Additionally, it broadened the scope of what kinds of environmental actions related to health could be covered by Article XX.

D. EC—Seal Products (2014)

In order to address public moral concerns regarding animal welfare, the EU banned seal

²⁷ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US—Shrimp*].

²⁸ Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil—Retreaded Tyres*].

products in European Communities—Measures Prohibiting the Importation and Marketing of Seal Products. Norway and Canada complained against the same.

The EU measure failed the chapeau test because it discriminated unfairly against seal products from different nations, even though the WTO Panel acknowledged that it addressed public morals under Article XX(a) rather than (b) or (g). This case reinforced the rigorous scrutiny applied under the chapeau, even in cases where the objective is widely acknowledged, even though the primary defense was not under XX(b) or (g).²⁹

Several doctrinal principles can be inferred from these cases:

- When interpreting Article XX(b) and (g), WTO panels are sensitive to environmental goals, especially when there is an obvious risk to public health or conservation.
- The definition of "exhaustible natural resources" has evolved over time to encompass renewable resources like marine wildlife and environmental goods like clean air.
- The chapeau serves as a crucial constraint, frequently disqualifying otherwise acceptable environmental measures due to procedural injustice or inconsistent application.
- When implementing environmental regulations, the WTO has promoted non-discriminatory practices, multilateralism, and consultation.

These precedents show that although Article XX can be a good legal way to support trade policies related to climate change and the environment, its procedural and structural limitations necessitate careful policy and legal design.

5. Climate-Conscious Trade Measures and the Limits of Article XX

Novel, climate-focused trade policies have emerged as a result of the global movement toward carbon neutrality and sustainable development. By influencing production practices in other nations, these policies frequently serve two purposes: lowering domestic carbon emissions and preventing carbon leakage. Although such policies support justifiable climate goals, they give rise to significant questions regarding their compliance with WTO regulations and whether GATT Article XX is adequate to protect them from challenge.

²⁹ Appellate Body Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) [hereinafter *EC—Seal Products*].

A. Types of Climate-Based Trade Measures

1. In recent years, a number of types of trade-related climate measures have surfaced, including:
 1. Carbon Border Adjustment Mechanisms (CBAMs): These tools charge importers a carbon price that is determined by the emissions that are a part of their manufacturing. For instance, industries like steel, cement, and electricity are covered by the EU CBAM.³⁰
 2. Trade Bans on High-Emission Goods: A number of states have suggested or put into effect import limitations on goods like plastic, fossil fuels, and commodities linked to deforestation.³¹
 3. Green Industry Subsidies: To support the clean technology and renewable energy sectors, nations are increasingly utilizing green industry subsidies, which may have an impact on export incentives and market competition.³²
 4. Mandatory Climate Standards and Labeling: The marketability of foreign goods may be impacted by life-cycle analysis-based product standards, carbon disclosure regulations, and environmental labeling programs.³³

These policies may be in violation of WTO principles, specifically most-favorable-nation treatment (Article I) and national treatment (Article III), even though they frequently mirror the Sustainable Development Goals and targets of the Paris Agreement.³⁴ This begs the question: Are these actions permissible under Article XX's environmental exceptions?

B. Potential for Justification Under Article XX

There is some legal room for climate-based trade policies thanks to the textual and jurisprudential flexibility of Article XX(b) and (g). As an example, CBAMs may be justified under Article XX(g) as actions pertaining to the preservation of finite natural resources (like clean air or the climate), so long as they are supported by comparable domestic regulations.³⁵ Under Article XX(b), trade restrictions on high-emission products may be justified as being

³⁰ Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism, COM (2021) 564 final (July 14, 2021).

³¹ Benjamin Simmons, Trade and Climate Change: Challenges and Opportunities, UNEP/WTO Workshop on Trade and Climate Change (Oct. 2020), <https://unep.org/resources>

³² OECD, *Environmental Considerations in Trade Agreements and Subsidy Disciplines* 12–15 (2021), <https://www.oecd.org/trade>.

³³ World Trade Organization, *Standards and Labelling Initiatives and the WTO TBT Agreement*, Trade and Environment Brief No. 3 (2020).

³⁴ General Agreement on Tariffs and Trade arts. I, III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

³⁵ See Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US—Gasoline*], at 14–16.

required to safeguard public health from environmental degradation brought on by climate change.

Nonetheless, a number of challenges still exist: First, the strict "necessity test" under Article XX(b) requires a state to demonstrate that there are no reasonably available, WTO-consistent alternatives;³⁶ and second, even if the measure satisfies the objective standard, it must still pass the chapeau test, which states that it cannot arbitrarily or unjustifiably discriminate between countries where similar conditions prevail.³⁷

In the case of CBAMs, differential treatment of developing countries based on capacity, technological access, or data availability may be subject to legal challenge if not properly designed; similarly, green subsidies and technical standards may be viewed as non-tariff barriers that violate WTO commitments, particularly if they unduly burden exporters from the Global South.

C. Limits of Article XX in the Climate Era

Several structural and interpretive limitations are revealed by the difficulties in defending contemporary climate measures under Article XX:

1. Limited Meaning of "Necessity": It is more difficult to defend many climate measures under Article XX(b) because they are a part of broader strategies rather than specifically designed interventions.³⁸
2. Over-reliance on Domestic Equivalence: Article XX(g) mandates concurrent domestic restrictions, which might not always reflect the extent or approach of trade measures with a foreign focus.
3. Inconsistency in Climate-Specific Measures Rather than carbon pricing, emission intensity benchmarks, or climate tariffs, the majority of the existing jurisprudence under Article XX has addressed biodiversity and pollution. Regarding the application of Article XX to global public goods such as the climate system, there is no established legal theory.³⁹

³⁶ See Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007), ¶¶ 140–149.

³⁷ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US—Shrimp*], 160–186.

³⁸ Thomas Cottier et al., *The Challenge of Reconciling Climate and Trade Regimes*, in *International Trade Regulation and the Mitigation of Climate Change* 3–24 (Thomas Cottier et al. eds., 2009).

³⁹ James Bacchus, *The Content of a WTO Climate Waiver*, CIGI Papers No. 201 (2020), at 10–13.

4. Risk of Green Protectionism: Even when used as an environmental cover, Article XX does not stop members from passing laws that could be interpreted as trade protectionism. The need for WTO guidance to differentiate between legal climate action and covert restrictions has grown as a result of this.

D. The Evolving Policy Context

States now have two sets of responsibilities: the WTO and multilateral environmental agreements (MEAs), such as the Paris Agreement. The application of Article XX is still unpredictable and context-sensitive, even though it has been interpreted to permit deference to international norms.⁴⁰ The legal ambiguity surrounding the application of Article XX to green trade measures, even in the absence of updated WTO rules specifically addressing climate, may discourage climate ambition, particularly among developing nations that are concerned about trade retaliation or dispute resolution. This raises concerns about whether Article XX can effectively support global climate governance in its current form and interpretation or if it needs to be reinterpreted, amended, or supplemented.

VI. Critical Evaluation - Does Article XX Adequately Support Climate Ambition?

A number of doctrinal, procedural, and structural limitations limit Article XX of the GATT's ability to support modern climate goals, despite the fact that it offers a crucial legal framework for striking a balance between trade and non-trade goals, including environmental protection. Despite its theoretical flexibility, Article XX is still not sufficiently responsive to the scope and urgency of the climate crisis, as demonstrated by the cases examined and the growing adoption of climate-conscious trade measures.

A. Formalistic and Rigid Interpretation

The formalistic approach taken by the Appellate Body and WTO panels, especially in the application of the chapeau, is one of the most urgent issues.⁴¹ Although the goal of the chapeau—to guard against misuse and guarantee equitable implementation—is legitimate, its implementation has frequently taken precedence over important environmental goals. For example, in US—Shrimp, the Appellate Body upheld the legitimacy of sea turtle conservation

⁴⁰ Markus W. Gehring & Marie-Claire Cordonier Segger, *Sustainable Development in World Trade Law* 153–158 (Kluwer Law Int'l 2005).

⁴¹ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R ¶¶ 156–186 (Oct. 12, 1998).

under Article XX(g), but invalidated the measure because it was applied unilaterally and inconsistently. This pattern indicates that WTO compliance is frequently determined by procedural design flaws rather than policy content.

Furthermore, Article XX(b)'s necessity test raises the bar for climate regulations, particularly those that deal with long-term or precautionary risk management, which may not have scientific consensus or quantifiable immediacy.⁴² A strict necessity test that concentrates on single-outcome efficiency may not be met by climate change measures, which are usually a part of larger decarbonization strategies.

B. Climate Measures vs. Trade Orthodoxy

The preventive and transformative objectives of climate regulations frequently clash with trade norms that place a higher priority on product equivalency and market access. For instance, Carbon Border Adjustment Mechanisms (CBAMs) challenge the WTO's long-standing distinction between "like products" based only on physical characteristics, regardless of their carbon intensity, even though their goal is to stop carbon leakage and promote global emissions reduction.⁴³ This limited interpretation impedes climate ambition and calls into question the validity of climate-based product differentiation.

Furthermore, even though they support global climate goals, green subsidies—like those provided under the EU Green Deal or the U.S. Inflation Reduction Act—are coming under increased WTO scrutiny as possible trade distortions.⁴⁴ The positive externalities of climate-oriented subsidies are not explicitly acknowledged by the WTO's current framework, which restricts the policy options available to transition economies.

C. Legal Uncertainty and Regulatory Chill

A regulatory chill is brought on by the ambiguous and changing interpretation of Article XX, especially for developing nations that might be reluctant to adopt bold climate policies out of concern for WTO action.⁴⁵ Unless WTO consistency can be ensured, legal ambiguity also

⁴² Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R ¶¶ 170–176 (Mar. 12, 2001).

⁴³ Joost Pauwelyn, *Carbon Leakage Measures and Border Tax Adjustments Under WTO Law*, in *Research Handbook on Environment, Health and the WTO* 448–452 (Geert Van Calster & Denise Prévost eds., 2013).

⁴⁴ OECD, *The Climate Impact of Subsidies: Legal and Policy Perspectives* 18–20 (2022), <https://www.oecd.org>

⁴⁵ Thomas Cottier et al., *The Challenge of Reconciling Climate and Trade Regimes*, in *International Trade Regulation and the Mitigation of Climate Change* 3–24 (Thomas Cottier et al. eds., 2009).

hinders collaboration among climate coalitions, deterring the formation of sectoral trade agreements or climate clubs. This discrepancy is made worse by the inability to harmonize WTO law with multilateral environmental agreements (MEAs), like the Paris Agreement. No official legal hierarchy has been established to give climate commitments precedence over trade disciplines in the event of conflict, despite rhetorical alignment.⁴⁶

D. Inadequate Differentiation and Equity Considerations

The insensitivity of Article XX to developmental asymmetries is another significant flaw. Exports from developing nations with limited financial or technological resources are frequently disproportionately impacted by climate measures. Common but differentiated responsibilities (CBDR), a fundamental tenet of the United Nations Framework Convention on Climate Change (UNFCCC), are not taken into consideration by Article XX, which puts legal pressure on nations that are least prepared to comply with strict trade-related climate requirements.⁴⁷

Although WTO members have expressed support for equity and sustainable development, neither the language of Article XX nor the dispute resolution process have yet to effectively operationalize these ideals.

E. Emerging Consensus on Reform Needs

In order to effectively support climate ambition, there is now growing academic and policy consensus that Article XX needs to be reinterpreted, soft law instruments should be used, or treaty amendments should be made.

Among the suggestions are:

- Creating interpretive standards for climate policies;
- Adding the atmosphere and global commons to the list of "exhaustible natural resources";
- Establishing a WTO–UNFCCC interface to address conflicting legal obligations;
- Permitting climate waivers similar to security or public health exceptions.⁴⁸

WTO members must tread carefully until such reforms are implemented: Developing climate policies within the confines of current trade law that are both successful and resistant to litigation

⁴⁶ Gabrielle Marceau, *WTO Rules and Sustainable Development Goals: A Legal Perspective*, 17 *World Trade Rev.* 1, 19–21 (2018).

⁴⁷ United Nations Framework Convention on Climate Change art. 3(1), May 9, 1992, 1771 U.N.T.S. 107.

⁴⁸ James Bacchus, *The Content of a WTO Climate Waiver*, CIGI Papers No. 201 (2020), at 14–17.

VII. Recommendations and Conclusion

The legal conflict between environmental requirements and trade liberalization is growing more and more unsustainable as climate change picks up speed and global trade continues to change. Although GATT Article XX provides a fundamental framework for defending trade-restrictive environmental policies, the complexity and urgency of today's climate issues are not adequately reflected in its current implementation. Not only is a more climate-conscious trade regime desirable, but it is also necessary.

A. Recommendations

The following suggestions are put forth in order to allow WTO law to more effectively support climate goals while maintaining the integrity of the multilateral trading system:

1. Rethink Article XX in View of Climate Science and the Paris Agreement

International climate commitments, especially those outlined in the Paris Agreement, should be incorporated into the WTO dispute resolution bodies' evolving interpretation of Article XX.⁴⁹ Future panels should recognize that the climate system is a global commons that needs to be protected, just as the US—Shrimp definition of "exhaustible natural resources" was interpreted to include clean air and living species.⁵⁰ Normative coherence between trade and environmental regimes would be improved by incorporating the principles of multilateral environmental agreements (MEAs).⁵¹

2. Explain Fair Procedures Under the Chapeau

To clarify what qualifies as "arbitrary or unjustifiable discrimination" under the chapter, the WTO ought to publish interpretive guidelines or soft law instruments.⁵² This would assist states in creating transparent, adaptable, and non-discriminatory climate policies, like CBAMs or green labelling regulations. A better balance between environmental legitimacy and trade discipline would be achieved by giving procedural fairness precedence over strict formalism.⁵³

3. Create a Climate Waiver or Protocol Within the WTO Framework

Following the precedent of **public health flexibilities under the TRIPS Agreement**, the WTO could introduce a **climate waiver** to permit trade measures taken in furtherance of

⁴⁹ Markus W. Gehring & Marie-Claire Cordonier Segger, *Sustainable Development in World Trade Law* 153–158 (Kluwer Law Int'l 2005).

⁵⁰ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R ¶ 131 (Oct. 12, 1998).

⁵¹ Robert Howse, The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate, *27 Colum. J. Envtl. L.* 491, 494–97 (2002).

⁵³ James Bacchus, *The Content of a WTO Climate Waiver*, CIGI Papers No. 201 (2020), at 14–17.

internationally recognized climate goals.⁵⁴ This would provide legal certainty and reduce the risk of conflict or litigation. A protocol on trade and climate, possibly linked to the **Committee on Trade and Environment (CTE)**, could serve as an institutional platform for such initiatives.⁵⁵

4. Assure Differentiated Responsibilities and Equity

Article XX revisions or interpretations are necessary to prevent escalating North-South disparities. It ought to incorporate climate law's common but differentiated responsibilities (CBDR) principle.⁵⁶ Transitional periods should be incorporated into new WTO-compatible climate frameworks, and developing nations should be given the financial, technical, and capacity-building support they need to adhere to climate-based trade standards.

5. Encourage Climate Clubs Through Multilateral Collaboration

Like-minded nations could create climate clubs that include environmental standards in preferential trade agreements if universal WTO reform is not possible.⁸ These should incorporate dispute resolution procedures, opt-in clauses for developing nations, and exceptions similar to those found in Article XX in order to maintain WTO consistency.

B. Conclusion

The GATT's two-tiered structure—specifically, the strict application of the chapeau and the high bar for necessity—remains inadequate to handle the scope and complexity of climate-oriented trade policies emerging today, as this paper's analysis shows. However, the future of climate-responsive trade law need not rely solely on textual reform; through reinterpretation, soft law, inter-institutional coordination, and member-driven innovation, the WTO can evolve to recognize climate legitimacy as a central component of sustainable trade, which will not only ensure coherence between trade and environmental governance but also reaffirm the WTO's relevance in a rapidly changing global order. International trade regulations run the risk of impeding rather than facilitating one of the most significant issues of our day if the law of exceptions is not construed to take into account the exceptional nature of the climate crisis.

⁵⁴ WTO General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (Sept. 1, 2003).

⁵⁵ WTO Committee on Trade and Environment, https://www.wto.org/english/tratop_e/envir_e/envir_e.htm.

⁵⁶ United Nations Framework Convention on Climate Change art. 3(1), May 9, 1992, 1771 U.N.T.S. 107.