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Leveling the Playing Field: The International Legality of Carbon Tariffs in the EU

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Abstract: In the absence of any robust international agreements to combat climate change, some countries undertake climate change policy unilaterally. One such example is the European Union’s emissions trading system, a government program that sets the quantity of authorized carbon emissions in the EU. This system, however, places the EU’s energy-intensive industries at a competitive disadvantage compared to foreign firms without similar environmental restrictions. In order to level the playing field, some have proposed carbon border taxes or “carbon tariffs.” This Note assesses the legality of these proposed carbon tariffs under the General Agreement on Tariffs and Trade, part of the World Trade Organization. Because such tariffs will likely violate the main text of the GATT, this Note examines whether Article XX exceptions may apply to permit carbon tariffs. The Note concludes that despite the importance of climate change mitigation and the recent liberalization of WTO jurisprudence, Article XX should not be interpreted so broadly as to permit the introduction of carbon tariffs in the EU.

Introduction

Climate change is a natural phenomenon, but most scientists now agree that human behavior has exacerbated this natural process.1 More specifically, carbon dioxide emissions from human activities have rapidly accelerated the “greenhouse effect” where greenhouse gases trap infrared radiation (heat energy) in the Earth’s atmosphere, contributing to an increase in the warming of the Earth’s surface.2 Studies esti-

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2 Nicholas Stern, The Economics of Climate Change: The Stern Review 4–5 (2007) [hereinafter Stern Review]. Climate change is the result of all greenhouse gas emissions, but carbon dioxide emissions are the most significant due to the “unparalleled quantities produced by humans each year.” Christina K. Harper, Climate Change and Tax Policy, 30 B.C. Int’l & Comp. L. Rev. 411, 415 (2007).
mate that concentrations of carbon dioxide in the atmosphere have risen more than thirty percent since pre-industrial times, and scientists predict that if emissions continue at the same rate, greenhouse gases will be twice pre-industrial levels by the middle of the twenty-first century. Many experts insist that this would have catastrophic consequences, and that there is an urgent need to reduce carbon emissions.

In response to climate change, the European Union (EU) has adopted an emissions trading scheme in which total carbon emissions in the EU are capped, and the EU distributes allowance permits to be traded among producers. Although this regional emissions agreement may be a major step toward reducing global carbon emissions, energy-intensive industries in the EU have expressed concern over competitiveness with energy-intensive industries outside the EU. Additionally, this asymmetry between EU and non-EU industries may create a phenomenon referred to as “carbon leakage.” Accordingly, a debate has emerged in the EU over possible border measures to address these perceived problems. Although EU commissioners remain skeptical, France has insisted upon border taxes related to carbon emissions for several years. In the wake of a largely unsuccessful climate convention in Copenhagen, the debate over carbon border taxes may reemerge in the EU with a new sense of urgency.
This Note explores the possibility of an EU-wide carbon border tax. Part I addresses the economics of climate change, and explains the EU response. It then explains carbon border tax adjustments and the EU’s position on using such adjustments to eliminate the artificial advantage for non-EU industries that do not have similar environmental restrictions. Part II examines the international legality of carbon border taxes under World Trade Organization (WTO) law, and discusses whether carbon border taxes might fit into an environmental exception under Article XX of the General Agreement on Tariffs and Trade (GATT). Part III analyzes the recent evolution of Article XX in WTO jurisprudence. As a result of this analysis, Part III suggests that carbon tariffs in the EU should fail the Article XX analysis for reasons that illustrate significant concerns with the recent liberalization of WTO jurisprudence. Despite a generally favorable response to this development in WTO jurisprudence, climate change mitigation presents a novel policy that demonstrates the inherent limitations of Article XX.

I. BACKGROUND

A. Climate Change and the EU’s Collective Response

In economic terms, climate change attributed to carbon emissions is a “negative externality.”\(^{12}\) A negative externality is a cost of economic activity that is not internalized to the economic activity itself.\(^{13}\) As such, negative externalities are costs imposed on third parties without market correction.\(^{14}\) As a result, they are generally treated as phenomena that policymakers must correct.\(^{15}\) Climate change represents a global negative externality because it involves the “global environmental commons.”\(^{16}\) Unregulated exploitation of the global environment by individual countries may create a “tragedy of the commons” in which every individual country has an incentive to exploit resources in the short

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\(^{12}\) WTO Report, supra note 1, at 88.

\(^{13}\) Michael J. Trebilcock & Robert Howse, The Regulation of International Trade 509 (3d ed. 2005). A simple example would be pollution that spills over from the productive activities of one country to the territory of another country. See id.

\(^{14}\) Stern Review, supra note 2, at 27.

\(^{15}\) See id. Stern refers to climate change due to human carbon emissions as a “market failure on the greatest scale the world has seen.” Id.

\(^{16}\) Trebilcock & Howse, supra note 13, at 509.
term without investing in long-term preservation. The most logical solution to this problem is international collective action.

The most significant and well-known global response to climate change is the Kyoto Protocol. The Kyoto Protocol was signed in 1997 and requires industrialized countries to reduce emissions over an initial commitment period from 2008–2012. Although the United States refused to ratify the Protocol, it came into force with Russia’s ratification in November 2004.

In 2003, to comply with Kyoto’s goals, the EU created the “largest emissions trading scheme ever implemented.” An emissions trading scheme (ETS) represents a government program that sets the quantity of authorized emissions and distributes permits accordingly, allowing the market to determine the price of carbon emissions. The EU ETS began on January 1, 2005, with a mandatory “warm-up” phase from 2005–2007, and a second mandatory phase from 2008–2012 that corresponds to the Kyoto Protocol’s first commitment period. As of 2009, the EU ETS covered “more than 10,000 installations in the energy and industrial sectors that are collectively responsible for about half of the EU’s emissions of CO₂.”

B. Leveling the Playing Field: Carbon Border Taxes in the EU?

The EU’s domestic regulation of carbon emissions through an ETS has provoked serious debate about the international competitiveness of energy-intensive industries within the EU. The EU ETS represents a

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17 Stern Review, supra note 2, at 512.
18 See id. at 510–11.
20 WTO Report, supra note 1, at 68. Countries considered “developed” are included in “Annex B,” and the goal of the Kyoto Protocol is to reduce greenhouse gas emissions from Annex B countries to five percent below 1990 levels during the first commitment period. Sikina Jinnah, Note, Emissions Trading Under the Kyoto Protocol: NAFTA and WTO Concerns, 15 GEO. INT’L ENVTL. L. REV. 709, 714 (2003).
21 Harper, supra note 2, at 417.
23 See WTO Report, supra note 1, at 91–92.
24 Asselt & Biermann, supra note 7, at 497–98.
25 WTO Report, supra note 1, at 91.
26 See Asselt & Biermann, supra note 7, at 498; see also Sindico, supra note 11, at 329 (noting that “certain sectors of European industry are seriously taking into consideration relocation as a business strategy”).
domestic program addressing a global negative externality. As such, the possibility of inequity arises because other countries with which the EU engages in commerce do not have similar programs in place. Accordingly, two major problems emerge. The first is the competitiveness of energy-intensive industries in the EU vis-à-vis competing industries in jurisdictions without similar environmental restrictions. Normally, a foreign producer that operates at lower costs is simply more competitive and should, under free trade principles, be able to out-compete its domestic rival. But when lower costs result from the lack of environmental costs, the advantage is artificial. Because the foreign producer is not subject to environmental restrictions and continues to emit carbon into the global commons, the foreign producer unfairly benefits from the efforts of domestic industry. This creates an “unequal playing field” in international trade within the energy-intensive sector of the global economy.

The second potential problem is “carbon leakage,” which means that any domestic carbon reduction would be offset in the global environmental commons by an increase in carbon emissions elsewhere. Unlike the first concern, which is essentially one of fairness, carbon leakage involves the effectiveness of environmental regulations. Foreign firms without environmental costs may be more competitive and produce higher emissions than they otherwise would, thereby offsetting some or all of the emissions reductions made by the domestic industry. Further, regulatory asymmetry may create “carbon havens” where industries relocate to benefit from lower environmental standards, which may accelerate the offsetting envisaged above.

27 See Stern Review, supra note 2, at 27.
28 See Asselt & Biermann, supra note 7, at 498.
29 See Trebilcock & Howse, supra note 12, at 511.
30 See id.
31 See Tania Voon, Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol, 10 J. Transnat’l L. & Pol’y 71, 74 (2000) (“The theory of comparative advantage suggests that countries should specialize in producing those goods and services that they can produce most efficiently.”).
33 See Asselt & Biermann, supra note 7, at 498.
34 See id.
35 See OECD Report, supra note 8, at 23.
36 See WTO Report, supra note 1, at 98.
37 See OECD Report, supra note 8, at 23.
38 See WTO Report, supra note 1, at 99.
Border tax adjustments are one of the most straightforward mechanisms by which the EU could attempt to level the playing field and reduce carbon leakage. The Organization for Economic Co-operation and Development’s (OECD) 1970 Working Party on Border Tax Adjustments defined a border tax adjustment as “any fiscal measures which put into effect, in whole or in part, the destination principle,” where the destination principle enables products to be taxed at the same rates in the importing and exporting countries. In other words, a border tax adjustment consists of either a charge on imports corresponding to a tax borne domestically or a tax exemption on exports. The potential policy mechanism by which the EU could level the playing field and reduce carbon leakage is a border tax on imports from foreign energy-intensive industries: colloquially, a “carbon tariff.”

There has been discussion regarding a possible carbon tariff since the inception of the EU ETS. In 2008, former EU Trade Commissioner Peter Mandelson remarked that a carbon border tax was the “elephant in the room” amid discussions of international trade incentives related to climate change programs. Since 2007, French President Nicolas Sarkozy has insisted upon some form of compensation mechanism for EU energy-intensive industries, and in 2009 he expressed interest in an EU-wide carbon border tax as part of the Copenhagen summit. Moreover, although the German State Secretary for

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39 See Asselt & Biermann, supra note 7, at 502.
41 Working Party, supra note 40. Although border tax adjustments may involve imports or exports, this Note focuses on imports only. Notably, relieving domestic energy-intensive industries from regulations through export BTAs would completely defeat the environmentalist purpose of domestic regulations. See Steve Charnovitz, Free Trade, Fair Trade, Green Trade: Defogging the Debate, 27 CORNELL' L. J. 459, 500 (1994).
45 France Wants EU Carbon Tax, supra note 10, at 983.
the Environment referred to carbon tariffs as “eco-imperialism,” Germany recently reversed its position and joined France in support of an EU carbon border tax.\(^48\) Still, many within the EU have remained skeptical of border taxes on carbon emissions.\(^49\) The European Commission has insisted that a carbon border tax should be considered only as a last resort.\(^50\)

In the wake of a largely unproductive Copenhagen summit, the serious possibility of an EU-wide carbon tariff may reemerge.\(^51\) In light of this possibility, the overarching question arises as to whether a border tax for carbon emissions—a carbon tariff—would be legal under prevailing international trade law: the WTO.\(^52\)

II. Discussion

A. Are Carbon Tariffs Eligible for Border Tax Adjustment?

Although the economic efficiency and administrative feasibility of carbon tariffs are subjects worthy of debate, the overarching issue is legal: would such tariffs comply with international trade law?\(^53\) In 1947,

\(^{47}\) Cf. Steve Charnovitz, The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality, 27 YALE J. INT’L L. 59, 62–63 (2002) (“[T]he rich country may be viewed as trying to coerce the poor country into placing a higher value on the environment than the poor country considers appropriate.”).


\(^{49}\) See Kristen A. Parillo, EU Commissioner Criticizes Carbon Border Tax, 56 TAX NOTES INT’L 234, 234 (2009) (noting the reservations of EU Environment Commissioner Stavros Dimas to an EU carbon border tax); France to Push EU Members States to Embrace Carbon Border Taxes, (BNA) (WTO Rep.) (June 17, 2009) (noting that former EU Trade Commissioner Peter Mandelson said that a carbon border tax would likely alienate countries, invite retaliation, and run the risk of violating WTO law); OECD Chief Warns Green-Conscious Nations Not to Apply Carbon Levies via Border Taxes, (BNA) (WTO Rep.) (Aug. 28, 2009) (noting that the Secretary General of the OECD, Angel Gurria, discouraged countries from applying border taxes related to climate change).

\(^{50}\) See France, Germany Aiming to Propose ‘Carbon’ Leakage Tax, Sarkozy Says, (BNA) (WTO Rep.) (Sept. 21, 2009); see also Parillo, supra note 49, at 235 (quoting EU Environment Commissioner Stavros Dimas as stating, “I believe, fully in line with the longstanding EU position on this, that the best way to avoid carbon leakage and address competitiveness concerns is to agree on an ambitious and comprehensive climate change deal in Copenhagen”).

\(^{51}\) See Sindico, supra note 11, at 333; U.N. Officials Say Climate Change Process ‘Taking Stock’ After Copenhagen Summit, supra note 11, at 85.

\(^{52}\) See Veel, supra note 42, at 770.

\(^{53}\) See id.
twenty-three major trading countries formed the GATT as a provisional agreement in the wake of World War II. Nevertheless, it has remained the “permanent institutional basis for the multilateral world trading regime” to this day. In 1994, the WTO replaced the GATT, although under the WTO agreement the GATT remains operative international law (now referred to as “GATT 1994”). The GATT’s purpose is to supervise trade restrictions and generally prohibit protectionist policies, thereby promoting competition. The international legality of a trade-restrictive measure such as carbon tariffs must be assessed under the provisions of the GATT.

Border tax adjustments are legal under the GATT in limited circumstances for internal taxes. Article II:2(a) governs the legality of customs charges unless the charge (tariff) is an adjustment for an internal tax. For such adjustments, Article III for internal taxes applies. There is no precedent, however, for whether an ETS like the EU’s could qualify as an internal tax. The term “tax” is not defined in the WTO agreement’s analytical index, and some authors suggest that the OECD’s definition should be used. Under this definition, a tax is a “compulsory contribution imposed by the government for which taxpayers receive nothing identifiable in return for their contribution.” Several authors argue that although an ETS is not technically an internal tax, a border tax adjustment could likely still be employed as long as permits were auctioned rather than freely distributed: this would create

55 TREBILCOCK & HOWSE, supra note 13, at 23.
56 Id.
57 See Agreement Establishing the Multilateral Trade Organization, 33 I.L.M. 1144, 1145 (1994) [hereinafter WTO Agreement].
58 See Charnovitz, supra note 41, at 485, 524–25.
59 See Asselt & Biermann, supra note 7, at 499.
62 See id. at 306.
63 See WTO Report, supra note 1, at 100–01.
64 See, e.g., Cendra, supra note 22, at 135.
a charge on domestic producers that could be adjusted at the border via carbon tariff. \(^{66}\) Notably, however, the EU ETS originally distributed most permits for free. \(^{67}\)

Nevertheless, if the permit allowance system under the EU ETS is characterized as an internal tax for purposes of the GATT, the question is whether this “tax” on carbon emissions qualifies for border tax adjustment. \(^{68}\) The basic distinction, first promulgated by the GATT Working Party on Border Tax Adjustments in 1970, is between direct and indirect taxes. \(^{69}\) Direct taxes are taxes on producers rather than products, and do not qualify for border tax adjustment. \(^{70}\) Indirect taxes, on the other hand, are taxes on products rather than producers, and qualify for border tax adjustment. \(^{71}\) Under the destination principle all products should be taxed in the country of consumption. \(^{72}\) Thus, the traditional rationale for the distinction is that product taxes will be passed forward to consumers while producer taxes will not. \(^{73}\)

Whether WTO and GATT case law establishes this bifurcation between product and producer taxes is somewhat controversial, \(^{74}\) but the distinction at least appears to be recognized in case law. \(^{75}\) Although there is no formal principle of stare decisis in WTO case law, there is practical precedent in the sense that dispute settlement bodies tend to follow past decisions. \(^{76}\) In any event, there is no precedent that answers

\(^{66}\) See, e.g., Cendra, supra note 22, at 136; see also Ismer & Neuhoff, supra note 65 (arguing that “the costs of obtaining the permits should not be seen as providing such a service” because the beneficiary is not the producer but the “wider community”).

\(^{67}\) See WTO Report, supra note 1, at 94. One author suggests that, even if distributed for free, the opportunity cost of selling the freely distributed permits could make an ETS qualify as an internal tax. See Joost Pauwelyn, U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law 21–22 (Nicholas Inst. for Envtl. Policy Solutions, Working Paper No. 07–02, 2007).

\(^{68}\) See WTO Report, supra note 1, at 103.

\(^{69}\) Working Party, supra note 40, para. 14. The panel also referred to “taxes occultes,” (“hidden taxes”) for which there was a divergence of views regarding eligibility for border tax adjustment. See id. at para. 15. One author argues that a tax on carbon emissions best fits into this category because the Report specifically listed “energy taxes” as an example. See Veel, supra note 42, at 772.


\(^{71}\) See id.

\(^{72}\) See Demaret & Stewardson, supra note 40, at 6.

\(^{73}\) See Pauwelyn, supra note 67, at 18.

\(^{74}\) See Trebilcock & Howse, supra note 13, at 539–40.

\(^{75}\) See, e.g., Superfund Panel Report, supra note 60, at para. 5.2.4.

whether border tax adjustments can be applied for domestic taxes on carbon emissions.\textsuperscript{77}

The closest analogy to carbon tariffs in case law is discussed in United States—Taxes on Petroleum and Certain Imported Substances (Superfund).\textsuperscript{78} The GATT Panel found that border tax adjustments could be applied to chemicals used in the production of imported products, and reasoned that domestic taxes on chemicals were product rather than producer taxes.\textsuperscript{79} Although some have suggested that this precedent paves the way for carbon border tax adjustments,\textsuperscript{80} there is a significant distinction: whereas the chemicals in Superfund were “physically incorporated” into the final products, carbon emissions are not incorporated into any product, but are a by-product of the production process.\textsuperscript{81} This distinction seems to weigh heavily in favor of carbon taxes as producer rather than product taxes.\textsuperscript{82} Indeed, most scholars agree that inputs must be physically incorporated into the final product to qualify for border tax adjustment, and that carbon tariffs would not be considered indirect taxes under Article III.\textsuperscript{83}

Moreover, even if carbon tariffs are considered Article III border tax adjustments, Article III requires that the importing country does not discriminate between domestic and foreign “like products.”\textsuperscript{84} The key issue here is whether foreign and domestic products can be distinguished based on the quantity of carbon emitted during the production process.\textsuperscript{85} If products cannot be distinguished, the tax burden on imports cannot exceed that on domestic products.\textsuperscript{86} A carbon tariff will thus violate GATT unless production methods with different carbon emissions are sufficient grounds for distinguishing between domestic

\textsuperscript{77} See Aaron Cosbey & Richard Tarasofsky, Climate Change, Competitiveness and Trade 20 (2007).
\textsuperscript{78} See Superfund Panel Report, supra note 60, at para. 5.2.4.
\textsuperscript{79} Id. In doing so, the Panel upheld the Working Party’s distinction. See id.
\textsuperscript{80} See Veel, supra note 42, at 773.
\textsuperscript{81} See id.
\textsuperscript{82} See id. Several authors argue that the purpose of a carbon tax demonstrates that it is really a tax on the product rather than on the producer. See, e.g., Mary Kate Crimp, Environmental Taxes: Can Border Tax Adjustments Be Used to Counter Any Market Disadvantage?, 12 N.Z. J. Env’t. L. 39, 55 (2008); Pauwelyn, supra note 67, at 20–21.
\textsuperscript{83} See Schoenbaum, supra note 61, at 311; Veel, supra note 42, at 778.
\textsuperscript{84} GATT art. 3, paras. 2, 4.
and foreign products. In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (*Asbestos*), the Appellate Body reasoned that “likeness” should be determined on a case-by-case basis, but involves factors such as end-use, consumer tastes, and physical properties. Most authors point out that, because carbon emissions are not incorporated into the final product, it is difficult to distinguish between products based solely on carbon emissions. Even a commentator who supports a more flexible characterization of the term “like product” insists that “it would be a radical shift to differentiate products on the basis of how they are produced, manufactured, or harvested.” For the same reason that carbon taxes are probably not product taxes, they are probably not compliant with Article III’s non-discrimination rule for like products.

### B. Article XX Exceptions

If carbon tariffs do not qualify as border tax adjustments consistent with Article III, Article XX provides a list of exceptions where violations of other GATT provisions may be permitted. Indeed, some commentators describe Article XX as an “environmental charter” because it allows trade restrictions related to protecting the environment (although the term “environment” is conspicuously absent). Article XX requires a two part analysis: first, whether the trade measure is provisionally justified by one of the substantive exceptions; second, whether the trade measure satisfies the Article’s prefatory “chapeau.” The treatment of trade measures in GATT jurisprudence changed radically after the WTO’s formation, and has since evolved to encompass broader policies

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87. See Veel, *supra* note 42, at 780.
89. See, e.g., Sindico, *supra* note 11, at 337–38; Veel, *supra* note 42, at 780–81. But see Daniel C. Esty, *Greening the GATT* 220 (1994) (“[T]he GATT must move beyond the existing distinction between trade restrictions on like products and those on production processes . . . . The same result could be achieved by redefining ‘like product.’ If products using different processes were deemed to be unlike, trade restrictions could be applied to goods produced using environmentally unacceptable methods without changing the existing structure of GATT rules.”).
91. See Veel, *supra* note 42, at 778. But see Charnovitz, *supra* note 47, at 63 (“Even today, a pervasive myth exists that the WTO forbids PPMs.”).
92. GATT, art. XX.
under its exceptions. Although the WTO dispute settlement system has not yet addressed climate change mitigation, two exceptions may prove extremely relevant.

Article XX(b) allows trade restrictions that are “necessary to protect human, animal or plant life or health,” and Article XX(g) allows trade restrictions “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” Importantly, WTO case law suggests that the policy objective underlying these exceptions is not at issue; rather, it is the trade measure and how it relates to the policy objective that is examined under Article XX. Several authors argue that Article XX(b) could cover policies aimed at reducing carbon emissions because of the possible adverse effects of global warming for humans, animals, and plants. Further, Article XX(g) could also cover such policies due to the conservation of the planet’s atmosphere and climate, as well as animal and plant species that may become extinct due to climate change.

1. Article XX(g) Exception

Most commentators treat Article XX(g) as a less restrictive exception than Article XX(b). Article XX(g) requires that the policy objective is within the range of policies for the conservation of exhaustible natural resources, and that the trade measure is “related to” this policy and is employed “in conjunction” with similar domestic restrictions. Early GATT case law did not permit the application of Article XX(g) to extraterritorial measures, reasoning that such an interpretation would allow “each contracting party [to] unilaterally determine the conserva-

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95 See Wofford, supra note 76, at 567–68, 572–73.
96 See WTO Report, supra note 1, at 107 (noting that XX(b) and XX(g) are the relevant environmental exceptions).
97 GATT, art. XX(b), (g).
99 WTO Report, supra note 1, at 108 (discussing attempts to fit climate change under XX(b) or XX(g) in the literature).
100 Id.
102 See GATT art. XX(b).
tion policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”

More recent WTO case law reveals that Article XX(g) is not limited to purely domestic conservation efforts. Additionally, the “conservation of exhaustible resources” is not limited to non-living stock resources (such as minerals), which is likely how the phrase was interpreted when the GATT was adopted. In United States—Standards for Reformulated and Conventional Gasoline (Gasoline), the Panel found that clean air was an exhaustible natural resource because, even though it was renewable, it could be depleted. Further, in United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp/Turtle), the Appellate Body found that migratory sea turtles were an exhaustible natural resource because conservation was not limited to non-living resources. The panel reasoned that the term “‘exhaustible natural resources’ . . . must be read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment” and that the term is “not static in its content or reference but is rather ‘by definition, evolutionary.’”

In recent WTO case law, the second requirement under XX(g)—“related to”—has been interpreted as a “substantial relationship” between the policy objective and the trade restriction. Although in United States—Restrictions on Imports of Tuna (Tuna/Dolphin II), the panel reasoned that an import ban on tuna was not “related to” the conservation of dolphins because the Article XX exceptions were to be interpreted narrowly, this interpretation has been relaxed in recent jurisprudence. For example, in Shrimp/Turtle, the Appellate Body found that trade measures prohibiting the importation of shrimp caught in...

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107 Shrimp/Turtle Appellate Body Report, supra note 104, at paras. 131–33.

108 Id. at paras. 129–30.

109 WTO Report, supra note 1, at 108.


111 See Wofford, supra note 76, at 577–80.
ways inimical to migratory sea turtle populations were “related to” sea turtle conservation.\textsuperscript{112} Additionally, the requirement that any trade restriction be “in conjunction with” domestic restrictions only requires “even-handedness.”\textsuperscript{113}

The case for carbon tariffs under Article XX(g) usually begins with an analogy to the clean air argument from \textit{Gasoline}.\textsuperscript{114} Because the panel found that “clean air” was an exhaustible natural resource, it is likely to find that the atmosphere’s greenhouse gas concentration is also an exhaustible natural resource.\textsuperscript{115} Additionally, the panel might find that “cool air” is a natural resource,\textsuperscript{116} or that the relevant natural resource involves the “potentially damaging environmental conditions that may arise [in a warmer world] such as impact on biodiversity and ecosystems.”\textsuperscript{117} In all these cases, the characterization of climate mitigation as conservation of a natural resource is admittedly attenuated.\textsuperscript{118} Given the recent interpretation of the term “conservation” as contextual and evolutionary,\textsuperscript{119} however, some suggest that climate change mitigation could be considered within the range of conservation efforts.\textsuperscript{120}

If WTO jurisprudence characterizes mitigating climate change as conservation, the next step is to determine whether a carbon tariff is “related to” climate change mitigation, and is imposed in conjunction with similar domestic restrictions.\textsuperscript{121} Although climate change is not confined to the EU, carbon tariffs may bear a substantial relationship to climate change, as shrimp import restrictions did to the conservation of migratory sea turtles.\textsuperscript{122} Further, because proposed carbon tariffs are a direct response to the EU’s domestic ETS regime, it is quite likely that the trade measures would satisfy the even-handedness requirement.\textsuperscript{123} This leads one scholar to conclude that carbon tariffs would easily satisfy Article XX(g)’s three-part analysis.\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} Shrimp/Turtle Appellate Body Report, \textit{supra} note 104, at paras. 141–42.
\item \textsuperscript{113} See \textit{Gasoline} Appellate Body Report, \textit{supra} note 98, at 20–21.
\item \textsuperscript{114} See Veel, \textit{supra} note 42, at 776.
\item \textsuperscript{115} See Pauwelyn, \textit{supra} note 67, at 35.
\item \textsuperscript{116} See Green, \textit{supra} note 101, at 183.
\item \textsuperscript{117} See \textit{id}.
\item \textsuperscript{118} Cf. \textit{id} (suggesting that interpreting climate change mitigation as “conservation” under Article XX(g) might require some creativity).
\item \textsuperscript{119} See Shrimp/Turtle Appellate Body Report, \textit{supra} note 104, at paras. 129–30.
\item \textsuperscript{120} See, e.g., Veel, \textit{supra} note 42, at 776–77.
\item \textsuperscript{121} See GATT art. XX(g).
\item \textsuperscript{122} See Veel, \textit{supra} note 42, at 777.
\item \textsuperscript{123} See \textit{id}.
\item \textsuperscript{124} See Pauwelyn, \textit{supra} note 67, at 35–36.
\end{enumerate}
\end{footnotesize}
2. Article XX(b) Exception

Article XX(b) is a stricter exception than Article XX(g) because the former requires a necessary connection between the challenged trade restriction and the protection of human, animal, or plant life or health.\textsuperscript{125} Case law establishes that the term “necessary” does not mean “indispensable,” but it is stricter than “making a contribution to.”\textsuperscript{126} In earlier GATT case law, such as \textit{Tuna/Shrimp II}, panels found that there could be no necessary connection if a policy was only effective where it “force[d] other countries to change their policies.”\textsuperscript{127} Recent case law presents a less restrictive interpretation, where “necessary” includes a balancing of factors and requires a “genuine relationship of ends and means between the objective pursued and the measure at issue.”\textsuperscript{128} In \textit{Asbestos}, the Appellate Body further suggested that vital policy objectives would more easily satisfy the test for “necessity” compared to non-vital policy objectives.\textsuperscript{129} In \textit{Asbestos}, the policy objective was “the preservation of human life and health” from hazardous asbestos, a vital policy objective weighing heavily in favor of finding a “necessary” connection.\textsuperscript{130}

When the GATT was adopted in 1947, the “protection of human, animal and plant life or health” was probably limited to sanitary issues, but is no longer characterized in this limited manner.\textsuperscript{131} In \textit{Gasoline}, the Panel found that reducing air pollution was a policy objective aimed at protecting life or health.\textsuperscript{132} Most recently, in \textit{Brazil—Measures Affecting Imports of Retreaded Tyres (Retreaded Tyres)}, the Appellate Body found that retreaded tire imports contributed significantly to tire waste that posed a risk of fire and mosquito-borne disease,\textsuperscript{133} and an import ban thus

\textsuperscript{125} See Green, \textit{supra} note 101, at 177.


\textsuperscript{127} \textit{Tuna/Dolphin II Panel Report}, \textit{supra} note 104, at para. 5.39.


\textsuperscript{129} Asbestos Appellate Body Report, \textit{supra} note 88, at para. 172.

\textsuperscript{130} See id.

\textsuperscript{131} See Charnovitz, \textit{supra} note 105, at 44–45.

\textsuperscript{132} See Gasoline Panel Report, \textit{supra} note 106, at para. 6.21. Although this was not considered by the Appellate Body because the “necessary” test under XX(b) was not satisfied. \textit{Trebilcock & Howse}, \textit{supra} note 13, at 527.

\textsuperscript{133} Retreaded Tyres Appellate Body Report, \textit{supra} note 128, at para. 118–19.
served the policy objective of protecting life or health. In fact, the Appellate Body even briefly addressed climate change:

> We recognize that certain . . . environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. . . . Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change . . . can only be evaluated with the benefit of time.

In addition to mentioning climate change mitigation, the Appellate Body emphasized the importance of understanding the relationship between a trade measure and the protection of life or health against the broader context of a comprehensive strategy. This seems to suggest a liberalization of the once stringent exception.

Establishing that climate change mitigation involves the protection of life and health is often viewed as plausible. Carbon emissions are deemed analogous to the relatively non-specific environmental damage in the most recent Article XX(b) case, Retreaded Tyres. Authors point to the potential damage that may result from increased global temperatures, such as: increased death rates among the very young, old, and sick; increased tropical diseases; increased air and water-borne parasites; loss of habitation due to rising sea levels; and even various adverse effects on trees and forests. These potential damages suggest that climate change mitigation involves the protection of life or health, broadly construed.

If WTO jurisprudence characterizes climate change mitigation as the protection of life or health, the next step is to determine whether a carbon tariff is “necessary” to this objective. Commentators tend to view this second prong of Article XX(b) as the more difficult obstacle. Because Article XX(b) has a narrower scope than Article XX(g),

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134 Id. at para. 258. Retreaded tires presented a health risk under Article XX(b) because they would reach the stage of waste earlier than new tires. See id. at paras. 3, 118–19, 121.
135 Id. at para. 151 (emphasis added).
136 See id.
138 See, e.g., Sindico, supra note 11, at 338.
139 See Condon, supra note 137, at 914.
140 See, e.g., Jinnah, supra note 20, at 733.
141 See id.
142 See GATT art. XX(b).
143 Cendra, supra note 22, at 144 n.122; Schoenbaum, supra note 61, at 276.
commentators seem concerned that the somewhat attenuated connections between climate change and carbon tariffs will not hold up to stricter scrutiny under Article XX(b). Still, in *Retreaded Tyres*, the Appellate Body emphasized the need to view trade measures against the context of a comprehensive regulatory strategy, and suggested that as long as the measure makes a serious contribution to this strategy, it could be deemed “necessary” under Article XX(b). This provides some commentators with hope that Article XX(b) may provide an alternative justification for carbon tariffs.

Many scholars see one or both Article XX exceptions as the key to providing for carbon tariffs under international trade law. Nevertheless, WTO jurisprudence has evolved to the point where the most challenging obstacle for environmental trade restrictions in the Article XX analysis lies in its preamble.

C. Article XX Chapeau

Even if carbon tariffs fit into one of the exceptions discussed above, they must still survive the prefatory chapeau to Article XX. Indeed, the chapeau has evolved into the filter through which otherwise acceptable trade restrictions cannot pass. The chapeau states that trade measures must not represent a means of unjustifiable or arbitrary discrimination, and must not represent a disguised restriction on international trade. As the Appellate Body stated in *Gasoline*, the purpose of the chapeau is to prevent “abuse of the exceptions.”

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144 Cf. Cendra, *supra* note 22, at 144 n.122 (arguing that although climate mitigation involves the protection of life and health, Article XX(g) is the more likely exception for carbon tariffs because it does not include the stricter test of “necessity”).


146 See, e.g., Werksman, *supra* note 101, at 260.

147 See, e.g., Pauwelyn, *supra* note 67, at 3.

148 See id. at 37.


150 See Pauwelyn, *supra* note 67, at 37 (“In all cases where the Appellate Body found that the GATT Article XX exception was not met, it did so under this introductory phrase.”).

151 GATT, art. XX.

152 *Gasoline* Appellate Body Report, *supra* note 98, at 22. In *Shrimp*, the Appellate Body stated that “[t]he task of interpreting and applying the chapeau is . . . the delicate one of locating and making out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions . . . of GATT 1994, so that neither of the competing rights will cancel out the other.” *Shrimp/Turtle* Appellate Body Report, *supra* note 104, at para. 159.
chapeau represents the requirement that any exception be made in “good faith.”\textsuperscript{153}

In all recent cases where the Appellate Body found that Article XX was not satisfied by environmental trade restrictions, the trade measures were provisionally justified under the substantive exceptions but did not satisfy the chapeau.\textsuperscript{154} In \textit{Gasoline}, the Appellate Body found that trade restrictions related to gasoline standards that were provisionally justified as conservation of clear air nonetheless violated the chapeau.\textsuperscript{155} Specifically, the Appellate Body reasoned that the United States had not attempted to resolve its concerns through cooperation, and had discriminated between foreign and domestic firms for purposes of alleviating costs to domestic firms.\textsuperscript{156} Similarly, in \textit{Shrimp/Turtle}, the Appellate Body found that the United States’ prohibition on shrimp imports, though provisionally justified as conservation of sea turtles, was nonetheless an unjustifiable and arbitrary means of discrimination under the chapeau.\textsuperscript{157} Specifically, the Appellate Body noted that the United States had failed to attempt serious negotiations before turning to unilateral measures, and that the trade restriction failed to take into account the different situations which may exist in exporting countries.\textsuperscript{158} Most recently, in \textit{Retreaded Tyres}, the Appellate Body again found that trade measures that were provisionally justified as the protection of life or health, nonetheless violated the chapeau.\textsuperscript{159} Brazil had allowed some imports of used tires through court injunctions, which the Appellate Body found inconsistent with the policy objective, demonstrating arbitrary or unjustifiable discrimination.\textsuperscript{160}

With an ever more liberal interpretation of the Article XX substantive exceptions,\textsuperscript{161} the crux of the Article XX analysis has shifted to the chapeau, such that carbon tariffs appear to face a greater challenge from the chapeau than from the Article XX(b) and XX(g) exceptions themselves.\textsuperscript{162} In other words, as long as carbon tariffs are designed such that the chapeau is satisfied, they will most likely be legal under

\textsuperscript{153} See \textit{Shrimp/Turtle Appellate Body Report}, \textit{supra} note 104, at para. 158.
\textsuperscript{154} See \textit{Pauwelyn}, \textit{supra} note 67, at 37.
\textsuperscript{155} See \textit{Gasoline Appellate Body Report}, \textit{supra} note 98, at 29.
\textsuperscript{156} See id. at 26–28.
\textsuperscript{157} \textit{Shrimp/Turtle Appellate Body Report}, \textit{supra} note 104, at para. 176.
\textsuperscript{158} See id. paras. 164–66.
\textsuperscript{159} \textit{Retreaded Tyres Appellate Body Report}, \textit{supra} note 128, at para. 258.
\textsuperscript{160} Id. at para. 246.
\textsuperscript{161} See ERICH VANES, \textit{TRADE AND THE ENVIRONMENT} 263 (2009).
\textsuperscript{162} See \textit{Pauwelyn}, \textit{supra} note 67, at 37.
international trade law.\textsuperscript{163} This shifts the focus to the design of carbon tariffs, rather than the legal (conceptual) permissibility of such trade measures.\textsuperscript{164}

Nevertheless, it would be a mistake to begin designing the most chapeau-friendly carbon tariff under the assumption that the overarching legal question is so easily answered. Although GATT jurisprudence has evolved to encompass ever more environmental issues under its Article XX exceptions, climate change is a global externality and thus presents a wholly novel issue for Article XX analysis.\textsuperscript{165}

III. Analysis

Unilateral extraterritorial trade restrictions pose a special challenge in the context of international trade law.\textsuperscript{166} Justification for such environmental trade restrictions can either involve leveling the playing field with respect to domestic measures or can involve trade measures employed for non-trade goals.\textsuperscript{167} This distinction mirrors that between Article III’s purpose (achieving commercial parity) and Article XX’s purpose (allowing certain trade restrictions otherwise illegal under GATT).\textsuperscript{168} When trade measures are aimed at preserving commercial parity between domestic and foreign industries, Article III provides for border tax adjustments to level the playing field.\textsuperscript{169} But for environmental trade measures that violate Article III, such as carbon tariffs,\textsuperscript{170} Article XX is the only remaining justification.\textsuperscript{171} Although Article XX may be employed for extrajurisdictional trade restrictions targeting cosmopolitan objectives like the environment,\textsuperscript{172} Article XX should not

\textsuperscript{163} See Veel, supra note 42, at 798–99. The same author even suggests that the issue of whether unilateral trade measures related to carbon emissions would comply with the GATT has been resolved in the affirmative, and scholars should no longer focus on this question. Id. Rather, future research should “focus on how to make this work given the existing legal and political constraints.” Id. at 799.

\textsuperscript{164} See id.

\textsuperscript{165} Cf. Stern Review, supra note 2, at 27 (arguing that climate change “must be regarded as market failure on the greatest scale the world has ever seen”).

\textsuperscript{166} See Trebilcock & Howse, supra note 13, at 523–24.

\textsuperscript{167} See id. at 511.

\textsuperscript{168} See id.

\textsuperscript{169} See Charnovitz, supra note 41, at 498.

\textsuperscript{170} Given that the purpose of Article III is to achieve commercial parity for internal taxes, a broad interpretation of Article III that permits discrimination based on production process would pose serious protectionist concerns. See Goh, supra note 86, at 423.

\textsuperscript{171} See Trebilcock & Howse, supra note 13, at 514.

\textsuperscript{172} See Charnovitz, supra note 41, at 525.
apply when the policy objective is to level the playing field.\textsuperscript{173} Thus, reducing carbon emissions and preventing carbon leakage are relevant for purposes of the Article XX analysis, whereas leveling the playing field between EU and non-EU energy-intensive industries is not relevant.\textsuperscript{174}

If the policy behind carbon tariffs in the EU is in fact commercial parity, which seems likely, the measures should be assessed under Article III and not Article XX.\textsuperscript{175} But importantly, carbon tariffs should not fail the Article XX analysis merely because the policy objective is unreasonable under the chapeau; rather, carbon tariffs should not even be provisionally justified under the substantive exceptions of Article XX.

A. Chapeau Shift

The evolution of GATT jurisprudence since the WTO’s creation displays a larger emphasis on the prefatory chapeau compared to the substantive exceptions themselves.\textsuperscript{176} Most commentators see this evolution as an enlightened response to rigid, poorly reasoned GATT decisions such as the Tuna/Dolphin cases.\textsuperscript{177} In addition to a change in the structure of the analysis, such that the chapeau is applied only after provisional justification vis-à-vis the exceptions, the jurisprudence has also rejected the categorical exclusion of unilateral extraterritorial measures.\textsuperscript{178} Indeed, as many authors point out, such categorical exclusion renders Article XX nugatory because the point of the exceptions is to allow unilateral action for international trade measures that would otherwise violate GATT.\textsuperscript{179} Nevertheless, the broad interpretation of the substantive exceptions may lead to the opposite problem, rendering the exceptions themselves nugatory.\textsuperscript{180} Some authors suggest that the purpose of GATT is strictly limited to eradicating protectionism,\textsuperscript{181} and therefore Article XX should only require that the importing country is not blatantly externalizing domestic costs through its unilateral,


\textsuperscript{174} See Charnovitz, supra note 47, at 106.

\textsuperscript{175} See id.

\textsuperscript{176} See supra text accompanying notes 154–64.

\textsuperscript{177} See Wofford, supra note 76, at 579 n.105.

\textsuperscript{178} See Tuna/Dolphin II Panel Report, supra note 104, at para. 5.16.

\textsuperscript{179} See Jinnah, supra note 20, at 737.

\textsuperscript{180} Cf. Pauwelyn, supra note 67, at 37 (arguing that measures have been provisionally justified under Article XX in every recent WTO case).

\textsuperscript{181} See, e.g., Charnovitz, supra note 41, at 485–86.
extraterritorial action. Yet this perspective seems to imply that the substance of the exceptions poses virtually no separate limitation for the design of border measures.

As mentioned above, carbon tariffs in the EU would probably fall short of Article XX justification in any event. But the “chapeau shift” remains quite significant within the context of carbon tariffs, even if the practical implications are not dramatic in the immediate future. Climate change mitigation—no matter how important—does represent the most archetypal global negative externality to be assessed under Article XX. As such, the presumption that carbon tariffs aimed at mitigating climate change will satisfy the ever broadening interpretation of the substantive exceptions themselves, only to fail the chapeau, is problematic. Namely, it represents a shift from assessing the trade measures themselves to examining only the reasonableness of their application. But clearly this cannot be right, as the two prongs of the analysis are separate, and the analysis of the policy and its connection to the trade restriction in question cannot be collapsed into the chapeau’s analysis of whether the trade restriction is reasonable and not protectionist in nature. Although the consensus appears to be that carbon tariffs would be provisionally justified under the Article XX exceptions, this consensus is no replacement for substantive analysis, and such analysis is needed before assessing the reasonableness of carbon tariffs under the chapeau.

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182 See Trebilcock & Howse, supra note 13, at 534.
183 See Charnovitz, supra note 41, at 485–86.
184 See supra text accompanying notes 170–72.
185 Cf. Veel, supra note 42, at 798 (arguing that as long as carbon tariffs are applied reasonably under the chapeau, they will comply with GATT).
186 Cf. Stern Review, supra note 2, at 27 (implying that compared to all other negative externalities, climate change is the most significant “market failure”).
187 See Vanes, supra note 161, at 278.
188 See Shrimp/Turtle Appellate Body Report, supra note 104, at para. 149.
189 Cf. Charnovitz, supra note 41, at 485 (arguing that the GATT’s limited role is to determine whether trade measures constitute protectionism).
190 See, e.g., Pauwelyn, supra note 67, at 37.
191 Cf. Shrimp/Turtle Appellate Body Report, supra note 104, at para. 149 (noting that the two steps in the Article XX analysis are separate).
B. Reassessing Substantive Exceptions for Climate Change

As an archetypal global negative externality,\(^\text{192}\) climate change clearly presents a novel situation for Article XX application, despite the liberalization of WTO jurisprudence in recent years.\(^\text{193}\) The categorical ban of unilateral extraterritorial measures envisaged by the Panel in *Tuna/Dolphin I* and the categorical permission implied by recent environmentalists are equally misplaced.\(^\text{194}\) Clearly, unilateral extraterritorial measures can be provisionally justified under the Article XX exceptions, but they need not be.\(^\text{195}\) The question is how to assess which measures should fit into the exceptions, without relying upon a categorical approach (either exclusionary or inclusionary).\(^\text{196}\) Although a balancing approach that considers proportionality may appear the obvious solution,\(^\text{197}\) there are considerable difficulties involved in assessing the value of the policy objective of such extraterritorial measures.\(^\text{198}\) Namely, such values are incommensurate and change country-to-country, so there is no way to objectively weigh them.\(^\text{199}\) Moreover, the WTO dispute settlement bodies are ill-equipped to judge domestic policies and weigh the costs and benefits of such policies when applied unilaterally and extraterritorially.\(^\text{200}\)

If categorical approaches are unwise, and a balancing approach is unworkable, Articles XX(b) and XX(g) would appear to pose intractable interpretive challenges.\(^\text{201}\) This causes some authors to reiterate that Article XX should be viewed simply as a mechanism for assessing the reasonableness of the relationship between the trade restriction and its policy objective.\(^\text{202}\) But again, this only focuses on the chapeau and ig-

\(^{192}\) Cf. *Stern Review*, *supra* note 2, at 25–27 (arguing that global negative externalities are market failures, and that climate change is a “market failure on the greatest scale the world has seen”).

\(^{193}\) See *WTO Report*, *supra* note 1, at 107.

\(^{194}\) Cf. *Jinnah*, *supra* note 20, at 737 (arguing that the Appellate Body has not made clear when unilateral extraterritorial measures will be permitted versus prohibited).

\(^{195}\) See *id*.

\(^{196}\) Cf. *Vanes*, *supra* note 161, at 100 (explaining attempts in the literature to avoid a categorical approach to jurisdictional conflicts).

\(^{197}\) See *id*. at 404.

\(^{198}\) See *Charnovitz*, *supra* note 41, at 481–82, 486.

\(^{199}\) See *Charnovitz*, *supra* note 47, at 101.

\(^{200}\) See *Charnovitz*, *supra* note 41, at 483.

\(^{201}\) Cf. *Vanes*, *supra* note 161, at 404 (noting that a balancing approach is the only alternative to categorical approaches to unilateral extraterritorial trade measures).

\(^{202}\) See *Trebilcock & Howse*, *supra* note 13, at 534 (arguing that it should not be necessary, for Article XX analysis, to go beyond a determination of whether the trade measure is protectionist in nature).
nores the independent nature of the substantive exceptions. Instead, it is worth considering that the relevant jurisprudence may not necessitate the radical broadening of the environmental policies covered under the exceptions. Despite protestations to the contrary, the Appellate Body does sometimes assess the legitimacy of policy objectives. Although it pays significant deference to a Member Country to create its own domestic policies, the Appellate Body does not shy away from assessing whether a policy fits under the enumerated exceptions. In fact, it is only under the presumption that such measures should apply to climate change mitigation—due to the importance of climate change mitigation coupled with the assumption that Article XX is a broad “environmental charter”—that it is at all convincing that they actually do.

Put plainly, the analogies to climate change mitigation under Articles XX(b) and XX(g) are weak. The relevant cases under Article XX(b) involved the removal of hazardous asbestos in Asbestos, the reduction of air pollution in Gasoline, and the health hazards of tire waste in Retreaded Tyres. Although scholars seem to imagine a clear connection between climate change mitigation and the “protection of life or health,” climate change mitigation is considerably distinct from these cases, each of which involved clear and direct health hazards. Climate change mitigation simply does not pose a similar distinct health hazard, whatever its potential future implications may be. Further, no Article XX(b) case to date has involved extraterritorial policies: they each involved domestic health hazards for which import restrictions were created. Early environmentalists even attacked Article

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204 Vanes, supra note 161, at 406.
205 See id. at 264.
206 Cf. Trebilcock & Howse, supra note 13, at 514 (reasoning that Article XX should be viewed as a broad environmental charter, influencing the conclusion that the substantive exceptions are in fact broad enough to cover most environmental issues).
207 Cf. Esty, supra note 89, at 221–22 (suggesting that Article XX does not, on its face, apply to climate change).
211 See Cendra, supra note 22, at 144; Sindico, supra note 11, at 338; Werksman, supra note 101, at 260.
213 See Voon, supra note 31, at 86.
214 See Condon, supra note 137, at 917–18.
XX(b) for its narrowness and failure to cover environmental policies aimed at the global commons.\textsuperscript{215} Lastly, although the Appellate Body in \textit{Retreaded Tyres} suggested that “climate change” might be justified under Article XX(b), it did not explain its reasoning beyond noting the general direction of evolutionary interpretation in WTO jurisprudence.\textsuperscript{216}

The relevant cases under Article XX(g) may pose even more attenuated policy analogies than the cases under Article XX(b).\textsuperscript{217} Although \textit{Shrimp/Turtle} established that exhaustible natural resources could be transboundary,\textsuperscript{218} migratory sea turtles are clearly an exhaustible natural resource because the species has tangible value and can become extinct.\textsuperscript{219} Further, although \textit{Gasoline} is the most obvious parallel to carbon tariffs in the EU, “clean air” is also a clear exhaustible natural resource because clean air has value and can tangibly be depleted by air pollution.\textsuperscript{220} But it is not at all obvious that current atmospheric carbon levels can be characterized as exhaustible (what is being depleted?) or even as resources (where is the tangible value?).\textsuperscript{221}

Additionally, were climate change mitigation deemed a legitimate policy objective under Article XX(b) or XX(g), the nexus between carbon tariffs in the EU and the policy objective is questionable. Although “necessary” and “related to” have been interpreted more liberally in recent jurisprudence,\textsuperscript{222} the relevant case law again evinces poor analogies.\textsuperscript{223} Unlike those cases discussed above, the contribution that carbon tariffs would make to climate change mitigation remains quite unclear, in large part due to scientific uncertainty surrounding global warming.\textsuperscript{224} Commentators will often appeal to the “precautionary principle” to establish that a policy objective such as climate change mitigation should not be dismissed simply due to the lack of a clearly evidenced connection between a policy and a trade measure.\textsuperscript{225} Although categorical dismissal based on uncertainty would thus be unwarranted, this uncertainty may still pose challenges to forging a suffi-

\begin{thebibliography}{9}
\bibitem{esty} See Esty, \textit{supra} note 89, at 221–22.
\bibitem{retreaded} See Retreaded Tyres Appellate Body Report, \textit{supra} note 128, at para. 151.
\bibitem{green} See Green, \textit{supra} note 101, at 183.
\bibitem{shrimp} See Shrimp/Turtle Appellate Body Report, \textit{supra} note 104, at para. 133.
\bibitem{id} See \textit{id.}, at paras. 131–32, 134.
\bibitem{green2} See Green, \textit{supra} note 101, at 183.
\bibitem{wto} See WTO Report, \textit{supra} note 1, at 108.
\bibitem{green3} See Green, \textit{supra} note 101, at 183.
\bibitem{id2} See \textit{id.}, at 186, 189.
\bibitem{voon} See Voon, \textit{supra} note 31, at 86.
\end{thebibliography}
cient nexus.\textsuperscript{226} Moreover, for the very reason that carbon tariffs may fail the chapeau— that the measures are too intimately related to “leveling the playing field” and \textit{not} to carbon leakage—they should probably not survive the “sufficient nexus” tests under the substantive exceptions either.\textsuperscript{227} Notably, there is scant evidence regarding the specific effects that such trade measures would have on carbon leakage or reductions in atmospheric carbon content.\textsuperscript{228} As long as more than subjective intent is required for the nexus between trade measures and policy objectives, carbon tariffs will face problems.\textsuperscript{229}

Although it is unclear what the Appellate Body would actually do if faced with carbon tariffs in the EU, these trade measures pose a novel issue that is not easily resolved by examining recent jurisprudence or paying lip service to the “enlightened liberalization” of WTO jurisprudence in recent years.\textsuperscript{230} In fact, carbon tariffs are precisely the kind of trade measure—aimed explicitly at a global negative externality with limited connection to any particular jurisdiction—\textsuperscript{231}—that demonstrates the importance of breathing life back into the substantive exceptions of Article XX.\textsuperscript{232} The “chapeau shift” implies that any environmental trade restrictions otherwise violating GATT may be justified under the Article XX exceptions, so long as the application of the restriction satisfies the reasonableness test of the chapeau.\textsuperscript{233} But this cannot be right, because Article XX does not cover every possible environmental restriction: it is not the “environmentalist charter” that some imagine it to be.\textsuperscript{234} Indeed, the word “environment” does not even appear in Article XX.\textsuperscript{235} As environmentalists argued before the advent of expansive

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\begin{itemize}
  \item \textsuperscript{226} See Gasoline Appellate Body Report, \textit{supra} note 98, at 21–22. One author notes that carbon tariffs may actually discourage global climate change mitigation by other countries. See Goh, \textit{supra} note 86, at 405.
  \item \textsuperscript{227} Cf. Charnovitz, \textit{supra} note 47, at 106 (arguing that “leveling the playing field” is not appropriate rationale under Article XX).
  \item \textsuperscript{228} See Goh, \textit{supra} note 86, at 405; Green, \textit{supra} note 101, at 186.
  \item \textsuperscript{229} Cf. Vanes, \textit{supra} note 161, at 268 (noting the difficulties with interpreting whether a trade restriction is “related to” a policy in terms of “the regulator’s subjective intentions”).
  \item \textsuperscript{230} See Condon, \textit{supra} note 137, at 914; Pauwelyn, \textit{supra} note 67, at 37.
  \item \textsuperscript{231} See \textit{Stern Review}, \textit{supra} note 2, at 27.
  \item \textsuperscript{232} Cf. Pauwelyn, \textit{supra} note 67, at 37 (arguing that measures have been provisionally justified under Article XX in every recent WTO case).
  \item \textsuperscript{233} See Veel, \textit{supra} note 42, at 798–99.
  \item \textsuperscript{234} See Trebilcock & Howse, \textit{supra} note 13, at 514.
  \item \textsuperscript{235} See \textit{id}. Although recent jurisprudence does not seem particularly concerned that the word “environment” is absent from Article XX, this Note suggests that this absence may be quite significant because it cautions strongly against a broad liberalization of Article XX that renders the substantive exceptions virtually meaningless. See \textit{supra} text accompanying notes 178–83.
\end{itemize}
WTO jurisprudence, Article XX is too narrow for environmental issues such as “the atmosphere and other elements of the global commons,” and to deal with such issues GATT should be amended or replaced.\textsuperscript{236} Interestingly, this Note reaches a similar conclusion. The substance of Article XX should not be interpreted so broadly as to cover carbon tariffs, and if this is viewed as dissatisfactory in light of the growing significance of climate change, WTO members should propose an amendment to Article XX.\textsuperscript{237}

\textbf{Conclusion}

The EU emissions trading system represents the largest domestic program addressing climate change—a significant achievement. Unfortunately, in a world with few similar programs, the EU’s progressive approach places its energy-intensive industries at a competitive disadvantage. As a result, some EU members have proposed carbon border taxes to level the playing field. The analysis for WTO-compliance of these carbon tariffs consists of several steps. The first step is to determine whether the border measure is in fact an “internal tax” for purposes of Articles II and III, and, if so, whether it is an indirect rather than a direct tax. If characterized as an indirect internal tax, the tax imposed on foreign products must not exceed taxes on “like domestic products.” If the border tax does not comply with Article III of GATT, it may be saved by the Article XX exceptions, which involve both a substantive analysis of whether an exception applies provisionally, as well as an analysis of whether the measure complies with the prefatory chapeau. At present, the consensus is that carbon border taxes would likely fail to comply with Article III, but succeed in satisfying one or both relevant exceptions when liberally construed, and that the most important question is thus whether a carbon tariff would satisfy the chapeau—largely a question of practical design.

Nevertheless, this Note suggests that for the unique policy of climate change mitigation, this general consensus is misplaced. Rather, the Article XX exceptions should be construed to pose a significant obstacle to carbon tariffs, such as those proposed for the EU. Accordingly, carbon tariffs in the EU should fail, not because their application would be unreasonable, but because Article XX probably does not permit trade restrictions related to climate change mitigation. If true, WTO Members intent on unilaterally addressing climate change should

\begin{footnotes}{\footnotesize
\textsuperscript{236} See Esty, \textit{supra} note 89, at 221–22.
\textsuperscript{237} See Charnovitz, \textit{supra} note 47, at 108.
\end{footnotes}
propose an amendment to GATT Article XX to explicitly allow such measures under international trade law.