NOTE

THE PERFECT CLIMATE FOR ENVIRONMENTAL TRADE COORDINATION: AN ANALYSIS OF THE EU CARBON BORDER ADJUSTMENT MECHANISM THROUGH GATT ARTICLES XX AND XXI

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ABSTRACT

The EU Carbon Border Adjustment Mechanism (CBAM) is an effort by the EU to fight climate change by bolstering cleaner production methods, supporting climate mitigation, and promoting sustainable development.[1] *It requires importers into the EU to pay a levy on carbon emissions released during the production of their carbon-intensive goods, as if the good were produced under the EU's Emission Trading System (ETS). As the intersection of international trade and climate issues is center stage in international dialogue, the CBAM emerges at a time of heightened urgency and interest.*

The CBAM has already received and is likely to receive more international attention. So, while this Note argues that it is likely compliant with World Trade Organization (WTO) rules pursuant to the national treatment and most favored nation (MFN) treatment obligations, it may nevertheless be challenged under the current WTO regime. This Note offers an analysis of possible defenses under Article XX of the General Agreement on Tariffs and Trade (GATT) but highlights the concerning vulnerabilities of these defenses regarding environmental measures and their urgent need for reform. Instead, this Note proposes that the current rise of the climate-security nexus may present an opportunity for the EU to assert an Article XXI national security defense. International cooperation on trade-related climate policy will be crucial in the coming decades, and acknowledging a climate-security defense by broadening the national security definition could give the WTO the opportunity to facilitate the harmonization of these two fields. Broadening the scope of national security definition may facilitate negotiations among WTO Members toward a general

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1. *See* European Commission Press Release QANDA/21/3661, Carbon Border Adjustment Mechanism: Questions and Answers (July 14, 2021) [hereinafter CBAM: Questions and Answers].

agreement on carbon abatement policies, thereby reducing litigation and appealing into the void—all with positive effects on WTO integrity and buy-in to the Appellate Body. So, while the CBAM has sparked disagreement among WTO Members, it has also created the perfect climate for the WTO to redefine environmental-trade relations and position itself at the forefront of this field for the coming decades.

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I. Introduction

At the 2023 United Nations Climate Change Conference (COP28), Director-General of the WTO Ngozi Okonjo-Iweala emphasized the important role of trade in sustainable climate action while announcing a new trade climate policy toolkit, stating that "we need to use every

weapon in our arsenal to fight the climate crisis."[2] This is no surprise: sustainable development has always been central to the WTO. Through its very Charter, WTO Members acknowledge that "[t]heir relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living . . . allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment."[3] And, as the intersection of international trade and climate issues becomes increasingly intertwined, this core principle is once again center stage. International cooperation around climate-related trade policies to reduce the dire effect of greenhouse gas (GHG) emissions that cause global warming has never been more crucial.

Carbon pricing is one important tool for climate action and GHG emissions reduction. However, the current patchwork of pricing systems has resulted in carbon leakage and trade conflicts.[4] In fact, in 2022, there were seventy carbon pricing initiatives implemented in forty-seven national jurisdictions.[5] The CBAM seeks to resolve the discrepancies in the current system. Introduced as part of the European Green Deal, which set the ambitious goal of becoming the first climate-neutral continent by 2050, the CBAM is an effort by the EU to fight climate change by bolstering cleaner production methods, supporting climate mitigation, and thus promoting sustainable development.[6] The CBAM requires importers into the EU to pay a levy on the emissions released during the production of their carbon-intensive goods, as if the good were produced under the EU's ETS.[7] The mechanism began to operate in October 2023, with a transitional period until 2026.[8] It has, however, already received pushback and may be challenged as a

2. *See DG Okonjo-Iweala: We need to use every weapon in our arsenal to fight the climate crisis*, WORLD TRADE ORG. (Dec. 4, 2023), https://www.wto.org/english/news_e/news23_e/cop28_04dec23_e.htm; *see also WTO Secretariat launches trade policy toolkit at COP28 to support action on climate goals,* WORLD TRADE ORG. (Dec. 2, 2023), https://www.wto.org/english/news_e/news23_e/publ_02dec23_e.htm.

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

4. *See* WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2022: CLIMATE CHANGE AND INTERNATIONAL TRADE 80–90 (2022) [hereinafter WORLD TRADE REPORT 2022].

5. *See generally Carbon Pricing Dashboard*, WORLD BANK, https://carbonpricingdashboard.worldbank.org/ (last visited Jan. 12, 2023).

6. *See* CBAM: Questions and Answers, *supra* note 1.

7. *See* Gabriel Weil, *European Parliament Passes CBAM*, CLIMATE LEADERSHIP COUNCIL (June 24, 2022), https://clcouncil.org/blog/european-parliament-passes-cbam/.

8. *See* Council of the European Union Press Release 1092/22, EU Climate Action: Provisional Agreement Reached on Carbon Border Adjustment Mechanism (CBAM), (Dec. 13, 2022)

violation of WTO rules. This Note looks at the viability of said challenges and, if they do arise, what affirmative defenses exist as alternative avenues for EU implementation of the CBAM.

This Note argues that in light of the current rise of the climate-security nexus, a GATT Article XXI national security defense is the best way forward for the EU. First, this Note looks at the history and goal of the CBAM to illustrate why it is one of the only mechanisms available to mitigate carbon leakage. Second, by reviewing its likely challenges, this Note argues that the CBAM is compliant with WTO rules given its adherence to both GATT Article III.4 national treatment and Article I.1 MFN treatment obligations.[9] Third, as the CBAM may nevertheless be challenged under the current WTO regime, this Note offers an analysis of possible defenses under Article XX while highlighting the concerning vulnerabilities of these defenses regarding environmental measures and their urgent need for reform. Finally, this Note proposes that the current rise of the climate-security nexus may present an opportunity for the EU to assert an Article XXI national security defense.

II. History and Implementation of the EU Carbon Border Adjustment Mechanism

A. *A Carbon Pricing Regime in Need of Reform*

While the international community recognizes the urgency of climate actions, coordination has been a sticking point. The U.N. Secretary-General warned that to conserve our natural resources and "[t]o have a chance of avoiding global warming's most ruinous impacts, the world must cut greenhouse gas pollution nearly in half by 2030 and erase its carbon footprint entirely by mid-century."[10] The 2022 WTO World Trade Report, focusing solely on the intersection of climate change and international trade, highlights the potential of carbon pricing to achieve said GHG emission cuts and advocates for a uniform global carbon price rather than regional prices.[11] The CBAM taps into this potential as a new, complementary measure to the EU's ETS.

[hereinafter CBAM Provisional Agreement Announcement]; CBAM: Questions and Answers, *supra* note 1.

9. *See Understanding the WTO: Principles of the Trading System*, WTO (Sept. 21, 2023), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#:~:text=1.,for%20all%20other%20WTO%20members.

10. Brady Dennis, *U.N. Secretary General Says Global Climate Target 'Is on Life Support'*, WASH. POST (Mar. 21, 2022), https://www.washingtonpost.com/climate-environment/2022/03/21/15c-climate-guterres-life-support/.

11. *See* WORLD TRADE REPORT 2022, *supra* note 4, at 79.

The current ETS caps GHG emissions per sector and requires producers to purchase allowances on the market.[12] This cap on allowances decreases over time to create an ETS market within which lower-emitting producers, or producers that have successfully reduced their emissions, can sell their excess allowances to other producers. However, this ETS system runs the risk of carbon leakage—a key issue the CBAM seeks to address. Carbon leakage is a side effect of uncoordinated carbon pricing policies, which ultimately undermines climate action.[13] It occurs when carbon pricing mechanisms are so high that they raise the cost of doing business domestically, causing producers to move to jurisdictions with less stringent carbon ambitions. The European Commission warned that "carbon leakage can shift emissions outside of Europe and therefore seriously undermine EU and global climate efforts."[14] Carbon leakage can also result in cheaper imported goods therefore displacing domestic goods due to higher carbon prices at home and cheaper goods abroad.[15] Thus, by imposing charges on imports that correspond to the charges levied on domestic industries under the EU ETS, the CBAM reduces carbon leakage and acts as a first step to modernizing the current patchwork of carbon pricing systems.

B. *The EU Carbon Border Adjustment Mechanism and its Implementation*

The CBAM was first introduced as part of the European Green Deal in response to growing environmental challenges and in line with Europe's goal of becoming the first climate-neutral continent by 2050.[16] At first, the Commission adopted a cautionary approach, hinting that "[s]hould differences in levels of ambition worldwide persist, as the EU increases its climate ambition, the Commission will propose a carbon border adjustment mechanism, for selected sectors, to reduce the risk of carbon leakage."[17] The CBAM was then officially proposed in July 2021, and a provisional agreement was reached in December

12. *See generally* Council Directive 2003/87/EC, of the European Parliament and of the Council of 13 October 2003 Establishing a System for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC, 2003 O.J. (L 275) 32.

13. *See* CBAM: Questions and Answers, *supra* note 1.

14. *Id.*

15. *See* Florian Misch & Philippe Wingender, *Revisiting Carbon Leakage* 18 (IMF Working Paper, Paper No. WP/21/207, 2021).

16. *See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal*, at 4, COM (2019) 640 final (Dec. 11, 2019).

17. *Id.* at 5.

2022. Its mission is to prevent carbon leakage and support climate change mitigation, all while ensuring WTO compatibility.[18]

Importers, registered with—and accredited by—WTO Members, are required to buy annual CBAM certificates based on their emissions of carbon-intensive imported goods.[19] The certificates essentially cover the carbon price that the producer would have paid if the good had been produced under the EU's current carbon pricing rules, so the certificate price is equal to the weekly average price of carbon permits on the ETS auction platform.[20] The certificates are based on the importer's declared embedded emissions; however, if an importer cannot determine actual emissions, the CBAM will apply a "default value."[21] The CBAM focuses on a few key sectors, namely iron, steel, refineries, cement, organic basic chemicals, and fertilizer, and will only apply to direct emissions within these sectors, not indirect emissions or downstream products produced using the materials from these industries.[22] Thus, by creating a more even playing field, the CBAM lowers the risk of carbon leakage because it reduces incentives for domestic producers to move abroad. Since the transition period began in October 2023, importers are encouraged but not obligated to purchase certificates—they will only have reporting obligations until 2026. Importers will need to report embedded emissions for the imported goods, including noting direct and indirect emissions and any carbon price paid abroad.[23] The transition period reporting mechanism is, therefore, broader than the actual CBAM, which only accounts for direct emissions, potentially foreshadowing a CBAM expansion in the future.

III. Is the EU Carbon Border Adjustment Mechanism Consistent with the GATT/WTO Rules?

The Commission has repeatedly emphasized its commitment to compatibility with WTO rules. To be compatible with WTO rules, the CBAM will need to be consistent with GATT Article III.4 national

18. *See id.*; Henrique Simões, *Carbon Border Adjustment Mechanism as Part of the European Green Deal*, EUR. PARLIAMENT LEGIS. TRAIN SCHEDULE, (Dec. 15, 2022), https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-carbon-border-adjustment-mechanism?sid=6501.

19. *See Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, arts. 6, 25, annex I, COM (2021) 564 final (July 14, 2021) [hereinafter *CBAM Proposal*].

20. *See id.* art. 21.

21. *See id.* art. 7, annex III.

22. CBAM: Questions and Answers, *supra* note 1; *see also CBAM Proposal*, *supra* note 19, art. 30.

23. *See CBAM Proposal*, *supra* note 19, arts. 32–35.

treatment and Article I.1 MFN treatment obligations.[24] In essence, the CBAM will need to ensure the GHG emissions regulatory burden is equalized across countries so that it does not favor EU products over imports or give an advantage to one WTO Member over another. However, there remains much debate about how this will play out in practice.[25] Producers from China, Brazil, and India have already argued that the CBAM might negatively affect their supply chain with the EU, and the United States has stated that it should be a measure of last resort.[26] This part analyzes each rule in turn and rebuts the arguments for incompatibility that may arise given the careful drafting of the mechanism.

A. *Article III.4—National Treatment*

To be compatible with WTO rules, the CBAM must be consistent with the national treatment requirement under GATT Article III.4. The national treatment requirement holds that any products imported into the EU should be treated no less favorably than like products of domestic EU origin "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[27] The two main arguments for WTO incompatibility are (1) that the CBAM offers domestic EU producers double protection and (2) that it is discriminatory toward developing countries. This Note rebuts these arguments by explaining that the EU has accounted for both issues in the mechanism's drafting by ensuring that it does not give any advantage to an EU domestic product over an imported product when assigning the appropriate cost of carbon.

The double protection argument can be averted by balancing the regulatory burden of like product imports. According to current data, forty-three percent of available ETS-free emission allowances were allocated to European companies to safeguard the competitiveness of regulated industries and account for carbon leakage.[28] However, with the

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24. *See Understanding the WTO: Principles of the Trading System*, *supra* note 9.

25. *See* Emily Benson, *CBAM Precedents: Experts Weigh In*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 8, 2022), https://www.csis.org/analysis/cbam-precedents-experts-weigh.

26. *See* ANUJ SAUSH & IOANNIS SISKOS, THE CONFERENCE BOARD, EU CARBON BORDER ADJUSTMENT MECHANISM: A PRIMER FOR STAKEHOLDERS 2 (2022).

27. *See* General Agreement on Tariffs and Trade art. III.4, Oct. 30, 1947, 61 Stat. A-11, 55 U.N. T.S. 194 [hereinafter GATT].

28. *See* Claudio Marcantonini et al., *Free Allowance Allocation in the EU ETS*, POLICY BRIEFS 2017/02, Florence School of Regulation, Energy, Climate, (March 2017), http://hdl.handle.net/1814/46048; *Emissions Trading System (EU ETS): Free Allocation*, EUR. COMM'N, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/free-allocation_en (last visited Jan. 12, 2023).

implementation of the CBAM, these free allowances will be phased out.[29] Thus, many EU companies still concerned that the CBAM will not provide sufficient protection against carbon leakage and about lower production costs abroad are pushing to keep these free emission allowances under the newly expanded ETS regime. If this were to occur, EU domestic products would retain free emission allowances, and imported like products would be required to purchase CBAM certificates. This imbalance puts import producers at a competitive disadvantage compared to like EU domestic products because EU products would essentially receive double protection.[30] The WTO Panel has noted that "treatment no less favourable" calls for "effective equality of opportunities for imported goods," and therefore, this double protection would be a violation of the national treatment rule.[31]

In practice, the EU could offset the free allowances of domestic importers on the CBAM emissions prices for like product imports by simply ensuring that both free allowances and CBAM certificates do not occur at the same time. In fact, the Commission has already spoken to this issue, stating that "until they are completely phased out in 2035, the CBAM will apply only to the proportion of emissions that does not benefit from free allowances under the EU ETS."[32] All in all, the EU will need to take care in confirming that the overall regulatory burden on domestic products—including both ETS allowances and CBAM certificates—is equivalent to that of like product imports.

Second, some developing countries have argued that the CBAM is green protectionism, a tool to protect European producers from competition from abroad, and therefore, a violation of the national treatment rule; special provisions are permissible under Part IV of the GATT and the European Green Deal.[33] Least Developed Countries (LDCs) argue that they should be exempt from the CBAM because they should not bear the same burden as developed countries that have historically contributed a larger share of cumulative carbon emissions.[34] They contend that even if the CBAM does not amount to *de jure*

29. *See Emissions Trading System (EU ETS): Free Allocation*, *supra* note 28.

30. *See* Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.10, WTO Doc. WT/DS2/R (adopted Jan. 29, 1996).

31. *See id.*

32. CBAM: Questions and Answers, *supra* note 1.

33. *See* Peter Holmes et al., *Border Carbon Adjustments and the Potential for Protectionism*, 11 CLIMATE POL'Y 883, 883, 893 (2011).

34. *See* SAM LOWE, CTR. FOR EUROPEAN REFORM & OPEN SOC'Y EUROPEAN POL'Y INST., THE EU'S CARBON BORDER ADJUSTMENT MECHANISM: HOW TO MAKE IT WORK FOR DEVELOPING COUNTRIES 2 (2021).

discrimination against imports, it may have *de facto* discriminatory effects if all the charges are imposed on poorer countries. Further, exemptions for LDCs would not harm the EU's climate objectives, given that their imports are relatively small, but the economic significance for LDCs' economies remains large.[35]

The EU may not need to refute this argument because special provisions or preferential treatment for LDCs is permissible pursuant to Part IV of the GATT, the Special and Differential Treatment Provisions, and the Enabling Clause.[36] Favorable discrimination of developing countries also aligns with the European Green Deal's goal of engaging and supporting developing countries in their transition away from carbon-intensive products and processes.[37] So, while a full CBAM waiver might undermine carbon leakage alleviation, the emissions from developing countries only account for a small proportion of EU demand, and as developing countries industrialize, they will eventually graduate from these exceptions.[38]

B. *Article I.1—Most Favored Nation Treatment*

The CBAM is also unlikely to be a violation of the MFN rule pursuant to Article I.1 as its focus is on carbon emissions of a particular product rather than the full emissions scheme of the country of origin. The MFN rule states that a WTO Member must not discriminate between like products from various trading partners.[39] So, if a WTO Member provides an advantage to an imported product, it must provide the same advantage to any other like product from other WTO Members.

The CBAM could violate the MFN rule if it discriminates between like products based on their carbon content. In deciding which WTO Members need to buy certificates and their quantity, the EU may judge other WTO Members' climate actions, resulting in certain Members receiving an advantage over others for like products. This argument

35. *See* ELIZABETTA CORNAGO & SAM LOWE, CTR. FOR EUROPEAN REFORM, AVOIDING THE PITFALLS OF AN EU CARBON BORDER ADJUSTMENT MECHANISM 4 (2021).

36. *See* GATT arts. XXXVI–XXXVII; *see generally* The Secretariat, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc. WT/COMTD/W/258 (Mar. 2, 2021); Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903 (Nov. 28, 1979).

37. *See* ALEX CLARK ET AL., EUROPEAN COUNCIL ON FOREIGN RELATIONS, CLIMATE OF COOPERATION: HOW THE EU CAN HELP DELIVER A GREEN GRAND BARGAIN 10–13 (2021).

38. *See* LOWE, *supra* note 34.

39. *See Basic Purpose and Concepts: 1.6 Most-Favoured-Nation Treatment*, WTO https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm.

was raised in the *Belgium Family Allowances* case.[40] *Belgium Family Allowances* was the first significant case to address the principle of trade discrimination and was brought by Norway and Denmark against Belgium. The Panel found that a Belgian law imposing a charge on certain goods from WTO Members whose systems did not meet specific family allowances requirements was inconsistent with the MFN principle.[41] The Panel went even further to state that this practice of origin-based conditions was "difficult to reconcile with the spirit of the General Agreement."[42]

However, as opposed to the contested Belgian legislation in the *Belgium Family Allowance* case, the CBAM is not discriminating by country of origin. The CBAM assessment looks at the carbon emissions of the product and not the emission scheme of the country of origin.[43] Instead, all imports of like products will be subject to the same carbon border adjustment regardless of whether said WTO Member has its own domestic carbon pricing scheme. So long as the EU ensures that it is not charging imports, regardless of the carbon cost already incurred in their home country, more than like domestic products, then the CBAM is likely to not violate the MFN rule.[44]

It is, therefore, unlikely that the CBAM is a violation of Article III.4 or Article I.1. Moreover, the Commission's focus on WTO consistency may help contextualize its implementation. While legislative intent is not a factor in the discrimination analysis, it should also not be viewed as immaterial.[45] The Commission has certified that imports are not directly or indirectly charged to a higher level than like domestic products. The purchase price of carbon certificates corresponds to the price a producer would have paid if the good had been produced under the EU carbon pricing rules and can be deducted for the importer if the non-EU producer can show that they have paid for the carbon used during production in a third country.[46] The CBAM "encourage[s] partner countries to establish carbon pricing policies to fight climate

40. *See generally* Report Adopted by the Contracting Parties, *Belgian Family Allowances (Allocations Familiales)*, G/32 – 1S/59 (Nov. 7, 1952), GATT B.I.S.D. 59.

41. *See id.* ¶ 8.

42. *See id.*

43. *See* CBAM: Questions and Answers, *supra* note 1.

44. *See* Anna Dias et al., *EU Border Carbon Adjustment and the WTO: Hand in Hand Towards Tackling Climate Change*, 15 GLOB. TRADE & CUSTOMS J. 15, 18 (2020).

45. *See* ERICH VRANES, TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW, AND LEGAL THEORY 229 (2009).

46. *See* CBAM: Questions and Answers, *supra* note 1.

change" and is thus not a violation of the national treatment or MFN obligations.[47]

IV. Alternative Paths to Implementation under Articles XX and XXI

Given the current challenges to certain provisions of the EU Renewable Energy Directive as unnecessary barriers to trade and the potential impact of the CBAM on WTO Member's export regimes, it is somewhat likely that the CBAM will receive pushback.[48] While this Note argues that the CBAM is likely not a violation of WTO rules, it may still be challenged, and the EU should be prepared to raise affirmative defenses. The two main defenses under the GATT are Article XX and Article XXI exceptions.[49] Under these Articles, an act or policy that would be in violation of the GATT can be legally employed; thus, they provide alternative paths to implement the CBAM. While a traditional analysis would suggest an Article XX defense for environmental measures, these have historically been unsuccessful.[50] This Note, therefore, provides a forward-looking argument suggesting that given the need for cooperation around climate-related trade measures and the growing climate-security nexus, bringing an Article XXI defense may be a new way forward.

A. *A Defense Under Article XX Exceptions*

Under the GATT, to date, the most common path for implementation of environmental measures is through the Article XX general exception. Under this exception, said act or policy must satisfy a two-tier test—to (1) fall within at least one of the general provisions of

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47. *See* Council of the European Union Press Release 263/22, Council Agrees on Carbon Border Adjustment Mechanism (CBAM) (Mar. 15, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/03/15/carbon-border-adjustment-mechanism-cbam-council-agrees-its-negotiating-mandate/.

48. *See* Andrew Mitchell & Christopher Tran, *The Consistency of the EU Renewable Energy Directive with the WTO Agreements* 4 (Georgetown Univ. L. Ctr., Working Paper No. 1485549, 2009); *see also* James Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism*, CATO INST., (Aug. 9, 2021), https://www.cato.org/briefing-paper/legal-issues-european-carbon-border-adjustment-mechanism.

49. *See* General Agreement on Tariffs and Trade 1994 arts. XX, XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

50. *See Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception*, PUB. CITIZEN (Aug. 19, 2015), https://www.citizen.org/wp-content/uploads/general-exception_4.pdf [hereinafter PUBLIC CITIZEN ARTICLE].

Article XX and (2) meet the chapeau of Article XX, which holds that the said act or policy must not be applied in a manner indicative of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[51]

The two general provisions most used for environmental measures are Article XX(b) ("necessary to protect human, animal, or plant life or health") and Article XX(g) ("relating to the conservation of exhaustible natural resources").[52] Given past cases, the CBAM could raise either or both exceptions. Complaints under Article XX(b) have been filed against policies to reduce the risk from asbestos and from accumulating waste tires, whereas Article XX(g) has seen complaints against policies aimed at conserving tuna, salmon, and other fish stock, as well as protecting dolphins, turtles, and clean air.[53] However, environmental arguments are often rejected by the WTO as failing the chapeau requirement. Only two cases have succeeded under Article XX, and both argue Article XX(g) defenses, though *US–Shrimp* only succeeded after the United States amended its policy.[54] So, while the Article XX exception may be a path forward, the sample size remains small and uncertain.

1. Article XX(b)—Necessary to Protect Human, Animal or Plant Life or Health

To succeed as a defense under the Article XX(b) exception, a policy must (1) fall within the range of policies intended to protect human, animal, and plant life, or health and (2) be "necessary" to fulfill that policy objective.[55] As this provision has been the less successful of the two, drawing a clear relationship between reducing carbon leakage and the reduction of human, animal, and plant risks is crucial.

The CBAM most likely falls within the range of policies included in the provision, as the mechanism is designed to protect human, animal, and plant life or health from the effects of climate change and less

51. *See* GATT 1994, art. XX.

52. *See id.* arts. XX(b), XX(g).

53. *See WTO Rules and Environmental Policies: GATT Exceptions*, WTO, https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Jan. 13, 2023) [hereinafter GATT Exceptions].

54. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) [hereinafter *EC—Asbestos*]; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (adopted Oct. 22, 2001) [hereinafter *US—Shrimp*].

55. *See* PUBLIC CITIZEN ARTICLE, s*upra* note 50.

ambitious climate policies abroad.[56] Similar to *Brazil–Retreaded Tyres,* where Brazil contended that the import ban on retreaded tires protected human life, health, and the environment by reducing environmental contamination, the EU could argue that the CBAM will protect human life, health, and the environment by reducing carbon emissions.[57] The Appellate Body in *Brazil–Retreaded Tyres* found that the ban to reduce the volume of tire waste was "apt to produce a material contribution to the achievement of its objective."[58] While ultimately finding the import ban unjustified under the chapeau, the Panel gave discretion to this evaluation by noting that the contributions of a measure to the objective of the policy can be observed "with the benefit of time," specifically citing "measures adopted in order to attenuate global warming and climate change."[59]

The second prong, the necessity test, is the more contentious part of the analysis. The Appellate Body has interpreted this prong to mean the "weighing and balancing" of a series of factors, including the contribution made by the specific measure to the policy objective, the importance of the common interests or values protected by the measure, and the impact of the measure on international trade.[60] As noted in *Korea–Beef,* "[t]he more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument."[61] In *EC–Asbestos*, the Appellate Body noted that the measures imposed by France to protect human health were "both vital and important in the highest degree," thus emphasizing the link between the CBAM and its aforementioned policy objectives will strengthen its "necessity" defense.[62] The fact that the CBAM is transparent in its assessment and based, in part, on international standards established through the Paris Agreement may weigh in its favor.[63]

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56. *See* CBAM: Questions and Answers, *supra* note 1.

57. *See* Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.99, WTO Doc. WT/DS332/R (adopted June 12, 2007) [hereinafter *Brazil—Retreaded Tyres Panel Report*].

58. *See* Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 151, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter *Brazil—Retreaded Tyres Appellate Body Report*].

59. *See id.*

60. *See* Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000) [hereinafter *Korea-Beef*].

61. *See id.* ¶ 162.

62. *See EC—Asbestos, supra* note 54, ¶ 172.

63. *See generally* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

The necessity test also considers whether there is a more WTO-compatible or a less trade-restrictive alternative to achieve the policy's objective.[64] While this is likely the most challenging part of the "necessary" requirement, the complaining party bears the burden of proof for showing that a "reasonably available" alternative exists.[65] The complaining party may argue, for example, that a carbon tax could achieve the same policy goal of mitigating climate change and carbon leakage. While the EU need not concern itself with outlining an infinite universe of less-restrictive alternatives, it may want to note and eliminate alternatives while presenting evidence for the Panel to weigh and balance in its *prima facie* case that the CBAM is "necessary."[66] Otherwise, the EU may later demonstrate that the alternative measure by the complainant does not achieve the required level of protection or is not "reasonably available" and thus not a genuine alternative.[67]

While "[i]n principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists," and in theory, the CBAM is responding to said risks associated with changing environmental patterns, Article XX affirmative defenses are often unsuccessful.[68] So, if the EU does raise this defense, this Note recommends it focus on highlighting the genuine relationship of ends and means between the objective pursued and the measure implemented. While other goals may be considered, such as creating an equal playing field between imports and domestic like products, it will be crucial that the focus remains on the protection of human, animal, and plant life or health. Further, "[m]easures specifically designed to avoid the generation of further risk, thereby contributing to the reduction of exposure to the risk," fall within the range of policies intended for Article XX(b).[69] This could also sway in favor of the CBAM, given recent studies finding that children today will face up to seven times more extreme weather patterns than their grandparents.[70] The CBAM is reducing the generation of

64. *See EC—Asbestos*, *supra* note 54, ¶ 172–74; *see also Korea-Beef*, *supra* note 60, ¶ 180.

65. *See* Appellate Body Report, *United States—Measures Affecting Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306–11, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005) [hereinafter *US—Gambling*].

66. *See id.* ¶¶ 308, 310.

67. *See id.* ¶ 311.

68. *See* Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.186, WTO Doc. WT/DS135/R (adopted Sept. 18, 2000).

69. *See Brazil—Retreaded Tyres Panel Report, supra* note 57, ¶ 7.98.

70. *See* Wim Thiery et al., *Intergenerational Inequities in Exposure to Climate Extremes*, 374 SCIENCE 158, 158 (2021).

future risk by encouraging non-EU producers to lower their emissions and green their production mechanisms.

2. Article XX(g)—Conservation of Exhaustible Natural Resources

The EU may raise a defense under Article XX(g), "the conservation of exhaustible natural resources," given the CBAM's goal of conserving the current climate and mitigating future damage to the planet.[71] The EU would need to show a "close and genuine relationship of means and ends" between the CBAM's procedures and the goal it is trying to achieve.[72] To succeed as a defense under this exception, a policy must (1) relate to the conservation of exhaustible natural resources and (2) be applied in conjunction with restrictions on domestic production or consumption—also known as the even-handedness requirement. The CBAM's structure, transparency, and reliance, in part, on international standards are all favorable in raising this defense.

As seen in *US–Shrimp*, the Appellate Body pays close attention to the structure of the measure in question to ensure that it is "fairly narrowly focused" and not a blanket provision, which is the first prong.[73] The CBAM is narrowly focused. Reducing carbon leakage and encouraging greener climate policies abroad are means to achieving the goals set out in the European Green Deal—a fifty-five percent reduction in carbon emissions compared to 1990 by 2030 and a climate-neutral continent by 2050.[74] The CBAM is not a sweeping policy applied to all importers but, instead, a measure tailored to equalize the price of carbon between domestic products and imports.[75] An importer will only need to purchase certificates if they have not already paid a price for carbon in a third country akin to what would have been paid if the good was produced under the EU's carbon pricing rules.

This CBAM structure is also an asset when evaluating it under the even-handedness requirement. This second prong is not interpreted as identical treatment between domestic and imported products but instead requires that the implemented measures on domestic and imported goods work together to conserve exhaustible natural

71. *See* WTO, ANALYTICAL INDEX OF THE GATT: ARTICLE XX - GENERAL EXCEPTIONS, 583–85, https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm.

72. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 136, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *US—Shrimp 1998 Appellate Body Report*].

73. *See id.* ¶ 138.

74. *See* CBAM: Questions and Answers, *supra* note 1.

75. *See id.*

resources.[76] The CBAM is even-handed in applying carbon pricing to imported goods, which is already implemented on domestic goods. EU carbon pricing regulations and the CBAM will work together to raise global climate ambitions and reduce carbon leakage.

One of the key ambiguities about Article XX(g) is whether there is a jurisdictional limit to conservation efforts—that is, whether the measures that target conservation must be within the national boundaries of the WTO Member implementing them, or could the measures be applied unilaterally to conservation beyond its borders? While the Appellate Body has not fully ruled on the extraterritorial application of the provision, *US–Shrimp* provides some guidance.[77] The Appellate Body focused on the importance of bilateral and multilateral action to protect natural resources along with the explicit recognition of sustainable development in the preamble to the WTO Agreement to find that migration of turtles in U.S. waters and beyond could still be considered "exhaustible natural resources" under Article XX(g).[78] Further, in *US–Gasoline,* the Appellate Body held that the United States' policy regulating the composition and emissions effects of gasoline to reduce air pollution was "primarily aimed at the conservation of exhaustible natural resources" under Article XX(g) despite clean air having no jurisdictional limit.[79] While neither ruling constitutes an implied jurisdictional limitation to the provision, the reasoning is valuable in constructing a defense under Article XX(g).

3. Article XX—Chapeau

The most challenging part of an Article XX defense will be satisfying the introductory clause of Article XX, also known as the chapeau.[80] The twin conditions under the chapeau are to ensure that measures adopted by WTO Members do not constitute a "means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."[81] *US–Gasoline* further clarified that these two conditions should be read as imparting meaning to one another and go hand-in-hand in analysis.[82] The purpose of the chapeau is to allow WTO

76. *See* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 21, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996) [hereinafter *US—Gasoline*].

77. *See* Sophocles Kitharidis, *The Unknown Territories of the National Security Exception: The Importance and Interpretation of Art XXI of the GATT*, 21 AUSTL. INT'L L.J. 79, 83 (2014).

78. *See US—Shrimp 1998 Appellate Body Report*, *supra* note 72, ¶ 131.

79. *See US—Gasoline*, *supra* note 76, at 14.

80. *See* GATT Exceptions, *supra* note 53.

81. *See id.*

82. *See US—Gasoline*, *supra* note 76, at 25.

Members to implement measures that would otherwise constitute a violation of WTO rules, but the chapeau also offers protection against abuse or misuse of the exception.[83] It provides a final balancing test between the Member invoking the exception and other WTO Members.[84]

The EU will need to heavily consider these requirements because only two environmental cases, *EC–Asbestos* and *US–Shrimp*, have successfully passed the scrutiny of the chapeau, and thus, the Article XX general exception.[85] The chapeau analysis is performed in relation to the objective of the measure and assesses whether the reasons given for the discrimination bears a rational connection to its objective. The discriminatory measures employed by the WTO Member must, therefore, be sufficiently rationally related to the objective of the measure itself to not constitute an arbitrary, unjustifiable, or disguised restriction on international trade.[86] The Appellate Body has specified that the Article XX(a)-(j) exceptions are "limited and conditional" on compliance with the chapeau.[87] Thus, noting that even if a measure is not shown to have a less restrictive alternative under the "necessary" test of Article XX(b), another examination of these considerations will take place under the chapeau.

A key consideration for the CBAM is to ensure that the EU has made sufficient efforts to negotiate with trading partners before imposing the measure.[88] While attempts to negotiate a multilateral agreement are not a prerequisite for justification under Article XX, the Appellate Body acknowledges that it is strongly preferred. This was a defining fact affecting the outcome of *US–Gasoline* as opposed to that of *US–Shrimp*. In *US–Gasoline*, the Appellate Body noted that the United States did not make sufficient efforts to negotiate a potentially mitigating agreement with Brazil or Venezuela.[89] On the other hand, in *US–Shrimp,* the United States made good faith efforts to negotiate an international agreement with other WTO Members, including the complainant.[90] While the United States had to amend its policy as it lost its first case, upon amendment, it successfully argued against Malaysia's compliance

83. *See* GATT Exceptions, *supra* note 53.
84. *See Brazil—Retreaded Tyres Appellate Body Report, supra* note 58, ¶ 29.
85. *See EC—Asbestos*, *supra* note 54*; US—Shrimp*, *supra* note 54.
86. *See* GATT Exceptions, *supra* note 53.
87. *See US—Shrimp 1998 Appellate Body Report*, *supra* note 72, ¶ 157.
88. *See id.* ¶ 166.
89. *See US—Gasoline*, *supra* note 76, 27–28.
90. *See US—Shrimp*, *supra* note 54, ¶ 134.

claim under Article XX.[91] The Appellate Body found that given said multilateral approach and good faith efforts, the measure was not applied in an unjustifiable or arbitrary manner despite treating WTO Members differently.[92] The Appellate Body is evidently looking for strong engagement with trading partners.[93]

This multilateral approach aligns with the CBAM's goal of preventing carbon leakage along with the ambitious climate measures of the European Green Deal. Mitigating climate change and lowering emissions levels will require international cooperation in addition to trade agreements. Group of 20 Finance Ministers have emphasized the need for increased international cooperation around carbon pricing mechanisms.[94] Between the initial proposal in July 2021 and the European Parliament reaching a provisional agreement in December 2022, the CBAM was heavily negotiated, resulting in many changes to its governance.[95] These changes included creating a centralized registry of CBAM importers, establishing a minimum value threshold of less than €150 for exemption from CBAM obligations to reduce administrative costs, and launching the "climate club," an alliance of countries with carbon pricing instruments.[96] Furthermore, the EU's action is based on international standards and climate law under the Paris Agreement.[97]

Lastly, for the EU to receive a favorable judgment about whether its measures are arbitrary or unjustifiable, the EU should emphasize that the CBAM is grounded in the assessment of carbon emissions for specific products and not a holistic assessment of the adequacy of the country's emissions levels. While the two often align, they should not be confused. The mechanism should not impose a set of rigid requirements to force other WTO Members to adopt identical regulations. Thus, the CBAM must make sure it focuses on the carbon emissions of specific products and not the country's GHG emissions reduction mechanisms, carbon pricing, or lack thereof.

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91. *See id.* ¶¶ 123–34.

92. *Id.*

93. *Id.* ¶¶ 123, 134.

94. *See* David Lawder, *G20 Recognizes Carbon Pricing as Climate Change Tool for First Time*, REUTERS (July 10, 2021), https://www.reuters.com/business/sustainable-business/g20-recognizes-carbon-pricing-climate-change-tool-first-time-2021-07-10/; Leslie Hook & Kristen Talman, *G20 Ministers Endorse Carbon Pricing to Help Tackle Climate Change*, FIN. TIMES (July 11, 2021), https://www.ft.com/content/9cd74b8f-4d6c-4cf8-a249-87c0acb1a828.

95. *See* CBAM Provisional Agreement Announcement, *supra* note 8.

96. *See* CBAM: Questions and Answers, *supra* note 1; Simões, *supra* note 18.

97. *See generally* Paris Agreement, *supra* note 63.

4. Issues with Article XX Exceptions

As trade and climate issues become increasingly intertwined, the WTO has an opportunity to strengthen its role as a forum of coordination. To do so, climate-related trade policies must become sources of cooperation rather than friction, and negotiation between Member States, rather than litigation, must be spearheaded by the WTO and Appellate Body. However, Article XX general exceptions that relate to environmental protection often fall short of the necessary coordination between trade and climate.

As stated above, of the forty-eight attempts to use the Article XX exception to justify domestic measures by a WTO Member, only two cases have succeeded.[98] A recent study by *Public Citizen* notes that of these forty-eight cases invoking the general exception, a tribunal deemed the defense relevant in forty of the cases, and of these forty, thirty-eight failed to satisfy the threshold tests.[99] Moreover, nine cases did not meet the subject matter scope requirement, meaning that the tribunal did not find that measures sufficiently accounted for the protection of human health.[100] Seventeen cases did not meet the "necessary" or "related to" thresholds, and twelve cases failed the chapeau, and thus, were found to be arbitrary or unjustifiably discriminatory.[101] While these findings are concerning, given the urgency of a global climate change response, the low success rate of the general exceptions may be more symptomatic of issues in the WTO dispute settlement system. While affirmative defenses using Article XX are unsuccessful ninety-six percent of the time, respondents in all WTO cases are unsuccessful ninety-one percent of the time, highlighting a potential imbalance of the WTO Dispute Settlement Body (DSB).[102]

There has been recent pressure to reform and rethink the general exception regime of the WTO.[103] With the current shutdown of the Appellate Body and skepticism of the DSB at a high, urgent innovation is needed, and reforming the general exceptions of the WTO may further help to rebuild trust in the system.

98. *See* DANIEL RANGEL, PUBLIC CITIZEN'S GLOBAL TRADE WATCH, WTO GENERAL EXCEPTIONS: TRADE LAW'S FAULTY IVORY TOWER 24 (2022), https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper_-1.pdf.

99. *See id.*

100. *See id.* at 5.

101. *See id.*

102. *See id.*

103. *See id.* at 4.

A key push has been to limit the discretion of the adjudicating bodies, beginning with the Article XX chapeau.[104] The chapeau has created a quasi-unattainable threshold with the Appellate Body essentially reserving itself the right to rule on a case-by-case basis—"[t]he location of the line of the equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[105] While the chapeau evaluates arbitrary restrictions on trade, a more explicit public policy balancing test is needed. This would allow the adjudicator to weigh the alleged discrimination against domestic public policies at play, such as a country's climate-neutral goals or specific environmental concerns. Addressing the interconnectedness of international trade interests with public policy interests, including the environment, is a crucial first step to move from friction to cooperation and rebuild trust in the WTO DSB.

B. *A Defense Under the Article XXI National Security Exception*

The EU should also consider an affirmative defense under Article XXI, also known as the national security exception. As the U.N. and states increasingly recognize climate change as a national security threat, an Article XXI defense for the CBAM is more feasible.[106] Climate security is the notion that climate change destabilizes international peace by intensifying existing conflicts and acting as a catalyst for new conflicts.[107] Indeed, climate change acts as a stressor for environmental, social, and economic issues with direct impacts on national security. As the window for action on shared threats, such as climate change, narrows, climate security is becoming a central part of states' national security strategies.[108]

For much of its history, Article XXI was rarely invoked, and thus, led to inconclusive results.[109] It was viewed as inherently deferential to the state to strike a balance between state sovereignty and free trade.[110] The United States and other countries therefore took the view that the provisions of

104. *See id.* at 7.

105. *See US—Shrimp 1998 Appellate Body Report*, *supra* note 72, ¶ 159.

106. *See* Samantha Franks, *Exploring Climate Security to Article XXI of the GATT*, 20 WASH. U. GLOB. STUD. L. REV. 523, 530–31 (2021); *see also* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (2022).

107. *See* Mark Nevitt, *On Environmental Law, Climate Change, & National Security Law*, 44 HARV. ENV'T. L. REV. 321, 321 (2020).

108. *See, e.g.*, THE WHITE HOUSE, *supra* note 106.

109. *See* Franks, *supra* note 106, at 526.

110. *See* Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L. L. 365, 389–96 (2003).

Article XXI were self-judging. While an argument under the national security exception is plausible, the limited jurisprudence under this exception leaves several ambiguities and uncertainties. However, weighing climate change as a threat multiplier against international trade may lead to a more expansive view of the Article XXI national security exception.

This section analyzes the Article XXI national security defense for the CBAM. In this context, paragraphs XXI(b)(iii), recognizing the importance of national security interests, and XXI(c), recognizing the supremacy of the U.N. Charter for maintaining international peace and security, are most relevant. This Note evaluates each in turn.

1. The EU Carbon Border Adjustment Mechanism as Protection of an Essential Security Interest

Article XXI(b)(iii) states that "[n]othing in the agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interest . . . taken in time of war or other emergency in international relations."[111] "Essential security interest" was defined by the WTO in the 2019 Panel Report for *Russia–Transit* as applying only to direct threats to the invoking state and any actions taken by said state related to that emergency.[112]

In response to Ukraine alleging that Russia's trade measures were a violation of treaty commitments, Russia argued that the issue concerned serious national security matters and that "[t]he WTO is not in a position to determine what essential security interests of a Member are."[113] This self-judging interpretation stemmed from the "which [the WTO Member] considers necessary" wording of the exception.[114] Essentially, Russia claimed that there are certain levels of a subject matter that can only be fully understood by the Member concerned. However, it was unclear whether WTO Members had the sole discretion to determine whether a given situation met the national security interest requirements, or if this self-judging provision included a good faith standard subject to judicial review.[115]

111. *See* GATT 1994, art. XXI(b)(iii).

112. *See* Panel Report, *Russia–Measures Concerning Traffic in Transit*, ¶¶ 7.130–.135, WTO Doc. WT/DS512/R, (adopted Apr. 5, 2019). [hereinafter *Russia–Transit*].

113. *See id.* ¶ 7.28.

114. *See* GATT 1994, art. XXI(b)(iii).

115. *See* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 704 (2011).

The Panel ruled that it did have jurisdiction to review the invocation of Article XXI(b)(iii) as within the terms of reference of the Dispute Settlement Understanding, and thus, the provision was not self-judging.[116] It further concluded that invoking Article XXI(b)(iii) does not shield the respondent from all scrutiny: "for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."[117] Since *Russia–Transit*, a handful of Article XXI security exception arguments have been made, and only one has reached a panel decision.[118] The climate security crisis is a topic yet to be addressed.

To invoke an Article XXI(b)(iii) defense, the EU would first need to articulate that the CBAM's goal of mitigating climate change is an essential security interest. In other words, the EU would need to show that climate change is an emergency impacting its domestic security interests. In fact, the security "hook" to climate change is becoming increasingly common in national and international discourse. A recent joint report by the Office of the Director of National Intelligence concludes that with intensifying effects of climate change and the unlikelihood of meeting the Paris Agreement goals, climate change "will increasingly exacerbate risks to US national security interests as the physical impacts increase and geopolitical tensions mount about how to respond to the challenge."[119] Ambassador Linda Thomas-Greenfield also emphasized in a recent address that "climate change is not only an environmental threat. It is also a national security threat and a health security threat. Climate change exacerbates existing conflicts and increases the chances of new ones."[120]

The European Parliament has issued similar warnings by adopting a Climate Change and Defense Roadmap, linking climate change with

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116. *See Russia—Transit*, *supra* note 112, ¶ 7.100.

117. *See id.* ¶ 7.101.

118. *See* Request for Consultations by the European Union, *US–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/1 (June 6, 2018); *see also* Panel Report, *Saudi Arabia–Measures Concerning the Protection of Intellectual Property*, WTO Doc. WT/DS567/R (adopted June 16, 2020); Request for Consultations by the Republic of Korea, *Japan–Measures Related to the Exportation of Products and Technology to Korea*, WTO Doc. WT/DS590/1 (Sept. 16, 2019).

119. *See* NAT'L INTEL. COUNCIL, NIC-NIE-2021-10030-A, NATIONAL INTELLIGENCE ESTIMATE: CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO US NATIONAL SECURITY THROUGH 2040, at i (2021).

120. *See* Linda Thomas-Greenfield, Ambassador, U.S. Rep. to the U.N., Remarks at a U.N. Security Council Arria-Formula Meeting on Climate Finance for Sustaining Peace and Security (Mar. 9, 2022), https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-arria-formula-meeting-on-climate-finance-for-sustaining-peace-and-security/.

state fragility among other considerations.[121] It warns that international actors should "[e]xpand their conflict prevention tools, including defence-related instruments, and reassess existing policies," considering increasing climate change threats to global stability and security.[122] On an international scale, the U.N. Security Council attempted to pass a resolution framing climate change as a "threat to international peace and security," however the resolution failed due to a veto by Russia.[123] As jurisprudence around Article XXI is minimal, it remains unclear how broad of a definition can be applied to "security interests"; however, with a growing consensus that threats to water and food security, the allocation of resources, critical infrastructure, and sea level rise all stem from climate change and could result in international conflicts, a security "hook" is increasingly persuasive.[124]

Second, the EU will need to clarify that it finds itself in a time of crisis in international relations. The EU needs to "articulate its essential security interests with greater specificity" to qualify the CBAM as essential for an "emergency in international relations."[125] An emergency in international relations can be interpreted as "armed conflict," "latent armed conflict," "heightened tension or crisis," or "general instability engulfing or surrounding a state."[126] In *Russia–Transit*, the Panel heavily considered the fact that the U.N. General Assembly recognized the nature of the situation between Russia and Ukraine as involving an armed conflict.[127] While weight was placed on the military aspect of the issue, it is time for an updated definition, given that the U.N. General Assembly recently recognized the right to a clean, healthy, and sustainable environment as a human right, and the Secretary-General has

121. *See The EU's Climate Change and Defence Roadmap*, EURO. UNION (Mar. 31, 2022), https://www.eeas.europa.eu/eeas/eu-climate-change-and-defence-roadmap_en.

122. *See* Elena Lazarou & Linda Tothava, *Climate Change Considerations for EU Security and Defence Policy*, EURO. PARLIAMENT RSCH. SERV., 1 (Jun. 2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729467/EPRS_BRI(2022)729467_EN.pdf.

123. *See Climate Change and Security: Vote on a Resolution*, SEC. COUNCIL REP. (Dec. 11, 2021), https://www.securitycouncilreport.org/whatsinblue/2021/12/climate-change-and-security-vote-on-a-resolution.php; Syed Ali Akhtar & Pranav Ganesan, *The U.N.Security Council and Climate Security: Reflections on the Unsuccessful Draft Resolution*, OPINIOJURIS (Feb. 14, 2022).

124. *See* Mark A. Levy, *Is the Environment a National Security Issue?*, 20 INT'L SEC. 35, 36 (Fall 1995); *see generally* Jessica Tuchman Mathews, *Redefining Security*, 68 FOREIGN AFFS. 162 (1989).

125. *See Russia—Transit*, *supra* note 112, ¶¶ 7.134–35; *see also* GATT, art. XXI(b)(iii).

126. *See* Chao Wang, *Invocation of National Security Exceptions Under GATT Article XXI: Jurisdiction to Review and Standard of Review*, 18 CHINESE J. INT'L. L. 695, 706 (2019).

127. *See Russia—Transit*, *supra* note 112, ¶ 7.122.

repeatedly classified the current situation as a climate crisis.[128] While too expansive an interpretation of the national security definition also has its risks, especially if expanded to digital trade among others, a broader interpretation of "national security" and "emergencies in international relations" under Article XXI to include climate considerations is in the interest of the WTO. So, a WTO challenge to the CBAM may provide an opportunity for the WTO to reframe its exceptions, and its Members to renegotiate, additional considerations besides actual war or military conflict that should be included in the concept of emergency in international relations. As a threat in itself, given the likelihood of increased climate emergencies (e.g., floods and fires), as well as a threat multiplier for other issues of peace and security (e.g., food security, critical infrastructure, and forced displacement), the geopolitical ripple effects of climate change are urgent and vast.

2. Supremacy of the U.N. Charter

Last, Article XXI(c) states "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligation under the United Nations Charter for the maintenance of international peace and security."[129] In other words, if a country were to successfully argue that the GATT and WTO rules were preventing it from upholding its obligations under the U.N. Charter, the U.N. Charter would receive priority. This obligation is also reaffirmed in Article 103 of the U.N. Charter.[130] While the U.N. Charter does not directly mention climate change, it does state that the U.N. will promote "solutions of international economic, social, health, and related problems."[131] Climate change impacts the economy through supply chain disruptions and exacerbates social problems through forced migration and health problems due to lack of clean air, water, and the current food security crisis.[132] The CBAM could be a

128. *See generally* G.A. Res. A/RES/76/300 (July 26, 2022); U.N. Secretary-General, Secretary-General's Message on the Launch of the United Nations Environment Programme Adaption Gap Report (Nov. 3, 2022), https://www.un.org/sg/en/content/sg/statement/2022-11-03/secretary-generals-message-the-launch-of-the-united-nations-environment-programme-adaptation-gap-report.

129. *See* GATT 1994, art. XXI(c).

130. *See* U.N. Charter, art. 103; *see also* Sophocles Kitharidis, *The Power of Article 103 of the U.N. Charter on Treaty Obligations*, 20 J. INT'L PEACEKEEPING 111, 113 (2016).

131. *See* U.N. Charter, art. 55(b).

132. *See* Elizabeth Elkin et al., *Mississippi River Drought Imperils Trade on Key US Waterways*, BLOOMBERG (Oct. 6, 2022), https://www.bloomberg.com/news/articles/2022-10-06/mississippi-river-drought-imperils-trade-on-vital-us-waterway?leadSource=uverify%20wall; Philip Oltermann, *Rhine Water Levels Fall to New Low as Germany's Drought Hits Shipping*, THE GUARDIAN (Aug. 12,

solution, at least in part, to these issues similar to the U.N.'s Sustainable Development Goals (SDGs) of 2030.[133] While the SDGs are not legally binding, they add to the urgency of climate issues and the need for accountability by the global community.

However, ambiguities remain and are important areas for further research. The uncertainty around this defense mainly stems from the fact that the individual EU Members are independent parties to the U.N. Charter, whereas the EU, as a political entity, is the legislative body behind the CBAM.[134] The EU, as opposed to its Member States, has a different status at the U.N. Indeed, the EU has had permanent observer status since 1974, it has been legally bound by the U.N. Charter since 2009, and it received enhanced observer status and participation rights at the U.N. General Assembly as of 2011.[135] While these rights are often likened to full Member rights, the EU does not have the right to vote.[136] Thus, due to this difference in status, the ambiguity depends on whether it is the EU or individual Member States that are being challenged for violations of the WTO and thus the party claiming a defense under XXI(c) and invoking its obligations under the U.N. Charter.

V. Conclusion: A Path Forward for the EU Carbon Border Adjustment Mechanism

The CBAM has already received and is likely to receive more international attention. For example, producers from China, Brazil, and India have argued that the CBAM would affect their supply chain with the EU, the United States has stated that it should be a measure of last resort, and South Korea has spoken out opposing the CBAM, while

2022), https://www.theguardian.com/world/2022/aug/12/germany-drought-rhine-water-levels-new-low.

133. *See generally* G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).

134. *See generally* U.N. Charter.

135. *See* Carla Monteleone, *The United Nations and the European Union*, Oxford Rsch. Encyc. (June 25, 2019), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1091; *Why Do We Need the Charter?*, Eur. Comm'n, https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en#:~:text=The%20Charter%20has%20become%20legally,of%20Lisbon%2C%20in%20December%202009; United Nations Regional Information Centre for Western Europe (UNRIC), How the European Union and the United Nations Cooperate 5 (2007), https://unric.org/en/wp-content/uploads/sites/15/2021/02/Leporello_EU-VN_e.pdf.

136. UNRIC, *supra* note 135.

Japan, on the other hand, supports it.[137] Therefore, under the likely assumption that it will be challenged, the EU should be prepared to raise affirmative defenses under Article XX and/or XXI.

While Article XX is the most common path for environmental measures, successful defenses are historically very rare. Only two cases have ever succeeded, and the provision needs reform to be more inclusive of public policy issues. If the EU were to pursue this path, this Note recommends prioritizing the relationship between the structure of the CBAM and its objective of reducing carbon leakage, emphasizing the multilateral negotiation that took place before reaching the provisional agreement, and highlighting the CBAM's transparency and its foundations in international standards established by the Paris Agreement.

An Article XXI national security defense, on the other hand, is increasingly plausible. Climate change is causing issues in food security, supply chains, public health, critical infrastructure, and forced migration, among others, all impacting national security. Thus, as the security threats of climate change become increasingly palpable, both the international community and domestic policies are focusing on the climate-security nexus.[138] The WTO may therefore be more likely to interpret climate change as an "emergency in international relations" and consider actions by Members in the prevention or mitigation of climate change as "national security" measures under GATT Article XXI. If the EU were to pursue a national security defense, it should emphasize the threat-multiplying nature of climate change along with the growing international recognition of climate security issues by the U.N. General Assembly. This would be new territory for WTO jurisprudence, and the EU should be prepared for this opportunity.

Because the national security exception is not self-judging, reform must be led by the WTO while still accounting for the needs and goals of its Members and the climate crisis. To sustain the openness of international trade, the WTO must facilitate negotiations among Members rather than relying on litigation as a method of dispute resolution.

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137. *See* GARY CLYDE HUFBAUER ET AL., PETERSON INSTITUTE FOR INT'L ECON. (PIIE), CAN EU CARBON BORDER ADJUSTMENT MEASURES PROPEL WTO CLIMATE TALKS? (2021); Delegation of the European Union to Japan Press Release 246/2022, European Green Deal: Agreement Reached on the Carbon Border Adjustment Mechanism (CBAM) (Dec. 13, 2022); SAUSH & SISKOS, *supra* note 26.

138. *See generally* Press Release, United Nations, With Climate Crisis Generating Growing Threats to Global Peace, Security Council Must Ramp Up Efforts, Lessen Risk of Conflicts, Speakers Stress in Open Debate, U.N. Press Release SC/15318 (June 13, 2023).

Broadening the scope of national security definitions may facilitate negotiations among WTO Members toward a general agreement on carbon abatement policies, thereby reducing litigation and appealing into the void—all with positive effects on WTO integrity and buy-in to the Appellate Body. So, while the CBAM has sparked disagreement among WTO Members, it has also created the perfect climate for the WTO to redefine environmental-trade relations and position itself at the forefront of this field for the coming decades.