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The WTO, the National Security Exception and Climate Change

Felicity Deane¹

Article XX has been a valuable weapon against the anti-discrimination provisions of the GATT 1994. In general this Article is suggested by commentators as the most likely defence for any climate change mitigation measure in breach GATT 1994 obligations. This is not disputed here. This paper considers the requirements of the Article XX exceptions but also explores the conditions of the National Security exception contained in Article XXI.

Although it is possible that this exception could be used for climate change mitigation measures, this paper argues that it is unlikely that the National Security exception could be legitimately applied in these circumstances without member agreement to the contrary.

I Introduction

Article XX of GATT has been used by a number of WTO member nations to justify measures that would otherwise breach World Trade Organization (WTO) obligations. Article XX has been a valuable weapon against the anti-discrimination provisions of the GATT 1994,² when measures have been introduced to protect the environment or ecosystem life. Indeed, it may be possible for this Article to defend climate change mitigation measures that may otherwise breach member obligations. However, Article XX has presented a number of challenges for parties choosing to rely on it. For example, the values promoted within Article XX must align with the clear objective of the measure in question.

This paper considers the applicability of Article XX for climate change. It also explores whether another defence may justify climate change action that would otherwise breach the GATT principles. It is arguable that the elusive, but powerful National Security Exception contained in Article XXI may indeed be applicable to climate change mitigation measures. Despite a recent statement by the President of the United Nations Security Council

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² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A ('*General Agreement on Tariffs and Trade 1994*')

emphasising climate change as a risk to existing national security threats, this proposal is not easily justified. Indeed it is unlikely to find favour without member agreement. It is however one that deserves further consideration both to determine whether it could be applicable to climate change mitigation policies, and to ensure it is not used as a means to justify protectionist measures cloaked in the guise of environmental protection.

II Why Consider the WTO for Climate Change?

The potential impacts of climate change are well documented. Sea level rise, ocean acidification, mass species extinction and extreme weather events are just some of the predictions that represent the enormous challenge of climate change. The difficulty of this challenge is caused in part by the many interests that compete against atmospheric preservation. International trade is arguably one of these competing interests.³

Along with a potential conflict of interest, the laws and rules of international trade may directly conflict with measures implemented for climate change mitigation. This could occur through measures introduced to complement domestic economic instruments such as subsidies, border tax adjustments, or obligations to purchase emissions permits.⁴ In truth, when these complementary measures are introduced to alleviate domestic industries' competitiveness concerns, conflict with the WTO rules is a realistic possibility.

Another reason to consider the law of the WTO is that the importance of global organisations such as the WTO is increasing. Indeed the dependence between states for basic human needs has increased the potential for trade and economic conflict.⁵ Alvarez noted:

‘states are driven to regulate at the international level by ever-rising movement of people, goods, and capital across borders, along with the positive and negative

³ Tracey Epps and Andrew Green, *Reconciling Trade and Climate Change: How the WTO Can Help Address Climate Change* (Cheltenham, Edward Elgar Publishing Inc., 2010) at 3.

⁴ See, eg, F. Biermann and R. Brohm, "Implementing the Kyoto Protocol without the USA: the strategic role of energy tax adjustments at the border" 4(3) *Climate Policy* (2005), 289; Jason Bordoff, 'International Trade Law and the Economics of Climate Policy: Evaluating the Legality and Effectiveness of Proposals to Address Competitiveness and Leakage Concerns' (Paper presented at the Brookings Forum on Climate Change, Trade and Competitiveness, Washington, 9 June 2008); Epps and Green, *Reconciling Trade*, supra, note 2; Robert Howse and Antonia Eliason, "Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues" in Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009) 48; Andrew Green, "Trade Rules and Climate Change Subsidies" 5 *World Trade Review* (2006), 377; Richard G Tarasofsky, "Heating Up International Trade Law: Challenges and Opportunities Posed by Efforts to Combat Climate Change" (1) *Carbon and Climate Law Review* (2008), 7.

⁵ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge, Cambridge University Press, 2003) at 19.

externalities emerging from such flows – from the rise in a common human rights ideal to emerging threats to the global commons.⁶

Therefore there must be global political institutions such as the WTO to ensure that behaviour between nations meets agreed standards.⁷ Without standards the weaker or developing nation states could potentially be disadvantaged by the powerful and influential.⁸ These agreed standards are not static and must be responsive and flexible to global societal changes.⁹ Whether the structure of the WTO is conducive to this necessary flexibility is questionable.

III The Structure of the WTO

The WTO is a member-based organisation where decisions are made by consensus between member states. This organisation exists as a contract between nations where cooperation is achieved through negotiated rules.¹⁰ There are three decision-making bodies within the WTO.¹¹ They are the Ministerial Conference, the General Council, and the Trade Negotiations committee.¹²

The Ministerial Conference is the WTO's highest decision-making body. Meetings of the Ministerial Conference are held once every two years. The Ministerial Conference consists of all members, and decisions can be made on any matter arising under the trade agreements.¹³ In the interim, between meetings of the Ministerial Conference, the General Council decides on day-to-day matters of the WTO. The General Council requires that each member state hold one vote, with decision-making by consensus. The vote of the General Council is taken on matters such as amendments to general principles, for example the most-favoured-nation principle, where unanimity is required. The General Council may also decide

⁶ Jose Alvarez, 'The New Treaty Makers' (2002) 25 Boston College International and Comparative Law Journal 213, 216 cited in Pauwelyn, *Conflicts*, supra, note 5 at 20.

⁷ Ann Capling, "The Multilateral Trading System at Risk? The Challenges to the World Trade Organization" in Ross P. Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (The Hague: Kluwer Law International, 2003) at 37

⁸ Some may argue that this continues to be the case within the confines of the WTO. See, eg, Xu Yi-Chong and Patrick Weller, "International Civil Servants and Multilateral Trade Negotiations" in Ross P. Buckley (ed), *The WTO and the Doha Round: Changing the Face of World Trade* (London: Kluwer Law International, 2003) 89, at 89.

⁹ Capling, "The Multilateral Trading System", supra, note 6, at 57.

¹⁰ Capling, "The Multilateral Trading System", supra, note 6, at 57.

¹¹ Capling, "The Multilateral Trading System", supra, note 6, at 53.

¹² Capling, "The Multilateral Trading System", supra, note 6, at 53.

¹³ World Trade Organization, *Understanding the WTO* (2011)

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm

on interpretations of the provisions of the WTO agreements, where two-thirds majority is necessary.¹⁴ Similarly, the Trade Negotiations Committee consists of all members.

The inclusion of over 150 members in each of these decision making bodies is essential to ensure fair representation of each member's interests. However it does lead to difficulties, at times impeding response to changes needed. This is especially the case with the large diversity between member nations.¹⁵ Therefore significant changes to the agreements, and clarification of principles are often not as forthcoming as is necessary.

IV THE PRINCIPLES OF THE LAW OF THE WTO

The *Marrakesh Agreement Establishing the World Trade Organization*¹⁶ ('WTO Agreement') is an umbrella agreement with all other WTO agreements annexed to it. The structure of the WTO and the agreements that bind the member states are complicated and lengthy in nature. Van Den Bossche has simplified the principles of the WTO obligations into five basic categories.¹⁷ This provides a succinct summation for the purposes of this paper. Excluding procedural rules, such as dispute settlement, Van Den Bossche suggests that the WTO principles fall into the following five categories:¹⁸

- Non discrimination, including the most favoured nation principle (MFN) and national treatment principle (NT);
- Market access rules, including rules for customs duties and other financial charges;
- Unfair trade, governing dumping and subsidized trade;
- Trade liberalization rules, commonly referred to as 'exceptions'; and,
- Rules promoting regulatory harmonisation around international standards.

A complex web of principles exists within these broad categories of rules. For example the non-discrimination rules contain the principles of MFN and NT that can be found in both GATT 1994, and GATS.¹⁹ The interpretation of these principles differs under both of these agreements, and potentially leads to difficulty in understanding a clear meaning. It is not the

¹⁴ Capling, "The Multilateral Trading System", supra, note 6 at 53.

¹⁵ Capling, "The Multilateral Trading System", supra, note 6, at 53.

¹⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995).

¹⁷ Van Den Bossche, *The Law and Policy*, supra, note 27, at 37.

¹⁸ Van Den Bossche, *The Law and Policy*, supra, note 27, at 37.

¹⁹ The MFN principle is also contained in the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B ('*General Agreement on Trade in Services 1994*'), Article II:1.

purpose of this paper to examine the difficulties associated with the general rules of the WTO, but rather to consider the exceptions to these general rules, and their applicability to the relatively new and challenging climate change conundrum. Indeed the scope of this paper is limited to the exceptions contained within the GATT 1994. It is important to note that it is generally accepted that these exceptions can only be used to defend obligations in the GATT 1994 itself.²⁰

V The Exceptions

The rules that enable divergence from obligations contained within the WTO Agreements are known as exceptions. Under the GATT there are two possible exception articles that may be relied on to excuse breaches of WTO law by climate change mitigation measures. The first of these, and indeed the most likely to succeed is Article XX. There is also a possibility that the National Security exception of Article XXI may apply to climate change measures. Recent discussions and decisions of the Security Council promote the consideration of this exception for climate change.²¹ Although not commonly considered for climate change mitigation measures, this Article provides a potentially powerful exception to the GATT principles.

VI Article XX Exceptions

The chapeau of Article XX indicates the purpose of including Article XX in the General Agreement is not to widen the scope for measures serving trade policy purposes but to ensure that commitments under GATT do not hinder the pursuit of policies implemented in the pursuit of the interests of the Article. Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement of...measures:

²⁰ The GATT exceptions arguably can apply beyond the GATT agreement itself but this discussion is beyond the scope of this paper. See Frieder Roessler, "Appellate Body Ruling in *China-Publications and Audiovisual Products*" 10(1) *World Trade Review* (2011), 119, at 131; But see Marie Wilke, 'Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review' (Issue Paper No. 4, International Centre for Trade and Sustainable Development, August 2011) at 20.

²¹ See, eg, United Nations Security Council, 'Security Council, in Statement, says 'Contextual Information on Possible Security Implications of Climate Change Important when Climate Impacts Drive Conflict': 'Make No Mistake', Says Secretary-General, 'Climate Change Not Only Exacerbates Threats to Peace and Security, It Is a Threat to International Peace and Security'' (Press Release, SC/10332, 20 July 2011).

- (b) ...necessary to protect human, animal or plant life or health, and;
- (g) ... relating to the conservation of exhaustible natural resources.²²

For a measure to be justified on the basis of one of the exceptions contained in Article XX *the intention* of the regulation must promote one of the purposes contained in the sub paragraphs to this provision.²³

The WTO has displayed some reluctance to interfere with a country's environmental objectives and measures. Indeed, in the *Brazil - Retreaded Tyres*²⁴ dispute the Appellate Body determined that it was for individual nation states to determine which environmental measures should be employed. This can be contrasted with the Panel decision in the *Thailand – Cigarettes*²⁵ dispute where it was concluded that there must be no alternative to the measure that a member could reasonably be expected to employ for Article XX to apply.

1 **Article XX (b)**

The first of the environmental exceptions is contained in Paragraph (b), and has two requirements beyond the satisfaction of the chapeau. For paragraph (b) to apply the measure must:

- Be designed to protect human, animal or plant life or health; and
- Be *necessary* to achieve the protection.

a. **Protect human, animal or plant life or health**

The requirement for 'protection of human, animal or plant life or health' can encompass a number of measures with varying degrees of success. The disputes have

²² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A ('*General Agreement on Tariffs and Trade 1994*') Article XX. The chapeau of the article is the opening paragraph. For authority on this see Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS58/AB/R, (adopted 6 November 1998).

²³ Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (17 December 2007). The Appellate Body stated that a measure will result in "disguised protection" or "arbitrary or unjustifiable discrimination" only where that discrimination or protection is unrelated to the overall environmental goal of the measure, provisionally justified under paragraphs (b) or (g).

²⁴ Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (17 December 2007).

²⁵ Panel Report, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (7 November 1990).

generally interpreted this requirement broadly. Thus, it appears that it is sufficient to identify a risk that is *lessened* by a measure in order to satisfy this requirement of this exception.²⁶

This exception was analysed in the *EC – Asbestos*²⁷ dispute. In this case the Appellate Body reviewed the decision of the Panel in finding that chrysotile asbestos fibres posed a risk to human health. In reaching this conclusion the Panel relied first on the statements of four scientific experts, who concurred that these fibres were a risk to human health, and second on the findings of prominent international bodies, including the International Agency for Research on Cancer and the World Health Organisation. The Appellate Body determined that the Panel was well within the limits of its discretion to conclude that the products in question were highly likely to pose a risk to human health.²⁸

The application of this reasoning to GHG intensive products is difficult. Obviously the threat to human health from products of this category is significantly less direct. Where asbestos containing products pose the risk themselves, the GHG intensive products pose the increased risk through production processes. Having said this, the scientific evidence is likely to be compelling that GHG intensive production poses a risk to *all three categories* of human, animal and plant life. Indeed any measure imposed for the purpose of reducing emissions intensity in production would have to be considered to *lessen* the risk to human, animal or plant life, however small that may be. Therefore it is not outside reasonable consideration that this requirement could be satisfied.

The purpose that this risk is reduced must also be the clear objective of any measure to be justified. The *EC-Tariff Preferences*²⁹ dispute is a clear example of this. In this case the Panel explored the policy objective of the measure in question, and considered whether the measure was designed to achieve the stated objective.³⁰ When the examination was concluded the Panel found nothing linking the policy to the protection of human life or health. Therefore if the objective of a climate change mitigation policy is to actually protect

²⁶ Christopher Tran, "Using GATT, Art XX to Justify Climate Change Measures in Claims under the WTO Agreements" 27 *Environmental and Planning Law Journal* (2010), 346, at 351.

²⁷ Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001) .

²⁸ Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001) at [162].

²⁹ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WTO Doc WT/DS246/R (adopted 20 April 2004).

³⁰ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WTO Doc WT/DS246/R (adopted 20 April 2004) at [7.198 – 7.199].

domestic industries from competition then it is unlikely that this exception can be relied on, even if risk reduction is achieved.

b. Be ‘necessary’ to achieve the protection

The second element that must be satisfied in order to justify a measure under Article XX (b) is that the policy measure is *necessary* to achieve the protection. In the *Korea – Imported Beef*³¹ dispute the meaning of *necessary* was examined. In this case the Panel suggested there was a continuum that covered the meaning of necessary, and that this continuum ranged from ‘indispensable’ through to ‘making a contribution to’. The conclusion in this case was that the meaning of necessary was closer to the ‘indispensable’ end of the continuum.³²

This element was also explored in detail in the *EC – Asbestos* dispute. The Panel suggested that for the measure to be *necessary* there must be no reasonably available alternative.³³ The Panel considered that a measure that was in compliance with the WTO provisions, but falling short of the level of protection of the disputed measure, was not a reasonably available alternative.³⁴ Furthermore it was concluded that it was a member’s right to determine the level of protection *necessary* in a given situation.³⁵

It follows, for the paragraph (b) exception to justify a policy measure the measure must have been *conceptualised* to achieve protection of human, animal or plant life or health and it must be *necessary* with no reasonably available alternatives. The tests of this exception are burdensome, and indeed the exception contained in paragraph (g) may provide an alternative.³⁶

1 Article XX (g)

In order for a provision to be justified under Paragraph (g) of Article XX it must satisfy three requirements:

³¹ Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (10 January 2001).

³² *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) , 270.

³³ Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001) at [175].

³⁴ Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001) at [174].

³⁵ Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001) at [168]. But see Panel Report, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (7 November 1990) . In the *Thailand – Cigarettes* dispute it was suggested that a measure was only ‘necessary’ if there was no ‘alternative’ measure that Thailand could *reasonably* be expected to employ to achieve its health policy objective.

³⁶ *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) [602].

- The measure must *relate to* conservation;
- The conservation must be of an exhaustible natural resource; and,
- The measure must be made effective with domestic restrictions.

a. 'Relate to' conservation

As previously mentioned, the objective of any policy measures is intrinsic to the relevance of exception provisions.³⁷ A clear example of the importance of the policy objective for this exception is the *Canada-Unprocessed Herring and Salmon* dispute.³⁸ The Panel in this dispute determined that while a trade measure did not have to be *necessary* or *essential* to the conservation of an exhaustible natural resource, it had to be *primarily aimed* at the conservation of an exhaustible natural resource to be considered as 'relating to' conservation within the meaning of Article XX:(g).³⁹

Thus it follows that the phrase 'relate to' is used interchangeably with 'primarily aimed at'.⁴⁰ The *US – Shrimp*⁴¹ report clarified this further, and suggested that there must exist a reasonable means and ends relationship between the measure and the conservation of a natural resource.

b. The conservation of natural resources

The definition of 'natural resources' was explored by the Appellate Body in the *US – Shrimp*⁴² case:

From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary".⁴³

In this case the Appellate Body went on to explain that the term *exhaustible* should be interpreted in light of 'contemporary concerns of the community of nations about the protection and conservation of the environment'.⁴⁴

³⁷ Tran, "Using GATT, Article XX", *supra*, note 39, at 350.

³⁸ GATT Panel Report, *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD 35S/ 98 (22 March 1988) .

³⁹ GATT Panel Report, *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD 35S/ 98 (22 March 1988) at [4.6].

⁴⁰ *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) at [630].

⁴¹ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998) at [141].

⁴² Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998) at [141].

⁴³ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998) at [130].

It follows that the conservation of the atmosphere is very likely fall within the scope of conservation of an exhaustible natural resource. Support for this may be found also in the *US-Gasoline* dispute.⁴⁵ In this case clean air was declared an ‘exhaustible natural resource’ within the meaning of Article XX (g).⁴⁶ The Panel report in this case explained this reasoning:

The Panel ... examined whether clean air could be considered an exhaustible natural resource. In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted ... the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource. Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).⁴⁷

This reasoning justifies the application of this exception to measures implemented to mitigate climate change.

c. Measure made effective with Domestic Restrictions

The final requirement of Article XX (g) requires any conservation strategy be implemented on domestic products as well as imported. In the *US – Gasoline* dispute⁴⁸ the Appellate Body examined the meaning of this requirement and suggested that what this aspect of the exception required was a certain degree of *even-handedness* in the application of the measure justified in the name of conservation.⁴⁹ The Appellate Body went on to clarify that this did not mean that the treatment of domestic and imported products had to be identical, rather that there had to at least be some requirements for domestic products to be able to justify a measure in the name of conservation.⁵⁰

⁴⁴ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998) [130] cited in *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) 276.

⁴⁵ Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS58/AB/R, (adopted 6 November 1998).

⁴⁶ In this particular dispute the measure in question was not justified under paragraph (g) because the Panel concluded that ‘the less favourable baseline establishments methods’ used by the measure were *not primarily aimed* at the conservation of exhaustible natural resources and thus fell outside the scope of Article XX(g). See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS58/AB/R, (adopted 6 November 1998) at 14.

⁴⁷ Panel Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS2//R, (29 January 1996) at [6.37].

⁴⁸ Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS58/AB/R, (adopted 6 November 1998).

⁴⁹ *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) at 279.

⁵⁰ *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) at 279.

An appropriate policy to mitigate climate change would indeed be likely to satisfy these requirements, however before concluding on the positive side of this debate, the chapeau of the article must be considered.

2 The Chapeau of Article XX

The Chapeau of Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination between countries* where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement of...measures...⁵¹

It was made clear in the *US - Gasoline*⁵² dispute that any measure justified under the Article XX exceptions had to satisfy the requirements of the chapeau, and thus added another tier to be satisfied by each of the Article XX exceptions.⁵³ This approach has been followed in a number of subsequent disputes.⁵⁴

The *Shrimp - Turtle*⁵⁵ dispute questioned the operation of the chapeau of the Article XX exception. In this case the measures implemented for the protection of sea turtles from shrimp fishing were deemed justified under the paragraph (g) exception, however were ruled invalid as a result of the discrimination between the parties it applied to, thus infringing the chapeau.

In truth this may be a concern for climate change mitigation measures. First, if a requirement exists only for countries without a domestic mechanism to price GHG emissions, the intention of the chapeau may be infringed. Second, if the emissions themselves trigger differences in liability discrimination may be inferred.

Although Article XX may be the most likely exception for climate change mitigation measures that potentially infringe other GATT principles, the above discussion has outlined some potential challenges. Therefore member states may consider it necessary to look beyond

⁵¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A ('*General Agreement on Tariffs and Trade 1994*') Article XX (emphasis added).

⁵² Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS58/AB/R, (adopted 6 November 1998).

⁵³ Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* WT/DS58/AB/R, (adopted 6 November 1998) at [6.20].

⁵⁴ See, eg, Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/AB/R (2001).

⁵⁵ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998).

Article XX for justification. One potentially powerful exception is the national security exception contained in Article XXI.

VII National Security Exception: Article XXI

Unlike Article XX of the GATT 1994, Article XXI does not have a chapeau to prevent misuse of the exceptions contained therein.⁵⁶ This is not to say that this exception can be used to excuse any measure howsoever implemented.

‘It is really a question of balance. We have got to have some exceptions. We cannot make it too tight because we cannot prohibit measures, which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose’⁵⁷

Therefore similar to the exception contained in Article XX, any provision that satisfies the national security exception must have been contemplated with the specific purpose of the preservation of national security.

There have been no panel or Appellate body decisions considering this exception since the WTO was established in 1995.⁵⁸ Commentators suggest that this exception may be open to abuse through the disinclination of the WTO to examine matters considered for the security of a nation state.⁵⁹ This premise was reinforced in the adopted decision of the *US – Imports of Sugar from Nicaragua*.⁶⁰ In this dispute the Panel concluded that it was not authorised to examine the reasons for justification under Article XXI, and therefore it was unable to determine if the measures in question were defensible.

An example of the use of the National Security exception was the attempted justification by the United States of the trade sanctions imposed on Cuba. The *Cuban Liberty and Democratic Solidarity Act*⁶¹ (*the Helms-Burton Act*) was introduced to tighten trade restrictions on Cuba.⁶² This led to an objection from the EU, that claimed the Act was an

⁵⁶ Van Den Bossche, *The Law and Policy*, supra, note 27, at 666.

⁵⁷ Amelia Porges, Friedl Weiss and Petros Mavroidis, *Analytical Index: Guide to GATT Law and Practice* (Geneva, GATT, 6th ed, 1994)600, cited in Bisweswar Bhattacharyya, "National Security in the WTO Context" in Manas Chatterji and B M Jain (eds), *Conflict and Peace in South Asia* (Bingley: Emerald Group Publishing Limited, 2008), 301, at 306.

⁵⁸ Van Den Bossche, *The Law and Policy*, supra, note 27, at 667.

⁵⁹ Richard A Westin, *Environmental Tax Initiatives and Multilateral Trade Agreements: Dangerous Collisions* (The Hague, Kluwer Law, 1997), at 183.

⁶⁰ GATT Panel Report, *United States - Trade Measures Affecting Nicaragua*, L/6053, dated 13 October 1986 (report unadopted), at [5.3].

⁶¹ *Cuban Liberty and Democratic Solidarity Act* 22 USC §§ 6021-6091 (1996)

⁶² E. Browne Rene, "Revisiting "national security" in an interdependent world: The GATT article XXI defense after Helms-Burton" 86(2) *Georgetown Law Journal* (1997), 405, at 405.

impermissible restriction on international trade.⁶³ A panel was appointed to adjudicate on the matter, however the United States officials announced they would not participate in the dispute because the ‘panel lacked competence to adjudicate on a national security issue’.⁶⁴ The EU and US subsequently came to an agreement, and therefore there was no ruling by a WTO adjudicative body.⁶⁵

1 Taken in a time of war or other emergency in international relations

The text of Article XXI provides:

(b)... nothing in the agreement shall be construed to prevent any member from taking any action which it considers necessary for the protection of its essential security interests...

(iii) taken in time of war or other emergency in international relations;⁶⁶ or,

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security...⁶⁷

Paragraph (b) proposes that if there are no armed conflicts directly linked to the warming of the planet then it must be shown that climate change could be considered as an ‘other emergency in international relations’.

The definition of ‘other emergency in international relations’ has not been clarified by a Panel or Appellate body, however it has been suggested that what it often means is ‘serious international tension’.⁶⁸ The interpretation of this requirement is therefore related to tensions between nations, and may not be read so broadly as to incorporate the types of tension and threats associated with climate change, at least not presently.

It is not outside the scope of reasonable consideration that the tensions surrounding climate change could escalate from international negotiation to international crisis. However, presently this is a difficult argument. Therefore, without agreement of the Ministerial Conference or General Council, it is *highly unlikely* that this particular provision could be used for the purposes of climate change mitigation.

⁶³ E. Browne Rene, "Revisiting "national security", supra, note 75, at 407.

⁶⁴ E. Browne Rene, "Revisiting "national security", supra, note 75, at 408.

⁶⁵ E. Browne Rene, "Revisiting "national security", supra, note 75, at 409.

⁶⁶ *General Agreement on Tariffs and Trade 1994*, Article XXI (b) (iii).

⁶⁷ *General Agreement on Tariffs and Trade 1994*, Article XXI (c).

⁶⁸ *Inventory of Non-Tariff Provisions in Regional Trade Agreements*, WTO Doc WT/REG/W/26 (5 May 1998) (Note by the Secretariat), at [28].

2 Pursuit of the Obligations of the United Nations Charter for the Maintenance of International Peace and Security.

The Charter of the United Nations ('the Charter') was signed on 26 June 1945 in the aftermath of the German surrender following World War II. The exception of allowing the pursuit of UN Charter obligations reaffirms Article 103 of the Charter.⁶⁹ Article 103 of the Charter states:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This exception allows members to depart from the WTO obligations in the course of responsibilities imposed by the Charter, or imposed by the organizations enforcing the obligations of the Charter. For example, the United Nations Security Council (the Security Council) has the power to order 'complete or partial interruption of economic relations'⁷⁰ in the pursuit of international peace and security.

The Security Council consists of 15 members who can overrule the obligations of any UN member under any earlier or later international agreement. This makes the Security Council a powerful decision-making body, and means the confines of the Council mandate must be adhered to.⁷¹ The mandate of the Security Council is contained in Article 24 of the UN Charter.⁷² The primary purpose of the Security Council is proclaimed therein to be the maintenance of international peace and security.⁷³ In a globalised society, this mandate has encompassed a number of issues from public health⁷⁴ to environmental threats. Indeed in 1992 the Security Council expanded the definition of what could amount to a threat to the

⁶⁹ Pauwelyn, *Conflicts*, supra, note 5 at 99.

⁷⁰ *Charter of the United Nations* Article 41, cited in Van Den Bossche, *The Law and Policy*, supra, note 27, at 668.

⁷¹ Pauwelyn, *Conflicts*, supra, note 5 at 100.

⁷² *The Charter of the United Nations*.

⁷³ *The Charter of the United Nations*, Article 24 (1).

⁷⁴ Bradley J. Condon, "The Twin Security Challenges of AIDS and Terrorism: Implications for Flows of Trade, Capital, People and Knowledge" in Ross P. Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (The Hague: Kluwer Law International, 2003) 251, at 272.

peace⁷⁵ to include ‘non-military sources of instability in the economic, social, humanitarian and ecological fields...’⁷⁶

On 17 April 2007 the Security Council considered climate change directly.⁷⁷ The debate itself was a cause of conflict between a number of critics and policymakers, with some suggesting that the subject matter should be considered outside the scope of the Security Council’s concern. The Security Council raised climate change again in July 2011. On July 20, 2011 the President of the Security Council released a statement detailing the position of the Security Council in regards to climate change.⁷⁸ In this statement the threat of climate change was clearly articulated:

The Security Council expresses its concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security.⁷⁹

This metaphorically opens the door to the imposition of trade sanctions, if the Security Council were to consider climate change mitigation as a matter of urgency.

As it stands no such sanctions have been considered, and the likelihood presently appears remote. Indeed even if such a sanction was imposed, the only type of measure justified would have to be within the limits of that sanction.

Thus the exception of Article XXI would face some major challenges in order to justify climate change mitigation measures. In truth it would be highly unlikely that this exception would be extended to climate change without an agreement of the Ministerial Conference, or at the very least the General Council. One could argue that the clear intention of Article XXI does not incorporate measures such as climate change mitigation, despite the seriousness associated with this global environmental phenomenon.

VIII Conclusion

The collision of WTO obligations and climate change mitigation measures has been the focus of many publications over a number of years.⁸⁰ Questions, including the legality of

⁷⁵ Charles Sampford et al, "Living Up to the Promises of Global Trade" in Ross P. Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (The Hague: Kluwer Law International, 2003) 9, 28.

⁷⁶ *Note by the President of the Security Council*, United Nations Security Council, UN Doc S/23500 (31 January 1992) cited in Sampford et al’ “Living up to the Promises”, supra, note 88, at 28.

⁷⁷ Alan Dupont, "The Strategic Implications of Climate Change" 50(3) *Survival* (2008), 29 , at 29.

⁷⁸ *Statement by the President of the Security Council*, United Nations Security Council, S/PRST/2011/15 (20 July 2011)

⁷⁹ *Statement by the President of the Security Council*, United Nations Security Council, S/PRST/2011/15 (20 July 2011)

border tax adjustments and free permit allocation in emissions trading schemes have lead commentators to suggest that implementing some mitigation measures may indeed conflict with existing trade obligations. Although this potential collision has lead to questions of legitimacy of global organisations, such as the WTO⁸¹ in truth these organisations are increasing in importance, given the trend of globalisation. Having said this these organisations do not operate in a vacuum and there is a need to consider issues that have potential to transform human society. The text of both Articles XX and XXI was drafted in 1948, and has not been amended since.⁸² This brings into question its legitimacy in the world and the trading system as it relates today. Arguably, the greatest threat to species survival is no longer armed conflict or political instability. Therefore in order for organisations, such as the WTO, to remain legitimate they must respond adequately to the modern environmental challenges. However, this must be done in balance with the values and purpose of the organisation itself.

⁸⁰ See, eg, Biermann and Brohm, "Implementing the Kyoto Protocol", supra, note 3; Jason Bordoff, 'International Trade Law and the Economics of Climate Policy: Evaluating the Legality and Effectiveness of Proposals to Address Competitiveness and Leakage Concerns' (Paper presented at the Brookings Forum on Climate Change, Trade and Competitiveness, Washington, 9 June 2008); Epps and Green, *Reconciling Trade*, supra, note 2; Howse and Eliason, "Domestic and International Strategies", supra, note 3.

⁸¹ Cormac Cullinan, *Wild Law* (Claremont, Siber Ink 2nd ed, 2011) at 179.

⁸² Porges, Weiss and Mavroidis, *Analytical Index*, supra, note 70 at 611.