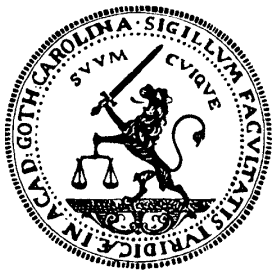

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The WTO permissibility of border trade measures in climate change mitigation

Master thesis
30 credits

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Contents

Summary

The purpose of this thesis is to examine the permissibility of border trade measures undertaken with a climate change rationale under the current regulatory environment of the WTO. Three interconnected angles regarding such permissibility have been examined. An overview was made of the current WTO regulation with regards to its potential impact on climate motivated border measures. This section found that WTO law in several cases leave potential room for approval for border measures undertaken with an environmental purpose such as climate change. However, it was also found that considerable uncertainty still remained regarding hard application of many of these rules. The very sizable difference in scale between previous WTO case law with environmental aspects when compared to the potentially enormous trade impact of permissible climate border measures also made caution necessary when drawing conclusions from them. Article XX of the GATT stating the general exceptions in that agreement was examined in some detail due to its potentially great importance in establishing the permissibility of any border measure undertaken with a climate change purpose. Though contingent on several crucial factors such as integrity of purpose, implementational details, the exact nature of potential discriminatory effect and WTO jurisprudence, it was found that Article XX recourse for climate motivated border measures can not be discounted ex ante.

Building on the knowledge gained in the first chapter, the second chapter seeks to examine the permissibility of some of the most popularly discussed border climate measures when confronted with WTO law. They were overall found to be problematic to square with WTO regulation in any clear sense. Border tax adjustments is arguably found to be the front-runner for permissibility although it may encounter serious problems due to the nefariously complex process of trying to measure ‘upstream’ carbon which may become necessary to implement a fair adjustment.

The last chapter, building on the previous two, is a response to the likelihood that the ultimate permissibility of climate border measures will come to rely on future policy developments. Thus, a number of the most likely WTO policy options with regards to determining permissibility are briefly examined with preference for a multilaterally crafted agreement.

Svensk sammanfattning

Syftet med denna uppsats är att undersöka lovligheten för handelsåtgärder vid gränsen, utförda som ett led i bekämpandet av klimatförändringar, mot bakgrund av rådande WTO-rätt. Tre sammanknutna infallsvinklar har undersökts i syfte att undersöka denna lovlighet. Inledningsvis har en översikt över rådande WTO-rätt genomförts för att utröna dess potentialla inverkan på klimatmotiverade handelsåtgärder vid gränsen. Kapitlet fann att WTO-rätten lämnade visst utrymme för åtgärder av detta slag. Dock befanns också en stor del osäkerhet alltjämt föreligga vad gäller faktisk applicering av reglerna i detta sammanhang. De WTO fall som anförs på området med miljömässigt relevanta aspekter har alla det gemensamt att de berör jämförelsevis mindre finansiella intressen och har betydligt mindre potential för inverkan på den skala som handelsrestriktioner mot bakgrund av klimatförändringsåtgärder kan medföra. Artikel XX i GATT som reglerar de allmänna undantagen från överenskommelsen ägnades en del detaljerad undersökning till följd av dess potentiellt mycket viktiga roll vid utrönandet av lovligheten inom detta område. Även om legitimiteten för en åtgärd vad gäller denna artikel till sist är beroende av viktiga faktorer som integritet i syfte, implementeringsspecifikationer, diskriminerande effekt och övrig jurisprudens inom WTO befanns det inte vara fallet att Artikel XX kan uteslutas som en möjlig väg till lovlighet för klimatmotiverade handelsåtgärder.

Mot bakgrund av kunskapen införskaffad i det första kapitlet undersökte nästföljande kapitel lovligheten i några av de oftast anförda alternativen vad gäller dessa handelsåtgärder vid gränsen. Överlag befanns det problematiskt att få åtgärderna att stämma överens med WTO-rätt i någon enklare bemärkelse. Gränsskattejusteringar (eng. Border Tax Adjustments) kan lyftas fram som ett något mer trovärdigt alternativ än övriga även om även denna riskerar betydande svårigheter vid en eventuell dispyt till följd av den potentiella nödvändigheten i att bedöma utländska produkters utsläppsegenskaper.

Det sista kapitlet, som i sin tur bygger på de föregående två, är ett resultat av den trolighet som ligger i att den slutliga lovligheten för klimatmotiverade handelsåtgärder vid gränsen till stor del kommer att vila i händerna på framtida policy-utvecklingar. Som ett led i detta

undersöks ett flertal troliga policy-alternativ vad gäller fastställande av lovligheten där ett multilateralt skapat miljöavtal framstår som den mest eftersträvansvärda handlingsåtgärden.

Preface

I want to extend my sincere thanks to Lars Roth, currently at the Embassy of Sweden in Washington DC. Our great discussions on trade and environment policy as well as our collaboration during my time at the embassy deepened my interest in the subject and ultimately led me to feel almost compelled to write my thesis on this area.

Very sincere thanks also go out to Dr. Rachel Wynberg at the Environmental Evaluation Unit in Cape Town, South Africa for her unwavering belief in my ability to complete this thesis and her invaluable advice and experience.

This effort in many ways also signal the culmination of a journey that I have traveled these student years. It is with deep gratitude and affection I conclude that they will forever be years I could not have spent more wisely.

Stockholm, April 2010

Johan Westberg

Abbreviations

ASCM	Agreement on Subsidies and Countervailing Measures
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MEA	Multilateral Environmental Agreement
TBT	Agreement on Technical Barriers to Trade
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organization

1 Introduction

1.1 Presentation of the subject and its significance

As scientific consensus centers[1] around the reality of human activity bringing with it adverse impact on the environment through climate change, a host of problematic areas mar the ability to put in to place solutions to this relatively newly discovered challenge. One such problem, and a major one it might be argued, is that many of the global institutions, societies and tools for economic growth that have been developed are not effectively equipped to deal with, let alone encompass, the holistic complexity presented to them by the spectre of climate change. This is as of yet understandable, as they generally stem from a time when it was not yet a known issue. [2]

Perhaps nowhere else is this inability as apparent as in the field of international trade. In a world where what was once an economic externality must now be priced and integrated into costs, the advent of serious climate change mitigation efforts signals the necessity of a landmark shift in the way trade regulation is utilized due to the potentially asymmetric nature of these mitigation efforts as a result of differing national responses. To understand how national efforts at alleviating climate change can be squared with the world trading system without causing unnecessary damage to the economic growth that trade allows has become one of the most important questions to answer.[3] Put simply, it is imperative to figure out who can do what with international trade regulation as it now stands in light of combating climate change to avoid trade conflict. In lieu of a global accord with hard emissions targets, it is not unlikely that uncertainty in this area might lead to a prolonged

[1] Climate change science is not an exact one and skepticism is by no means dead, Patrick Michaels of the Cato institute in his policy analysis entitled *Is the sky really falling? A review of recent global warming scare tactics*, provides a good overview of the most common skeptical arguments such as exaggeration of negative impacts.
[2] Howse and Eliason, 60.
[3] Zelli and Van Asselt, 79.

period of bitter trade-friction as nationally championed, environmentally motivated, efforts clash with current international trade regulation as being distorting trade measures.[4] In a nutshell, the uncertainty and inexperience in the current regulatory environment of the WTO and GATT on how to deal with such measures has become a cause for serious concern for countries willing to push forward with national climate change mitigation efforts. If national regulators remain unsure on whether competitiveness concerns can be alleviated through permissibility of market equalizing border measures, justified by climate change mitigation efforts, then national approaches to serious mitigation efforts will be severely hindered. Despite this current uncertainty on the regulatory landscape of the WTO, border measures are included in some[5] of the proposed and undertaken national climate change mitigation efforts in lack of global accord. Thus, it seems quite likely that the question of their permissibility under the current world trading system, as regulated primarily by WTO and GATT, will come to the forefront before long. This thesis therefore concerns itself with the permissibility of such border measures under the current world trading system

1.2 Problem formulation and research purpose

The general purpose of this thesis is to examine the permissibility of border measures undertaken with a climate change rationale under the current regulatory environment of the WTO. Specifically, the thesis will attempt to answer *what* WTO regulation will likely be affected, *how* some of the most popular border measures will be affected by such regulation and *where* the regulatory landscape of the WTO concerning climate change motivated border measures looks likely to be headed based on the findings concerning the current regulatory environment. In attempting to achieve its objectives, this thesis does assume rudimentary knowledge about the general function of the WTO.

[4] Stern (2008), 43.
[5] For example, the draft released on the 11th of May 2010 for the American Power Act, also known as the Kerry-Lieberman bill, included emissions allowance purchase requirements as a border measure.

1.3 Delimitations

In the first, descriptive, part space has generally been accorded to the relevant WTO rules in relation to their importance for the subject matter. In the second, prescriptive, part of the thesis the border climate measures covered have been chosen in accordance with their popularity and likely application in national climate change regulation. Perhaps there are more exotic border measure variants that are not mentioned, but I have generally found discussions in the literature and among practitioners' centering on rather similar types of measures when discussing border measures of this nature. In accessing other sources in the course of working on this thesis, I have not found any reason to change the prioritization made. Thus, to make an all-encompassing list of every possible border climate measure falls outside the scope of this thesis.

The choice made, I believe, well represent the climate measures typically most discussed when drafting national law in these matters.

The third part, being a future policy discussion of sorts, is delimited mainly by the avenues open to the WTO as an institution when discussing its future policy path. Action outside the WTO has been included however, in a few places where it was of obvious importance. For example, a discussion of the impact of a multilateral environmental agreement negotiated in the UN on the WTO has been included.

As a further clarifying note, it may be mentioned that the specific type of emissions control mechanism that a state chooses to use (i.e. cap-and-trade, carbon tax, fee and dividend etc.) does not generally affect the conclusions concerning border measures that the thesis focuses on. However, some discussions on border measures are of course strongly connected to certain types of mechanisms (such as the implications of border tax adjustments on a carbon tax or a border requirement to purchase emissions allowances under a cap and trade scheme).

1.4 Method, material and information

The printed sources used for this thesis have been literature, articles and academic papers. Some of the printed sources and many of the cases used I have been made aware of through discussions with past and current mentors in discussions ranging over the past year. For most others, more traditional research has been conducted.
All legal treaty texts and case law of the WTO (GATT, ASCM etc.), have been accessed through the internet homepages of the relevant institutions.
The division of this thesis into three parts, as expounded on below in the structure section, has necessitated differing methodological approaches. The first descriptive part falls generally under what is known as traditional legal-dogmatic. The second, prescriptive, part is characterized by comparative method. The third part, built upon the previous two, is characterized by de lege ferenda analysis with normative elements included. The three parts are not necessarily meant to be read as equal components with the first part written so as to constitute the core of the thesis.

The use of first hand sources has been prioritized when writing.

Appendixes have also been provided for easy cross-referencing to what is being said. Integrating whole case briefs directly into the text was found cumbersome and generally distracting from the points being made while holding back the pacing of the writing. However, short descriptions of the major cases are typically included to facilitate the flow of the text.

1.5 Structure

This thesis is divided into three parts.

The *first* part creates an overview and examination of applicable WTO and GATT regulations that may be cited in a trade dispute sparked over border climate change measures with the possibility for trade distorting effects. In other words, this overview section deals with what will in all likelihood come to be the most cited and relevant regulations in WTO and GATT when attempting to establish the permissibility of border measures with the potential for trade impact that are backed by a climate change rationale. The section will focus descriptively on the current function and status of the regulations to gain general understanding of how they work. This is done in order to use and relate to these working functions in the analysis conducted in subsequent chapters.

The *second* part examines how some of the most commonly discussed specific border trade measures with a climate change mitigation rationale behind their usage fall under the current WTO regulatory framework (explored in the first part). This section will apply the current WTO regulatory framework upon the proposed border measures that states seek to adopt as a part of climate change mitigation efforts.

The *third* part concerns itself with the likely paths WTO policy may take in determining permissibility for climate change motivated border trade measures, as seen from the current regulatory framework of the WTO. Put simply, the section will seek to determine some likely and realistic future paths for the WTO in attempting to square climate border measures with the current regulatory framework. This section will further build on the possibilities and limitations that we find in sections one and two.

Therefore,
The first part can be said to be *descriptive.*
The second part can be said to be *prescriptive.*
The third and final part can be said to be *analytical* and *predictive.*

2 The legal-technical aspect: introducing and outlining the WTO rules that determine the permissibility of climate motivated border measures

2.1 Introduction

Member countries of the WTO have broad possibilities when it comes to implementing different types of domestic environmental regulations.[6] This possibility is less wide however if and when these regulations have economic effects (such as trade effects) that go beyond the borders of the implementing country. As such, any implementation of, say, a multilateral environmental agreement or any execution of a domestic environmental policy with transborder economic effects have the potential to conflict with WTO rules between members.

One thing is important to keep in mind while reading this section. Due to WTO regulation being drafted long before climate change was a pressing concern for action, considerable uncertainty exists. Therefore, the *future usage* of the WTO provisions mentioned in this chapter that will eventually come to be applied on climate measures will most likely come to rest on future policy developments of some sort. This overview of the regulation as it currently stands will therefore also facilitate understanding of how such later actions may unfold. It is important to understand the WTO rules at work when examining the climate-trade intersection. WTO rules and case law that relate generally to environmental issues are relevant to the examination of climate change measures.[7] This part will therefore attempt to explain a number of WTO rules with such climate relevance. Relevance is here attributed in accordance with relevance for border trade measures undertaken with a climate change

[6] WTO-UNEP Trade and Climate Change Report (2009), 107.
[7] Ibid, 89.

rationale, in keeping with the purpose of this thesis. Several provisions of the GATT will be mentioned including the general prohibition against quantitative restrictions, the general non-discrimination principle (that consists of the Most Favoured Nation and National Treatment principles), and finally the general exceptions of the GATT which allows members some policy space with regards to environmental measures.

In short, the rules described in this section are the playing cards with which members may argue for the permissibility of their border measures undertaken with a climate change rationale. Therefore, understanding the meaning of them becomes important to play the "cards" wisely. It should be noted however, as pointed out by Palmer and Tarasofsky, that there is no rule of stare decisis in WTO adjudication.[8] This means disputes are decided on a case by case basis, and findings in one dispute do not necessarily govern later disputes. Still, both members and WTO courts may, and routinely do, look to past dispute outcomes for guidance in how to interpret WTO rules. Thus, past cases and past interpretations of WTO law are of importance to study if one seeks to understand likely paths within WTO dispute settlement.

The political factor should also be underlined. This thesis deals with WTO law and some of its technicalities, yet technical understanding of the law separated from a policy and political context in this area is hard. Trade between nations, much like climate change, is a multi-faceted affair. Bearing this other dimension in mind, the technical aspect of WTO rules must still be understood and examined carefully in order to gain knowledge of the spaces within which room for maneuvering exists.[9] Thus, the technical aspect is as essential as that of policy though they ultimately form a whole. This chapter aims to clarify this technical aspect somewhat by examining the WTO law that is pertinent to climate change motivated border measures. Put simply, this chapter will attempt to show the reader the deck of cards so as to facilitate understanding the subsequent chapter which will examine how members may choose to play them in justifying their border measures.

[8] Palmer and Tarasofsky, 7.
[9] Ibid, 49.

For clarity and as a go-to reminder of the bigger picture, this small schedule provides an overview of what GATT articles apply to what border measure and, where applicable, under which principle it can be subsumed:

DISCRIMINATORY BEHAVIOUR:

- *MOST FAVOURED NATION PRINCIPLE*
  - Origin discrimination — Article I.1
- *NATIONAL TREATMENT PRINCIPLE*
  - Internal taxes or charges on *products* — Article III:2
  - Regulations of sales on the internal *market* — Article III:4

EXCEPTIONS TO ORDINARY CUSTOMS DUTIES, EQUIVALENCY RULES

- Charges equivalent to domestic taxes (BTA:s) — Article II:2(a)
- "Other" duties and charges on (product) imports — Article II:1(b)

GENERAL PROHIBITION ON QUANTITATIVE RESTRICTIONS

- Import bans and other quantitative restrictions (quotas) — Article XI:1

2.2 Most Favoured Nation

Article I:1 of the GATT lays out the most favored nation principle, a fundamental and widely accepted part of WTO membership.[10] Put simply, it accords that the most favourable treatment to a product given by one member to another member, must be extended to all members. Article I:1 mentions that this principle extends to rules and formalities regarding exports and imports, customs duties and charges, and the measures covered by Article III:2 and III:4.[11] The principle then, has a broad area of application and clearly, depending on the circumstances, could be brought to bear on climate motivated border measures.[12] For the

[10] Pauwelyn, 32.
[11] WTO-UNEP Trade and Climate Change Report (2009), 106.
[12] Ibid, 162.

purposes of this thesis, two cases may illustrate and illuminate some important clarifications on the very wide applicability of this principle.

In the *Canada – Autos* case, the appellate body said that discrimination according to Article I:1 extends also to de facto discrimination, as opposed to only covering de jure discrimination. This means that even seemingly neutral policies that in effect still discriminate is to be covered by Article I:1.[13] Put simply, good intentions and seemingly wise *formulation* of policy may not be enough. It cannot be discriminatory in practice.[14]

In the famous *European Communities – Bananas* case it was clarified that the interpretation of the term "advantage" in the Article should be given a wide scope.[15] In this case, different rules had been put into place by The European Community regarding importation of bananas. The EC had given out export certificates in a discriminatory manner, in violation of the Most Favoured Nation principle. The EC:s attempt to justify it by pointing to competition policy was not succesful since the rules afforded an *advantage* to some members but not to others.[16]

2.3 National Treatment

Article III of the GATT states the principle of national treatment. It holds that imported products are to be treated no less favorably than like domestic products. Simply, a member shall not discriminate between its own and like foreign products (thus, giving them "national treatment".[17] This is a key discipline within the WTO and GATT and has been pointed out as particularly relevant in cases where climate change related regulation is applied differently to domestic and foreign producers.[18]

The broader purpose of Article III is to avoid protectionism through internal tax and regulatory messages.[19] The first sentence of Article III:2 tries to limit such behaviour being

[13] *Canada – Certain Measures Affecting the Automotive Industry*, Appellate Body Report, paragraph 78.
[14] Hufbauer et al., 46. Also see Green, 164.
[15] Ibid, 46.
[16] *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, Appellate Body Report, paragraphs 206-207.
[17] WTO-UNEP Trade and Climate Change Report (2009), 106. The principle of national treatment is not absolute. For instance, if an imported product is priced at a level that would qualify it as "dumping", then less favorable treatment is allowed undert GATT Article VI and the WTO Antidumping Agreement.
[18] Ibid, 106.
[19] Green, 153.

undertaken with internal charges or taxes on products. Article III:4 in order deal with taxes and regulations that do not fall under Article III:2. As such, the national treatment principle is ensured through a two-pronged approach.[20]

2.3.1 The first prong: Curbing protectionism undertaken with internal charges or taxes on products.

The first sentence of GATT Article III:2 is the first prong of the National Treatment principle.[21] It states: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." In the *Argentina – Hides and Leather* case, a panel clarified the meaning of this sentence by stating that three[22] criteria need to be fulfilled for this provision to be violated:

1. That the internal tax or charge (the measure) is covered by the sentence.
2. That the products of comparison (i.e. the taxed imported product and domestic product) are "like".
3. That *more* tax is laid upon the imported product than the domestic one (described with the term "excess" tax, with any difference constituting an excess).

The criteria of what constitutes "like" is intriguing and should be explained.
In the so called *Japan-alcohol* case the term was clarified.[23] The Appellate Body stated that when performing comparisons of "like" products, the term "like" should be "construed narrowly".[24] The facts on which to build this narrow construction could include the product's

[20] WTO-UNEP Trade and Climate Change Report (2009), 106.
[21] The second sentence of Article III:2 is relevant to the principle of national treatment but it falls outside the scope of this thesis as it is not pertinent to climate change measures.
[22] *Argentina – measures affecting the export of bovine hides and the import of finished leather,* WTO Panel Report, paragraph 11.131.
[23] Green, 157.
[24] Voigt, 57.

end use, consumer tastes and habits, the properties and nature of the product as well as tariff classification.[25] Though this may seem like a rather wide scope within which to find likeness, it is meant to signify that the likeness within these categories between products must be very similar for them to be considered "like".[26]
For the third criteria, neither trade impact nor a protective purpose needs to be shown by the complainant.[27]

As mentioned above, the first sentence of Article III:2 also covers "other internal charges of any kind", not just taxes. This includes charges collected at the border. The meaning of "charge" in *Argentina – hides and leather* was explained as being a "pecuniary burden" as well as a "liability to pay money laid on a person".[28] Even if a product has already passed the border and been imported, an obligation to pay a charge caused by something inside the customs territory is still a charge covered by Article III:2[29] as the Appellate Body explained in the *China-Auto Parts* case.[30]

2.3.2 The second prong: Other taxes and regulations.

The second prong of National Treatment is GATT Article III:4. This article is similar in wording to Article III:2 and covers taxes, regulations and requirements not covered by the latter.

Due to the similarity, there is some guidance in the case law on where these two articles differ. In *European Communities (EC) – Asbestos*, France had put in place a ban on white asbestos due to its harmful health effects. The ban was found to be consistent with WTO rules.[31]

[25] *Japan – Taxes on alcoholic beverages,* Appellate Body Report, paragraphs 20-21. Also, see Green 164.
[26] Green, 164.
[27] Green, 161.
[28] *Argentina – Hides and Leather*, Panel Report, paragraph 11.143.
[29] Hufbauer et al., 36.
[30] *China – Measures Affecting Imports of Automobile Parts,* Appellate Body Report, paragraph 161, 171.
[31] Palmer and Tarasofsky, 8.

The Appellate Body explained in this case that the usage of the term "like" in this article carries different meaning from when used in Article III:2.[32] The Appellate body explained that in III:4 it has a "a relatively broad product scope" and is to be considered broader than the same term used in III:2.[33] Panels should look holistically at the evidence to decide whether or not products are "like".[34]

Another case examining the term "like" in Article III:4 was the *United States – Foreign Sales Corporations* case.[35] In this case, a tax measure in the form of an income tax exemption was linked to the purchase of a minimum amount of US origin goods and services
The panel here concluded that a tax measure with the *potential* for general use that had horizontal application while being "solely and explicitly based on origin[36]", fulfilled the "like criteria" of Article III:4.. The result of this case was that the US was found to be discriminating against goods of a foreign origin. In the same case, the word "affecting" in Article III:4 was examined by the Appellate Body. They concluded that the word functions to clarify the scope of Article III:4 and held that it has a "broad scope of application".[37]

Thus, one may conclude based on these findings that the second prong of the National Treatment principle has a relatively wider scope of application with regards to the criterias of "like" and "affect". A measure falling under the second prong thereby stands a relatively greater chance of being covered by the provision when compared to the similarly worded first prong of National Treatment.

What "no less favorable treatment" means in Article III:4 has been quite well explored in a few important cases.

[32] Green, 158.
[33] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report, paragraphs 98-100,103.
[34] Green, 166.
[35] Hufbauer et al., 36.
[36] *United States – Tax Treatment for Foreign Sales Corporations*, Panel Report, Recourse to Article 21.5 of the Dispute Settlement Understanding (DSU) procedures by the European Communities, paragraphs 8.133-8.135.
[37] Ibid, paragraphs 8.133-8.135.

When considering whether a measure provides no less favorable treatment, the Appellate Body must determine whether the fundamental aim of the measure "modifies the conditions of competition in the relevant market to the detriment of imported products".[38] This famous line was first stated in the so called *Korea-Beef* case. In another case before the Appellate Body, *Dominican Republic – Import and Sales of Cigarettes*, further clarification of the meaning of what constitutes no less favorable treatment is given by stating that a detrimental effect on the imported good by the measure may still not fail the no less favorable treatment criteria if the detrimental effect "is explained by factors or circumstances unrelated to the foreign origins of the product...".[39] An overall point made by the Appellate Body in their body of case law regarding no less favorable treatment is to give governments the right to still draw distinctions between products even when determined to be "like", without the "like" criteria coupled with distinction in itself automatically meaning less favorable treatment.[40] In practice the effects of the measure in the marketplace will often be a very important part of the Appellate Body's analysis, but the analysis need not be *based* on actual marketplace effects.[41] Finally, it is worth mentioning that an analysis of no less favorable treatment need not be based solely on formal treatment. The panel in *Dominican Republic – Import and sales of cigarettes*, concluded that formal requirements for identical treatment had been fulfilled (in this case due to a tax stamp requirement), yet less favorable treatment was still found for imports due to other processes and costs that had to be born by importers.[42]

[38] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, paragraphs 137, 142.
[39] *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Appellate Body Report, paragraph 96.
[40] *European Communities – Asbestos*, Appellate Body Report, paragraph 100. See also, Howse and Eliason, 21.
[41] *United States – Foreign Sales Corporations*, Appellate Body Report, (Article 21.5-EC), paragraph 215.
[42] *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Appellate Body Report, paragraph 7.196.

2.4 Applying charges and customs duties at the border to level out the effect of internal taxes

Article II of the GATT regulates ordinary customs duties. According to Pauwelyn, the line between generally prohibited border tariffs and generally permitted domestic taxes is set out in GATT Article II:2(a). This, he means, is done in the article by limiting the scope of Article II by stating[43] that nothing (in the article) should hinder a state from imposing on the importation:

"a charge *equivalent* (emphasis mine) to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part".

Put simply, as long as it's done in accordance with the first prong of the National Treatment a member may impose a charge equivalent to an internal tax to an imported product that is "like". The notion of "produced in whole or *in part*" is intriguing. Does this "in part" also cover equivalency charges that target the production process of an import, such as energy? We shall return to the question of targeting foreign production processes but it should be underlined that this question has potentially great relevance for border measures backed by national climate change responses.

Unfortunately, there does not seem to be much case law clarifying Article II:2(a) with regards to climate change. The Appellate Body clarifies in the *Chile-Price Band System*[44] case that charges equivalent to internal taxes are excluded from the "other duties or charges" provision in Article II:1.[45]

The single WTO case that applies Article II:2(a) to charges imposed at the border is the recent *India – Additional Import Duties* case wherein the United States filed a dispute against India over excessive duties on imports. The Appellate Body here analyzed the meaning of

[43] Pauwelyn, 17.
[44] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Appellate Body Report, paragraph 276.
[45] This refers to the text in Article II:1(b) that targets and prohibits new charges on items with bound tariffs by extending the paragraphs coverage to "all other duties or charges of any kind imposed".

"equivalent" in Article II:2(a).[46] It was held that the equivalent concept contained aspects of "effect" and "amount" that a panel needed to take into account. A panel should also comparatively assess the charge in question and the internal tax proposed to be equivalent in a process that is both qualitative and quantitative.[47] Charges covered by Article II:2(a), it was further stated, can not be in excess of the internal tax (i.e. anything more than the internal tax constitutes excess).[48] The extra charges imposed by India in the case were not found to be equivalent of internal taxes imposed on the like product and thus the measure was not justified.[49]

2.5 Border Tax Adjustments on products

Border Tax Adjustments function in trade as a leveler of the playing field of sorts. The philosophy behind BTA:s is to ensure trade neutrality.[50] In the simplest terms, the way it typically works in trade practice is that an exporting country removes the taxes the product would have paid domestically when the product goes on export. This is called an export rebate (or the export rebate "part" of the BTA process). Upon export of said product, at the border of the importing country, the equivalent taxes that like domestic products have to pay in the importing country are then levied on the product, thereby ensuring a level playing field for the products in the target marketplace. There is no symmetry requirement. For example, if a government chooses to adjust product taxes on imports but not exports, they are free to do so.

For administrative reasons with regards to composite goods, export rebates are typically given by average rates for a given class of goods. It is simply too time-consuming and inefficient to classify every specific product. The product is classed and then the overall export rebate for that class applies to the product.

[46] WTO-UNEP Trade and Climate Change Report (2009), 133.
[47] *India – Additional and Extra Additional Duties on Imports from the United States*, Appellate Body Report, paragraphs 172, 175.
[48] *India – Additional Import Duties*, Appellate Body Report, paragraph 180.
[49] WTO-UNEP Trade and Climate Change Report (2009), 133.
[50] Working Party Report, *Border Tax Adjustments*, BISD 18S/97, adopted 1970 (December 2), paragraph 9.

2.5.1 BTA:s on imports

There is broad consensus that BTA:s on imports are allowed by international trade rules regarding consumption taxes levied on *products.*[51] For instance, a consumption tax may be a sales tax, or an environmental tax, that is levied directly on the product. So far no issues.
However, whether or not environmental taxes that target the *producer* of a product are allowed for adjusting, such as taxing energy expenditure or the emission of greenhouse gases, is fraught with considerable uncertainty and much debate in trade law.

A GATT working party report adopted in 1970 delved deeper into the BTA, attempting to further define the role of BTA[52] and when they should be considered permissible. Most of the basic aspects of the BTA (as covered above) were confirmed in this report.[53] Regarding energy and transportation taxes however, there were differing opinions and the report left it unclear whether or not these taxes were permissible for adjustment.[54]
In the report there was relative consensus that certain taxes that were not direct product taxes were not eligible for tax adjustment. The example of government social security taxes was given as one such tax that should not be considered eligible for adjustment.[55] For taxes that fell in between the extremes of direct product taxes and things like social security taxes, there were differences of opinion. In discussing this problematic middle ground, the term of "taxes occultes" were used to describe some of the taxes that fell inbetween, among them taxes on "energy" and "transportation".[56]

Articles II and III, discussed above, are the relevant GATT rules for BTA:s regarding imports. Perhaps the most important case on border tax adjustments on imports is the one known as *United States – Taxes on petroleum and certain imported substances*, but perhaps better

[51] Quick, 165.
[52] Working Party Report, *Border Tax Adjustments*, paragraph 4.
[53] A note on the extent of trade neutrality: while almost all delegations agreed that this was the overarching philosophy behind BTA:s, the extent of this trade neutrality was also discussed. Some delegations believed that BTA:s could not entail *any* form or effect of protection, only equality in treatment. Ibid, paragraph 13.
[54] Pauwelyn, 19.
[55] Working Party Report, *Border Tax Adjustments*, paragraph 14.
[56] Ibid, paragraph 15. Further note: Pollution taxes are not mentioned directly and the report did not define the exact meaning of what constitutes a "tax occulte".

known as the *Superfund* case. In this case, the United States were imposing an (environmental) tax on imports of certain chemicals that were taxed when produced domestically. The principal set-up of the tax was made to, at least theoretically, equalize the taxation of domestic and imported products. Before the GATT panel, The United States argued that their equalizing measure was a BTA in consistence with Articles II:2(a) and III:2 of the GATT. The panel also ultimately found this to be the case. Very interestingly however, the United States had another, unused, provision that stated that failure to produce sufficient information would result in an additional tax for the importer, a sort of penalty tax. Although it was not under scrutiny, the panel said this would violate Article III:2 if it was actually used.[57] Thus, the equalizing tax was found permissible but the accompanying penalty tax for failure to comply was not.[58]

In this case the purpose of the tax also came under scrutiny as the European Economic Community, a counterpart in the case, meant the tax conflicted with the OECD principle of "polluter-pays" since, as having the purpose of an environmental tax, the pollution created in production did not happen in the United States. The panel ruled that the purpose of this tax was not relevant in determining whether it complied with GATT rules on BTA:s.

The tax in this case was considered directly applied to a product, equivalent and working as an agent of trade neutrality. Therefore the panel concluded it was legal under GATT.

2.5.2 BTA:s on exports, demarcating between export rebates and export subsidies

BTA:s on exports (export rebates) are regulated in the GATT by Article XVI and in the Agreement on Subsidies and Countervailing Measures (ASCM). Understanding the ASCM is not a straightforward process and the footnotes to the text bear significant impact on the interpretation of it. Starting with footnote 1 to the ASCM, one can read that:

"In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of

[57] *United States – Taxes on Petroleum and Certain Imported Substances*, GATT Panel Report, BISD 34S/136, June 17, 1987.
[58] WTO-UNEP Trade and Climate Change Report (2009), 102.

such duties or taxes in amounts not in excess of those which have accrued, shall *not* (emphasis mine) be deemed to be a subsidy".[59]

This footnote clarifies that some removal of taxes on products that go for export, that would have been taxed if aimed at the domestic market, are *not* subsidies according to the ASCM. The importance of a border measure not being an export subsidy is obvious since anything classified as an export subsidy in WTO regulation faces a rather severe limitation of applicability. So if footnote 1 gives us that 'some' of these taxes are not subsidies, then exactly which ones qualify as (permissible) export rebates rather than export subsidies? In footnote 5 of the ASCM we can read that:

"Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement".[60]

Therefore, looking at Annex 1 may give us a more unambiguous answer to what practices, that are not export subsidies, are allowed by the ASCM. One should note however, that this argument to some extent relies on the ASCM having at least partly outdated GATT Article XVI. This interpretation should not be controversial as the ASCM is WTO law, goes into considerably more depth, and of course is a newer piece of regulation.

Annex I of the ASCM defines allowable BTA:s through its footnote 58. Direct taxes are typically taxes on income and property tax. In my opinion it is clear that no pollution or emissions tax will fall under this category when being considered for border adjustability.

Regarding import charges footnote 58 states:

"The term "import charges" shall mean tariffs, duties, and *other fiscal charges not elsewhere enumerated in this note* (emphasis mine) that are levied on imports;" [61]

While for indirect taxes, the same footnote states:

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;"[62]

Remember, the GATT working party report, described above, mentioned so called 'taxes occultes' for taxes between direct and indirect ones, energy taxes having been named as an

[59] Agreement on Subsidies and Countervailing Measures, footnote 1 of Article 1.1 (a)(1)(ii).
[60] Agreement on Subsidies and Countervailing Measures, footnote 5 of Article 3.1 (a).
[61] Agreement on Subsidies and Countervailing Measures, footnote 58 of Annex I (e).
[62] Ibid.

example of such a tax. In the ASCM, somewhat surprisingly, 'taxes occultes' seem not to be mentioned anywhere. One might wonder if it was deemed obvious that the taxes occultes previously discussed were to be included in the indirect tax definition of the ASCM or if it is merely a case of silence in the law and continued definitional uncertainty. Regardless, it seems from the definitions in footnote 58 that energy taxes or pollution taxes must fall either under indirect tax or as an 'other fiscal charge' mentioned above. By looking closer at Annex I it is possible to further distuingish where these environmental taxes would fall under the ASCM. In Annex I, item (h) deals with "prior-stage cumulative indirect taxes" (in other words it is a sub-group of indirect taxes). If these taxes, according to the same item (h), are applied to "inputs that are consumed in the production of the exported product" then a special rule applies that refers to Annex II of the ASCM. The meaning of this is to guide the reader to footnote 61 of Annex II wherein "inputs" are defined. Footnote 61 defines these as:

"inputs physically incorporated, *energy* (emphasis mine), fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product."

Pauwelyn means that specific environmental taxes, such as a carbon tax, are not cumulative taxes.[63] Even so, it does seem that item (h) covers taxes on energy and some fuels that is utilized in the production process without being physically incorporated inputs (of the product). This in turn seems to suggest that taxes on energy are to be viewed as indirect taxes which would settle the uncertainty around them. It would certainly shed more light on the opaqueness of 'taxes occultes' that surrounded the 1970 GATT working report.

Thus, item (h) may provide us with a much sought after definition of how to define an energy tax, but it is not in itself what will permit the use of export rebates for energy taxes. If energy taxes are indirect taxes one can then use item (g) of Annex I to justify permissibility of export BTA:s on them. Of course, in accordance with the definition found in item (h), the export rebate must exactly match the taxes levied on the domestic equivalent (in keeping with the text and with the role of BTA as a leveler of the playing field).

To recap and bring it into perspective, the above stated reasons like this: Energy taxes as indirect taxes finds definitional clarity in Annex I item (h) with reference to footnote 61 of Annex II. With the definition established, item (g) of Annex I is used to make export BTA:s

[63] Pauwelyn, 20.

permissible for energy taxes as long as they accord with everything else applying to indirect taxes (i.e. the BTA exactly matches the domestic equivalent tax).
If argued as Pauwelyn above, one could argue that Item (g) has nothing to do with energy taxes and that the ASCM deals with these solely under item (h) and footnote 61 and that's it. The trick here is to find the right definition for energy taxes. If we can expand the treatment of energy taxes in item (h) and footnote 61 into meaning that energy taxes are *overall* to be considered indirect taxes, then we can likely also use item (g) once this definition is established. If we are restrictive in our interpretation of energy taxes in item (h), we can at most only allow export rebates for that which is allowed under item (h), which only applies to prior-stage cumulative indirect taxes and inputs used in production. In other words, we get a broader scope to work with if we can use item (h) and footnote 61 for definition purposes and then use item (g) for application than we get if we are limited to only applying export rebates in accordance with item (h).
If the question of how to define an energy tax were to be solved in a WTO dispute, the classification of it would be paramount.

The potential meaning of this is great. If export BTA:s are allowed, states could put in place a carbon tax for its domestic production but give export rebates exactly matching that tax for products that go on export. In theory, international competitiveness and domestic effect would both become more secure as a result. This remains a speculative area of law however. The permissibility of BTA:s on exports remain unclear without further negotiated clarifications or WTO dispute settlement. At the very least, but very importantly, it does seem to be the case that border adjustments on energy exports are a legal possibility. Thus, there is legal room for creating BTA:s for energy taxes and with this possibility, perhaps negotiations and politics will come to determine their ultimate permissibility in the WTO system as much as the provisions in the GATT and the ASCM. Put simply, the findings do not mean permissibility is certain, it just means the door is not closed[64] and can be stepped into if future will and interpretation choose to view it as open.

[64] Palmer and Tarasofsky, 5.

2.6 Import bans and quotas (quantitative restrictions)

Article XI of the GATT forbids quantitative restrictions as well as total import bans. The text specifically mentions "quotas, import or export licenses or other measures" as inadmissible for putting into place import restrictions on the product of another member. Article XI does not include "duties, taxes or other charges" in its range although the provisions regulating these of course can interconnect with the Article.

In a few illustrative cases, a broad interpretation has been made of Article XI:1, effectively including any form of import restriction under its scope. In the above mentioned *Korea – beef* case, a de facto restriction on import was found when a state chose to use grain-fed beef over grass-fed (i.e. excluding the purchase of grass-fed). The panel found this to be a violation of Article XI:1, thus constituting an import restriction.[65] Overt import bans and quotas are straightforwardly prohibited by Article XI and, I contend, the most interesting aspects of these measures lie in the more subtle variants of de facto discrimination such as in the *Korea – Beef* case if they come to be pertinent in climate change border measures. Indeed, some authors even assume, and do so rightly I believe, that climate motivated direct import bans are not seriously on the table as a border measure.[66] Attempts at indirect manipulation of murky import licensing schemes (or de facto effects amounting to it) may also be a prime area for Article XI applicability on border measures.

In a recent case, *Brazil-Tyres*, some insight may be gained on the justifiability of climate change measures.[67] This dispute was about whether or not a brazilian prohibition to import retreaded tyres was justified by human health objectives. Also, Brazil had put in place an exemption to this ban for countries that were members in the MERCOSUR trade organization, the GATT permissibility of this exemption was also under scrutiny.

The measure was found illegal in accordance with Article XI:1 without possibility for justification by the general exceptions in Article XX of GATT (the measure did not pass the

[65] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Panel Report, paragraphs 206-207.
[66] Pauwelyn, 12.
[67] Abaza and Biermann, 91.

test of complying with the Article XX chapeau).[68] The Appellate Body came to the conclusion that Brazil was arbitrarily discriminatory in their importation of retreaded tyres and this disguised restriction fell as an unlawful measure under Article XI:1.[69] In this case, Brazil invoked Article XX(b) to justify their import ban, arguing it was necessary to protect human health for various reasons. However, the possibility for exemption for certain trade partners gravely undermined this argumentation. Abaza and Biermann mean that this case is relevant for climate change primarily due to the Appellate Body's encouraging of taking a holistic approach when judging a measure. This, it is argued, may be beneficial for justifying a restrictive trade measures that is part of a larger, "holistic", climate change mitigation policy.[70]

2.7 WTO supervision of technical regulations on products imposed by member states

There is a possibility that member states may want to impose certain technical regulations on products in order to, for example, regulate the energy "footprint" of said products. Such measures may fall under the Agreement on Technical Barriers to Trade (TBT), a WTO agreement that works in addition to the GATT and includes both mandatory and voluntary measures. (Mandatory) technical regulations are regulations that define "product characteristics or their related processes and production methods".[71] Whether or not the TBT covers not just technical regulations regarding the product itself (such as flammability standards) but also the way a product is made is an interesting question. In the *European Communities – Asbestos* case the Appellate Body clarified what is meant in the TBT by "product characteristics" (which is what the TBT is applicable on).[72] Product characteristics, it was said, were "any objectively definable 'features', 'qualities', 'attributes' or other

[68] Abaza and Biermann, 93.
[69] *Brazil – Measures Affecting Imports of Retreaded Tyres*, Panel Report, WT/DS332/R, December 17, 2007, paragraph 7.15.
[70] Abaza and Biermann, 92.
[71] Agreement on Technical Barriers to Trade, Article 1.2 and Annex 1, paragraph 1.
[72] Green, 152.

'distuingishing mark' of a product"[73] while also saying that product characteristics can be linked to "not only features and qualities intrinsic to the product itself, but also *related* (emphasis mine) 'characteristics'".[74] Exactly what this means and whether or not the TBT is able to include regulations not just about a product but also its production process seems to be uncertain. The word "related" was unfortunately not expounded upon by the Appellate Body in the above mentioned case.

If a technical regulation concerning the energy footprint of a product is found *not* to fall within the confines of the TBT, reasoning around its permissibility would most likely fall under GATT articles XI or III:4. This is also the most likely result in my opinion. If, however, the same regulation *is* found to be covered by the TBT then the agreement includes some interesting possibilities. For example, Howse has written that Article 2.5 of the TBT under such circumstances can result in a technical regulation being applied for one of several "legitimate objectives" included in the agreement, one of them being the environment. If a technical regulation falls under such a legitimate objective and is also in keeping with an international standard, then the measure according to Howse should be presumed not to distort or obtrude international trade.[75]

If the TBT is applicable to a measure, a trade-limiting technical standard may therefore be squared with the TBT (and thus the WTO system) if it has a legitimate objective and is aligned with an international standard.[76] Such an accord with an international standard could be very problematic in practice however and I find it hard to view the TBT as a persuasive avenue for reaching such goals with the help of the agreement as it now stands. If international negotiations go as far as agreed international technical environmental standards, then one may wonder if it is not more likely that the international community will already have developed something better to lean on than just the TBT in its current form.

[73] *European Communities – Asbestos,* Appellate Body Report, paragraph 67.
[74] Ibid.
[75] Howse, 2006, 393-394.
[76] WTO-UNEP (2009) Trade and Climate Change Report, 89.

2.8 Article XX, General Exceptions

Any violation of the GATT articles reviewed above can be excused if the violating measure qualifies as an exception under Article XX of the GATT. It is important to note however, that Article XX can not excuse violations of the TBT or the ASCM.[77] Some authors have singled out Article XX as perhaps one of the most important "environmental windows" existing in WTO law.[78]

2.8.1 The exceptions of article XX

The Appellate Body, when applying Article XX, conduct a two-pronged analysis. *First* the measure must be examined to determine whether or not it falls within the scope of one of the paragraphs of Article XX. *Second*, if the measure does fall within the scope of a paragraph in the Article, the specific exception paragraph will be considered to see if the specifics of the measure in question meets the conditions set forth therein. If both of these stages are cleared by the measure, the next step is to determine whether or not the measure qualifies for the standards set out in the chapeau of Article XX. The paragraphs in Article XX are all public policy exceptions and constitute a finite list. If the measure does not fall within it there is no vague and general 'safety-net' paragraph to save a violating measure. For the purposes of this thesis, it is important to underline that there is of course no paragraph that overtly gives exception to trade-distorting measures that are found necessary to perform due to negative *competitive* effects resulting from domestic environmental regulation. However, some interesting case law does exist to demarcate where *environmental* measures stand with respect to Article XX.

As mentioned at the very outset of this chapter, the WTO gives broad possibilities for a state to create environmental policy. It is only when such environmental policy starts exacting standards upon the environmental policy of other member states that things get problematic.

[77] Palmer and Tarasofsky, 5.
[78] Zelli and Van Asselt, 85.

For a long time, there was considerable uncertainty regarding this grey area where national environmental conservation efforts had the potential to clash with trade liberalization efforts. In the so called *Shrimp-Turtle* case, the role of import bans was clarified in this context

The *US-Shrimp* dispute concerned a US ban on shrimp import which had been caught without using a certain device that prevented the incidental capture of endangered sea turtles.[79] The US simply did not want shrimp being sold on its markets if the device had not been used.

In this case, the Appellate Body wrote about this unilateral measure:

"conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of the exceptions (a) to (j) of Article XX".[80]

At a later stage, the panel in a compliance review of the same case stated that conditioning access for the exporting country to the domestic market on entering into a regulatory program "deemed comparable to its own" is not in itself inadmissible under the WTO agreement.[81] In other words, the WTO agreement does not provide for recourse for an exporting country where another member requires, as a condition of access, certain standards comparable to its own. The implications are that a country may condition market access on certain environmental standards if the environmental policy underlying the measure is deemed valid with regards to the exceptions in Article XX. Of course, turtle excluder devices and climate change mitigation are rather different animals.

On the issue of climate change specifically, Article XX (g) is arguably the most pertinent exception that falls closest to the issue.[82] Exception (g) states that measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" can constitute an exception. Whether or not the scope of this exception is applicable to climate change is a

[79] Palmer and Tarasofsky, 7.
[80] *United States – Shrimp*, Appellate Body Report, paragraph 121.
[81] *United States – Import prohibitions of Certain Shrimp and Shrimp Products*, Panel Report, paragraph 5.103.
[82] WTO-UNEP Trade and Climate Change Report (2009), 108 and Palmer and Tarasofsky, 5.

source of considerable debate.[83] In many ways, it depends on how you define climate change mitigation and what can be included in the scope of the term "exhaustible natural resources" in item (g).

It is possible to argue that climate change mitigation policy, as it is performed in practice, is a pollution control policy, and not strictly speaking a conservation policy. Although many factors determine climate change, perhaps the principal (anthropogenic) one is the release of greenhouse gases into the atmosphere. Thus, control of such pollution can be viewed as a pollution control policy that seeks to maintain a certain balance of gases in the atmosphere and not a conservation policy that seeks to, strictly speaking, conserve the atmosphere itself. If interpreted as such, climate change falls outside the scope of the exception. Conversely, it may also be argued that such a view falls short of the ultimate aim of the policy, which is to *conserve* the climate (and thereby the environment) itself and its current functioning form, with certain pollution control mechanism constituting logical steps in the achievment of this policy goal. In my opinion, this latter interpretation strikes me as far more likely. In support of the latter view, the panel ruled in the *Reformulated gasoline* case that clean air had value, was natural, was a *resource* (i.e. motivating *conservation* efforts), and could be depleted.[84] With this there lies a precedent regarding preventative measures undertaken to hinder the deteriorating effects of air pollution. Adding to this is the statement of the Appellate Body in the above mentioned *Shrimp-Turtle* case where it was said that the crucial term of what constitutes "exhaustible natural resources" must be read "by a treaty interpreter in the light of *contemporary concerns* (emphasis mine) of the community of nations about the protection and conservation of the environment.[85] Thus it adopted an evolutionary interpretation.[86] The Appellate Body in the following paragraph also mentions that natural resources is not a static concept but evolutionary.[87] On such merits, one may cautiously expect climate change to be included in the scope of the Article XX (g) exception.[88]

[83] Some authors, like Frankel, have strong opinions that it is, most choose to be more cautious in their opinion however. Frankel, 75.
[84] *United States – Standards for Reformulated and Conventional Gasoline*, Panel Report, paragraph 6.37.
[85] *United States – Shrimp*, Appellate Body Report, paragraph 129.
[86] Voigt, 60.
[87] *United States – Shrimp*, Appellate Body Report, paragraph 130.
[88] Abaza and Biermann, 92.

A measure found to fall within the scope of item (g) will then be examined under the two terms included in the item text itself. The *first* of these is to determine whether or not the measure is (sufficiently) "relating" to the conservation of exhaustible natural resources. The issue of relation has been dealt with primarily in the *Shrimp-Turtle* case.[89] In the *Shrimp-Turtle* case, the issue of the natural resources relation to the United States took the form of determining whether or not sea turtles had "sufficient nexus"[90] to the country. This meant finding out whether or not there was sufficient connection between the migratory and endangered marine populations and the United States for purposes of Article XX (g).[91] This was found to be the case, as well as confirming that this resource was exhaustible.[92] The Appellate Body then examined whether the structure of the measure, an import ban in this case, was in keeping with the legitimate policy of conserving natural resources. The US regulatory program requiring the use of so called turtle excluder devices for market access was in this case found to be "reasonable related to the ends"[93] with the ends here signifying a legitimate policy of conservation. With this established, the measure passed the first test of item (g).

The second term to pass is whether or not the measure is fair when viewing its application toward domestic production and consumption. In the *Reformulated gasoline* case, The Appellate Body stated that this meant "even-handedness in the imposition of restrictions" [94], i.e. fairness. In the same paragraph, it was also mentioned that the words "made effective" in the item do not refer to an effects test of some kind.

Upon a potential dismissal of the (g) exception, recourse can still be sought in item (b) of the same Article. Item (b) concerns itself with measures put in place "to protect human, animal or plant life or health". Although the (b) item is often mentioned in this context, it is generally considered weaker than (g) although some authors believe it could be applied to climate change.[95] In support of the application of item (b) however, is a surprising mentioning of

[89] In p.19 of the *Gasoline* case mentioned above, the Appellate Body found there to be "substantial relationship" between the measure and conservation efforts. The usage of the word "substantial" may thus be noted.
[90] *United States – Shrimp,* Appellate Body Report, paragraph 133-134.
[91] WTO-UNEP Trade and Climate Change Report (2009), 108.
[92] Frankel, 75. Also note that Frankel, interestingly, draws a big conclusion from this and means that this created a precedent for countries to be able to target the production processes of other countries.
[93] *United States – Shrimp,* Appellate Body Report, paragraph 141-142.
[94] *United States – Gasoline,* Appellate Body Report, paragraph 21.
[95] See Bhagwati and Mavroidis, 2007, 308.

climate change in the previously mentioned *Brazil – Tyres* case. In this case, item (b) was discussed surrounding the case details of adverse health effects resulting from imported tires. When analyzing item (b) in this context, the Appellate Body was clarifying that a measure seeking exception under item (b) must achieve a real contribution towards completing its protective objective. As an example of when this is not possible however, the Appellate Body continued in the same paragraph to say that the results of measures adopted as mitigation efforts for climate change must "be evaluated with the benefit of time".[96]

The inclusion of a discussion on climate change in an Appellate Body decision may or may not signal some applicability of the item on the concept of climate change. In light of the slightly offhand way in which it was included, my opinion is that climate change was used primarily as just an example in this case without the Appellate Body meaning for it to speak anything concretely on the inclusion of climate change in item (b).

2.8.2 The chapeau

The Chapeau of Article XX, far from being just an outset to the items contained in the Article, is enormously important in determining a justifiable exception. If a measure has passed the foregoing tests of being included in the scope of one of the items in the Article, and has fulfilled the criteria contained therein, it must finally be squared with the chapeau of Article XX to determine its permissibility. A measure passing everything up until the chapeau is considered provisionally justified[97] but must be further appraised in accordance with the chapeau to gain justifiable exception status overall.

The chapeau basically expresses that the measure under scrutiny can not be a discriminatory effort between countries where the same conditions prevail and neither can it be a disguised restriction on international trade. In the *Shrimp-Turtle* case, the Appellate Body stated that depending on the exception item used in the Article, the standards of the chapeau may differ.[98]

[96] *Brazil – Tyres*, Appellate Body Report, paragraph151.
[97] Ibid, paragraph 4.
[98] *United States – Shrimp,* Appellate Body Report, paragraph 120.

David Runnalls, in a paper presented to the United Nations Climate Change Conference in Bali 2007, noted that the norms of the chapeau in Article XX have been internalized in article 3.5 of the UNFCCC. Article 3.5 expresses that "Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade." Runnalls, on account of this, means that a type of cross-pollination between the GATT and some fundamental norms of environmental regulation have occurred, with this state of affairs now having been integrated into the ongoing formation of the climate regime.[99] Authors such as Zelli and Van Asselt do not agree however and mean that the case law still points to WTO prevalence where WTO and MEA:s meet.[100]

The Appellate Body has stated that the chapeau concerns itself primarily with the manner in which the contested measure is applied and less with the contents of the measure.[101] This makes sense as the contents of the measure should in the majority of cases already have been satisfactorily examined when determining its permissibility under one of the items. In other words, it is not a signal by the Appellate Body that the measures content is ultimately less important, but that it has been dealt with in a previous stage of the process of determining permissibility. In evidence of this, the Appellate Body in the *Shrimp-Turtle* case stated that a violation of the chapeau could (still) occur when the "detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity."[102] Thus, although the chapeau typically occupies itself with the big picture, it does not mean that details concerning the measure itself are necessarily unimportant at this stage.

The Appellate Body has further stated that the role of the chapeau is to ensure that the items in the Article are used in good faith and to hinder any exploitation of the exceptions by members.[103] In the same paragraph, it is also explained that this entails a balancing act of the rights of the complaining state and the state invoking the exception.

In the *Shrimp-Turtle* case the role of the preamble to the WTO agreement was also explicitly mentioned as something that should give "colour, texting, and shading" to the balancing act

[99] Runnalls, 2007 speech at Bali trade ministerial meeting.
[100] Zelli and Van Asselt, 86.
[101] *United States – Gasoline*, Appellate Body Report, paragraph 22.
[102] *United States – Shrimp*, paragraph, Appellate Body Report, paragraph 160.
[103] *Brazil – Tyres*, Appellate Body Report, paragraph 224.

performed when using the chapeau of Article XX. This was a reference to the preamble's statement that using the world's resources "should be made in accordance with the objectives of *sustainable development* (emphasis mine)".[104] With such broad interests to consider, the WTO judiciary may be said to have quite some discretion in making these decisions, and the applicable case law also seems to suggest this is so.[105]

The Appellate Body has suggested that both substantial and procedural requirements are included in the chapeau.[106] The procedural requirement is conceptually quite easy to understand and can, as an example, relate to a member giving (or refusing to give) another member an honest process of appeals for the measure. The substantive requirements dealing with (overall) discrimination in implementation is a bit more multi-faceted. An analysis of this substantive requirement requires examining what constitutes "arbitrary or unjustifiable discrimination" as the chapeau text sets out. In the *Brazil Tyres* case it was said that this analysis of discrimination "relates primarily to the cause or rationale" of the discrimination.[107] In the same paragraph the Appellate Body expounded on this, meaning that the determinants of cause and rationale is to find whether there is a legitimate cause and whether the rationale is strong enough to justify a discrimination.

The question of what exactly constitutes discrimination when determining its permissibility under Article XX has been noted by the Appellate Body. It has explained that the "nature and quality" of discrimination under the chapeau is different from that applied to determining discrimination in the treatment of products (that is dealt with in other GATT Articles).[108]
The exact meaning of this remains unclear but can perhaps reasonably be assumed to be somehow connected to the wider perspective adopted by the adjudicators when applying the chapeau.

If discrimination is found to have occurred under the chapeau, it must then be examined to determine whether or not this discrimination is unjustifiable or arbitrary as stated in the text of

[104] *United States – Shrimp,* Appellate Body Report, paragraphs 153, 155.
[105] Green, 188.
[106] *United States – Shrimp,* Appellate Body Report, paragraph 160.
[107] *Brazil – Tyres,* Appellate Body Report, paragraph 225.
[108] *United States – Shrimp,* Appellate Body Report, paragraph 150.

the chapeau. A quick note may be included here regarding the requirement of "same conditions" in the chapeau. There does not seem to be much case law surrounding this requirement and it has typically not proven problematic.[109] One should note however that the significance of this requirement may have the potential to increase greatly when discussing climate change mitigation measures. However, taking into account different conditions in other territories has come up when trying to determine what constitutes the above mentioned "unjustifiable" requirement. As a rule, it was explicated in the *Shrimp-Turtle* case, it is not allowed to put in place straight economic embargoes of other nations with the purpose of forcing others to adopt a certain regulatory program with no regard to their differing circumstances.[110] However, the less bold effort of conditioning market access on certain efficiency standards was evidently considered permissible in the case. The key thing for a state to have taken into account seems to be a certain flexible approach that sufficiently caters to the differing circumstances of other members. Importantly, the Appellate Body explicated that this does not mean that every individual members condition must be addressed separately and some degree of generality is in reality necessary.[111]

There are no bright lines around what constitutes a sufficiently cooperative approach as suggested by the case law just now described. However, in the *Shrimp-Turtle* case a failure of the United States to negotiate with the complainant countries while having negotiated with others on the turtle conservation issue was seen as unjustifiable.[112] In a later following compliance review of the *Shrimp-Turtle* case the Appellate Body stated that like opportunities should be given to negotiate an international agreement with such agreements being "comparable" to other forums of negotiation.[113] However, there seems to be no requirement in being succesful when pursuing cooperation but a sufficient good faith attempt may be enough.[114] In the *Reformulated gasoline* case the defendant's use of the measure was found lacking (under the chapeau) due to failure to pursue sufficient cooperative agreement with

[109] There was a claim by Argentina in the *Argentina – Hides and Leather* case that the same conditions did not apply between Argentina and the European Community. This was rejected by the Panel, paragraph 11.315.
[110] *United States – Shrimp*, Appellate Body Report, paragraph164.
[111] Ibid, paragraph 149.
[112] Ibid, paragraph 172.
[113] *United States – Shrimp*, Appellate Body Report, compliance review, paragraph 149.
[114] In the compliance review of the *shrimp* case, the Appellate Body said legitimacy under the chapeau was not dependant on succesful results in the negotiations. *United States – Shrimp* compliance review, paragraphs 123-124. The sufficiency of a good faith was also mirrored in the joint WTO-UNEP Trade and Climate Change Report from 2009, 109.

foreign governments and foreign industry to gain information that could have better informed the regulation in question.

On such merits, one might understandably be tempted to conclude that a sort of missioning for international agreement constitutes a qualification for justification under Article XX.[115] The ramifications on squaring climate change with the WTO trading system should be apparent if this is the case. Even the WTO Director, Pascal Lamy, has suggested such a conclusion and urged a multilateral accord on climate change.[116] While the extent of such a requirement remains speculative[117], I would contend that one may at least conclude that demands for cooperation under the Article XX chapeau are set relatively high for the permissibility of unilateral measures.[118] The overall lesson is that, to the largest extent possible, a country that sees itself as forced to invoke some type of discrimination for environmental purposes are well advised to seek the maximum amount of good faith cooperation while trying to extend that possibility for cooperation as equally as possible to the exporting countries affected. Most authors seem to base these conclusions on having studied the *Shrimp-Turtle* case, but it has poignantly been argued that in the area of climate change, virtually every country is "involved" in negotiations in some way, complicating matters.[119]

In *Brazil – Tyres*, The import ban put into place by Brazil was considered by the Appellate Body with the "arbitrary" and "unjustifiable" qualifications lumped together. It was stated that Brazil's allowing of import from Mercosur countries while banning import from others was arbitrary *or* unjustifiable because complying with the Mercosur treaty (Brazil's justification for it) did not "relate to the pursuit or would go against the objective" in Article XX(b) (the item used by Brazil).[120] WTO jurisprudence seems to not want to undermine the applicability of the chapeau by taking other (trade) treaties too much into account. Whether or not this would also apply to an environmental treaty is uncertain.

The question of what constitues a "disguised restriction" has also been explored in a few of the cases outlined above. In the *Asbestos* case, the panel said intention is a part of determining

[115] Voigt, 62.
[116] Lamy, European Parliament speech, May 29, 2008.
[117] Abaza and Biermann, 90.
[118] Put differently, a unilateral approach heightens the risk of dispute as stated by Palmer and Tarasofsky, 9.
[119] Abaza and Biermann, 90.
[120] *Brazil – Tyres*, Appellate Body Report, paragraph 227.

"disguised", and meant that the actual pursuit of limiting trade could be such an intention to take into account.[121] In the same paragraph, the panel continued to say that such protectionism could be concluded from, among other things, its architecture and "revealing structure". This is somewhat symptomatic of what some authors argue is a distinct lack of hard and fast rules when it comes to the chapeau, with much discretion laying in the hands of the WTO courts.[122]

With the case law of the WTO in dealing with Article XX having on several occasions come to handle the production processes of foreign states, perhaps one may conclude that (climate change-motivated) measures with some such links do not automatically fall outside the scope of Article XX. It is my opinion that there is even some degree of room in both the items and the chapeau for such measures, with the caveat of considerable lingering uncertainty surrounding exactly how much.[123]

[121] *European Communities – Measures affecting Asbestos and Asbestos- Containing Products*, Panel Report, paragraph 8.236.
[122] Voigt, 63.
[123] Compare Zelli and Van Asselt, 85, who reach much the same conclusion.

3 Status of some climate-motivated border measures under the WTO

3.1 Introduction

This section will deal with a number of the most common "real world" approaches regarding border measures for climate change mitigation. As such, this section and its discussion to some degree presumes to have a certain relevance in reflecting some common approaches regarding climate change-motivated border measures. This 'connect' with reality should be tempered with a quick note that these methods, here individually discussed, will invariably be part of a larger whole. The approaches discussed here will in reality always be part of an overall national policy framework for climate change mitigation. In other words, so called 'hybrid' systems including subsidies of various sorts, border trade measures, domestic regulation, one or several emissions control functions and other measures constituting a whole is the most likely policy approach for serious attempts at national mitigation efforts.[124] Obviously, this full range and its potentially complex case-by-case linkage falls outside the scope of this thesis but it is important to interject that WTO implications can follow from a holistic policy approach wherein a number of systemic features may have to be examined by several GATT Articles and WTO treaties. Also, since very few climate related border measures are actually currently implemented, it is worth noting that many of their implications will likely stem from their specific design and condition, likely warranting specialized studies.[125]

[124] WTO-UNEP Trade and Climate Change Report (2009), viii.
[125] Ibid, 142.

3.2 Border adjustments, taxes and charges

Border tax adjustments, also described in the previous chapter, are tools to level the playing field. They do not, of course, have a traditional link to environmental concerns per se. There needs to be a clearly defined domestic tax or charge for a border tax adjustment to be put into place. For example, if a state proposes to average out the costs of complying with a certain climate change policy and then apply this average to imported products at the border, this is not a border tax adjustment since there is no identifiable reference domestic tax.[126]

Border tax adjustments applies to taxes on products, other taxes are not susceptible to being border adjusted. The permissibility of taxes on embedded characteristics of a product, such as energy expenditure in the production process, remains unclear and as of yet no WTO cases have dealt directly with the issue.

In the preceding chapter, an argument was made that it is possible to read the ASCM so as to allow rebating energy taxes on *exports*. This however does not automatically mean that imposing such energy taxes on *imports* for adjustment purposes is allowed. Remember, there is no symmetry requirement in border tax adjustments. It is theoretically perfectly possible to allow rebates on exports without allowing imposition of taxes on imports.

Why then, one may ask , would the attempted imposition of energy taxes on imports constitute a bigger problem than rebating energy taxes on exports? The question, largely, can be answered by the difficulties that a state will encounter in trying to "measure carbon" at the border.[127] The energy expenditures of different countries and even different firms can vary greatly. Thus, imposing a uniform tax on imports at the border that corresponds with the domestic one may seem simple, but due to differences in production processes it is far from certain that it will fairly reflect the energy expenditure at which it takes aim.[128] Accurately assessing the "upstream" carbon or greenhouse gas emissions of a foreign producer without basing it on the country of origin (and the entailing problems with the principle of National Treatment) is not easy.[129] If a state chooses to ignore the specifics of the carbon expenditure

[126] Such a measure would almost certainly not be allowed under Article III:2 of the GATT (national treatment).
[127] WTO-UNEP Trade and Climate Change Report (2009), 101.
[128] Ibid, 101.
[129] Houser et al. make an excellent overview of the typical problems involved with such efforts in *Leveling the Carbon Playing Field*, p. 34. In short, the complexity primarily lay in accurate assessments of production

of the imported product and just apply the same domestic product tax to imports, the measure will likely fail the equivalency requirement in GATT Article II:2(a). Also, in something tantamount to opening Pandora's box, it may also be questioned whether or not the "likeness" criteria contained within the same paragraph regarding products would be satisfied under circumstances where energy expenditure was allowed as a type of product "characteristic". There are proposed ways to solve this conundrum[130], but for the purposes of this thesis it is sufficient to be aware of the fact that levying product BTA:s on imports is fraught with relatively more complexity than allowing export rebates on exported products.

Regarding border adjustment of energy taxes on exports, it should again be noted that their permissibility remains unclear. I have argued above that there is room for such interpretation but this of course does not entail any great certainty in the matter. A clarification should also be included that I have, for obvious reasons, primarily been adressing tax adjustments on the basis of a carbon tax as pollution control mechanism. There should be no confusion around the fact that rebating emissions allowances that were used in the production of a product upon export under a cap and trade system does *not* constitute a BTA.[131] Regulations that require the purchase of emissions allowances are regulations, not taxes. If an emissions allowance were to be defined as having monetary value, basically being money, then remitting such a cost upon export would likely constitute an unpermissible export subsidy.

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process, feedstock (i.e. what type of fuel is used), energy source for converting feedstocks and technical efficiency.

[130] For example, carbon "passports" have been suggested (also known as carbon labelling or green certificates) by the Australian Bureau of Agricultural and Resource Economics. This would entail a domestic requirement that a product sold must have a certificate that states its carbon intensity. Such detailed certificates are then coupled with a carbon tax that taxes the proportionate amount of carbon stated on the certificate according to a preset scale. This, it is argued, would circumvent National Treatment as well as satisfying the equivalency and likeness criteria of WTO BTA regulation in Article II:2(a). In my opinion, the problem of determining the accuracy of such certificates makes it run into familiar problems, ultimately not solving much of anything. There would be a direct financial incentive to manipulate the product certificate and dependable verification would be very hard. These two factors all but ensure some agents would act on the negative incentive.

[131] The lax use of the BTA terminology is not uncommon in the literature, see WGPA Policy Paper, 12 for an example where the term is used too broadly.

3.3 Countervailing duties imposed at the border to penalize foreign regulation

If a state puts in place subsidies to a firm or industry in order to favor its goods, it may be permissible for another state to counter such a competititve advantage through the imposition of a countervailing duty on the subsidized product. If the countervailing duty is in accordance with GATT Article VI (3) and the ASCM, meaning that the subsidy is specific and there is material harm on the domestic industry producing the "like" product, then it can be permissible with trade rules.

The technical potential for permissibility of countervailing duties means they are sometimes carelessly used outside of their intended use. With regards to climate change mitigation, trade penalties such as countervailing duties at the border are sometimes discussed as a potential weapon against the policices of less concerned states.[132] In effect, this argument states that countries without domestic carbon controls engage in a form of subsidization of their products by *not* having in place an acceptable climate change mitigation regime. The requirements of countervailing duties however, do not lend themselves easily to be used in such a way. First, the requirement of subsidy under the ASCM Article 1:1 does not include *absence* of a government regulation.[133] Thus, attempting to use countervailing duties in order to punish slow-moving countries for their lack of climate change mitigation efforts will almost surely constitute a breach of WTO law through Article I or XI.

An observer may note that in the *Shrimp-Turtle* case, it could be argued that the United States unilaterally "got away with" a form of sanction that at least indirectly was also meant to 'encourage', if not outright change, the regulatory environments of other states.[134] However, the justification for the import ban in that case lay in the proven killing of endangered sea turtles and also dealt with a relatively minor part of the economy (where the change in regulation for compliance was relatively minor i.e. turtle excluder devices). Incentives for change in other countries are often put forward as a rationale for climate related border

[132] WTO-UNEP Trade and Climate Change Report (2009), 101.
[133] WTO-UNEP Trade and Climate Change Report (2009), 101.
[134] Some authors think it is rather meaningless to give any weight to discussions surrounding "unilaterality" since the term has not been defined in the WTO. See Abaza and Biermann, 89.

measures.[135] In my opinion, the astronomically different scale of economy-wide climate change mitigation constitutes an entirely different creature from what was discussed in the *Shrimp-Turtle* case. I find it hard to believe that the Appellate Body would lean on this case for approving border trade sanctions meant to punish climate laggards rather than finding them prohibited according to the WTO rules discussed above. However, some authors have noted that these differences in effect may not be as large when judging each climate trade measure by itself.[136]

3.4 Conditioning market access on carbon footprint standards

A state could put in place mandatory government regulation in the form of carbon footprint (i.e. intensity) standards that would then be applied to different sectors of the economy, both for imports and domestically. With such standards, a requirement could be made that a product that used more carbon in its production than the allowed intensity standard permitted could not be sold on the domestic market.[137]

This approach means revisiting the challenges described above concerning measuring carbon at the border for imports. If challenged, the measure would likely be examined under Article III of the GATT to determine if the standard is discriminatory towards foreign products. Such evaluation would very likely center around the specific method used in determining the carbon usage of foreign products (which in this case would be directly linked to determining their market access). If discriminatory circumstances are found, recourse could be found in GATT Article XX and the above described process it entails.

Some authors have floated the idea that carbon footprint standards may be regulated by the TBT by broadly interpreting its Article 1.2 and Annex 1 paragraph 1, provisions that lay out the regulations covered by the agreement.[138] As one may recall from the above included discussion on the TBT, the question of whether or not the carbon footprint standard is linked

[135] WTO-UNEP Trade and Climate Change Report (2009), 98.
[136] WTO-UNEP Trade and Climate Change Report (2009), 99.
[137] Vossenaar (UNCTAD trade and environment review 2009/10), 61.
[138] Verrill 2008, 43-53.

to an international standard would be very important if it fell within the scope of the agreement. Article 2.5 of the TBT expressly mentions that such standards linked to international ones shall be "rebuttably presumed not to create an unnecessary obstacle to trade". However, Article 12.4 of the TBT also goes on to say that such international standards may not be applicable to developing countries if they are "not appropriate to their development, financial, and trade needs". Carbon footprint standards imposed by a developed country on the imports of a developing country may therefore not be allowed.[139] Of course, there may be difficulties linking a domestic carbon footprint standard to an international one if the latter doesn't exist yet. In such a case, a purely unilateral standard, once again presuming it falls within the scope of the TBT, will not be presumed to have no trade-distorting effects and must conform with Article 2.2 of the TBT. Article 2.2 lays out that a standard that tries to achieve a legitimate objective must not be more trade-restrictive than what is necessary. The environment is specifically mentioned as being such a legitimate objective in the same article.

If a potential dispute settlement proceeding does not include carbon footprint standards then the measure would likely be analyzed under Article III:4 of the GATT, dealing with regulating sales on the internal market. Since there is a real possibility that any measure that bases its implementation on some type of analysis of the production processes of other countries may be illegal under Article III:4, recourse for carbon footprint standards may have to be sought in Article XX. If the domestic standard applies generally to both domestic production as well as imports from other member states, it is not impossible that an Article XX (g) defense of a carbon footprint standard would succeed, despite a potential violation of Article III:4, due to the above discussed room for climate measures in the GATT exceptions. However, internal trade debates in the WTO has revealed that the measure is very unpopular among developing nations due to fears over restricted market access.[140]

[139] Vossenaar, (UNCTAD trade and environment review 2009/10), 62.
[140] Zelli and Van Asselt, 86.

3.5 Transportation charges imposed at the border

Not all environmental border measures concern the climate footprint of the imported products directly. The emissions produced when transporting products may also be targeted as an externality to be internalized by imposing a transportation charge on the transported product at the border. The rationale would be to charge the product with the equivalent amount of emissions that was used in its shipping in order to "fairly" integrate the climate cost of the transportation.[141]

The origin-specific nature of transport charges (i.e. more distant places would invariably be discriminated against) means any such charge would very likely be a violation of GATT Article I. Neither would it be eligible as a border tax adjustment presuming that a domestic transportation tax was instituted in the implementing country. Transportation is a service and not an article (i.e. product), as required by GATT Article II:2(a) which regulates border tax adjusting. Thus, transportation emissions charges are unlikely to be permissible with WTO law.[142] Furthermore, one should note that this border measure is not an "easy lift". Targeting transportation in this way will have very large impacts on overall trade.[143] Though the popularity of this measure seems to be on the rise[144], trade scholars have pointed out flaws in the perceived good of the concept and generally do not recommend this approach.[145] Stringent analysis of data comparing the total lifecycle of a product did not necessarily mean more local prouction produced lower carbon emissions.[146] Unfortunately, the intuitiveness of the concept seems to lend itself to being easily picked up and repeated in the general debate, despite the dubious benefits of it.

[141] The not-so-simple fairness argument has been laudably studied in Müller's aptly named paper "Food Miles or Poverty Eradication? The moral duty to eat African strawberries at Christmas" where he points out the difficulty of determining fairness on different levels of the climate and trade debate.
[142] Hogan and Thorpe come to a similar conclusion regarding difficulties with trade regulation, p.18.
[143] Wynen and Vanzetti, 8.
[144] Ibid, 2.
[145] Ibid, 9.
[146] Ibid, 7.

3.6 Emissions allowance purchase requirements at the border

A state opting to use a cap and trade mechanism as its emissions control scheme may choose to implement purchase requirements on imports in order for them to comply with domestic law. In theory, the importer of a product would be required to purchase sufficient allowances to cover its greenhouse gas emissions, just like domestic firms would have to purchase allowances to produce goods for the domestic market. The price of the allowances to be purchased for these imports would of course typically be set at the same price as purchasing an allowance on the domestic market. Since the emissions of imported products are produced elsewhere (and thus should not add to the domestic cap or emissions profile), the type of allowance to be purchased by imports would likely be a special type of "import" or "international" allowance, the quantity of which would be determined by a formula of some sort by the implementor country.[147] The specifics of such a formula can vary wildly but for the purposes of this thesis the essential part to grasp is that import allowances do not add to the emissions profile, and thus the cap, of a country (since the emissions of the import are not produced in that country) and therefore must necessarily constitute a separate category, despite being like the other allowances regarding price and other outer aspects.

The recently revealed American Power Act, a piece of energy and climate legislation put forth by senator John Kerry and Joseph Lieberman on the 11th of May 2010 has included this measure in Part F, subpart 1 of the proposal draft alongside a federal cap and trade system. Other authors have also flagged the measure as one of the likeliest to be implemented in member states in the years ahead.[148]

A requirement that importers purchase additional allowances for their imports would likely fall under the "other duties and charges" levied on importers, regulated in GATT Article

[147] For example the United States Boxer amendment to the Lieberman Warner Climate Security Act proposed in 2008 tried to solve this with a rather complex system that, among other things, would attempt to take into account foreign climate programs and technology usage.
[148] Abaza and Biermann, 87.

II:1(b). If this is the case, this will likely constitute an "automatic" violation[149] of that provision. It is important to keep in mind however that this thesis deals with border measures. It would not be impossible for an implementor country to reframe the measure as an internal charge rather than a border charge. This would necessitate another review under GATT (most likely Article III:2) but this falls outside the scope of our purposes here.

An allowance purchase requirement at the border would also very likely constitute a violation of GATT Article I.1. It would be inherently impossible to calculate foreign emissions intensity to determine the exact purchase requirement without being origin-specific in violation of this Article.[150] Most likely, an implementor country would attempt to determine some type of comparability to its own domestic efforts and adjust the allowance requirement levied on the import thereafter. It is not generally permissible in the GATT to adjust trade treatment depending on such comparability of foreign states with domestic policy or regulation. In effect, this would clearly mean two like products would receive differing treatment due to their origin, thus standing in stark violation of Article I.1. The WTO, as of yet, does not take any heed to the emissions profile of a product when determining likeness. If they did the outcome might be different, but under current trading rules this is not the case and as a result discrimination would likely be found in a dispute.[151]

Assuming the measure would fall under Article I.1 as origin.specific discrimination, recourse might be sought in Article XX. To gain some specificity, I will here assume recourse is sought under Article XX(g).
Whether or not the measure would fall under the scope of item (g) would be closely related to the purpose of the measure in the specific case. Put bluntly, the key question to "win" here in a potential dispute would likely center around establishing a legitimate purpose for the measure. For success in this, it may reasonably be expected that the measure can not simply be described as a 'trade leveler' or as strictly being put into place for simple competitiveness reasons. The purpose of the measure would have to make clear that a legitimate policy goal is aspired to. For example, an implementor state would be wise to clearly define the measure as

[149] Quick 2008, p. 166.
[150] Voigt, 56.
[151] Abaza and Biermann, 88.

seeking to further, for example, the policy goal of conservation or perhaps linking the measure to the principle of "common but differentiated responsibilities".[152] Perhaps more boldly, the domestic regulation could also put into place purpose definitions directly in the legal text that empasized the program (and the measure that is part of it) as being designed to encourage "better" standards in other countries.[153] Whatever the specifics, the point is that a legitimate purpose for the measure must be established and that preferably this purpose has some tangible weight behind it.

If the measure is found to fall within the scope of item (g), the two prongs of that paragraph must be complied with. The first prong will examine if the measure is reasonably related to the ends of the policy. For example, if a country claims that the measure is connected to a conservation policy, a dispute panel will ask how charging importers at the border for allowances promotes such conservation. If the revenue collected from such sales are directly transferred to the state treasury, the measure would run a real risk of simply being seen as transferring funds from foreign producers to the national government. A way of circumventing this has been proposed by a US climate change proposal, the Boxer amendment to the so called Lieberman-Warner Act, wherein all the revenue would be earmarked for climate change reinvestment in *foreign* countries. With such a provision, the measure may be seen as reasonably related to the policy goal and thus be allowed under the first prong of item (g).

The second prong of item (g) requires fairness in applying the measure by having it "effective in conjunction with restrictions on domestic production". Since the emissions control in this case will clearly affect domestic producers in this case the second prong may be less problematic. It should be noted however that the text requires efficiency with regards to domestic *production*, period. Not just efficiency regarding domestically produced goods aimed at the domestic market. Thus, if a country chooses to export rebate its exports and thereby relieve them of their allowance burden, it is entirely possible that the second prong is not satisfied as the exported part of the domestic production will not be affected by the measure in that case.

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[152] Voigt, 60.

[153] This would of course have some basis in the *Shrimp-Turtle* case wherein such a rationale was put forward as a purpose for the measure (encouraging foreign regulation). As noted above, the very different creature of border trade measures based on emissions controls leaves serious doubts, in my opinion, concerning the applicability of this case. The *potential* for applicability however, it must be noted, is there.

Supposing both the scope of item (g) as well as its provisions are passed, the measure would have to be squared with the chapeau of Article XX.[154] Recalling that the chapeau typically primarily concerns itself with the manner in which the contested measure is applied and less with the contents of the measure, an abstract analysis is difficult without any real-world measure to connect it to. To be sure, much of the chapeau permissibility would be determined by real-world effects and implementational efforts. However, a few problems of a general nature may be put forward as examples of where a measure such as this one may find difficulties with the chapeau.

First, procedural requirements could be violated. In the *Shrimp-Turtle* case the Appellate Body expressed concern that the US measures were very unilateral in their nature and were created with little participation of other countries. It may by expected that such a concern could surface once more regarding go-it-alone climate change border measures. Also, inability of foreign states to appeal or otherwise be involved in the process of implementing a climate change mitigation may act incriminatingly on the degree of cooperative approach pursued by the implementing state.

Second, if a discrimination is found in the procedure it would be essential, as explicated above regarding the *Brazil-Tyres* case, that the discrimination is *in line* with the environmental purpose of the discrimination. This may not be self-evident. Suppose that the emissions allowance purchase requirement made some type of carbon-measurement average for countries. Even supposing this very complex operation were to be executed perfectly so as to be ostensibly fair in every way, the very fact of utilizing an average could mean that a clean energy producer with a poor national average would not just be discriminated against, but the act of discrimination would *go against* the environmental purpose of the discrimination.

Third, an implementing country must scrutinize its intentions with the measure carefully. If some evidence in implementation or motive would surface that so called "green protectionism"[155] was a factor in the design, implementation or effect of the measure, a violation of the chapeau could occur, primarily with reference to the "disguised restriction" part. In the *Shrimp-Turtle* case the lack of commercial gain from the measure was considered evidence that no disguised restriction had occurred. Any domestic commercial gain resulting

[154] Voigt believes the measure should be able to reach this state of being "provisionally justified". Voigt, 62.
[155] Stern (2008), 42.

from the measure may lead a panel to detect a disguised restriction. Thus, an implementing country would be wise to resist protectionist temptation of any kind when implementing the measure, even if only tangential.

Overall, the inherent difficulties that must be overcome in implementing this measure likely promises to make it both complex and contentious to square with (current) WTO law. Frankel even goes so far as to recommend against the measure, fearing it may lead to retaliation and trade war.[156]

[156] Frankel, 80.

4 Trajectory of climate change-motivated border measures and future policy options for determining permissibility in the WTO

As has been alluded to above, the ultimate permissibility of climate border measures in WTO law will likely come to depend on future policy developments in the Organization. This, in turn, may likely come to hinge on the general progress of international climate cooperation. Of course, the exact way in which these two enormously influential circumstances come to pan out eventually is at the moment of writing impossible to predict[157] and falls outside the scope of the thesis. What may be more helpfully presented at this point is a presentation of some of the most likely routes that integration of border climate measures into organization law may take. With climate mitigation efforts moving at different speeds, the clashes that may result from it in international trade all but ensures that this question must sooner or later be addressed by the WTO. Unfortunately, the discussions having been conducted thus far in the WTO Committee on Trade and Environment have yielded poor results.[158] There is still much controversy about the climate-trade overlap and authoritative statements from places such as the IPCC are lacking.[159] How the WTO chooses to adress the matter will likely come to depend on the appropriateness of the methods at their disposal. Some of these methods will be outlined here.

The "default" way of establishing certainty with regards to the permissibility of climate border measures, is to simply wait until disputes spark up and then attempt to solve their

[157] Without delving too deeply into it, it looks likely that the uneven speed of national climate mitigation will continue. This difference of speed will likely create clashes with international trade. Thus, in my opinion, the near future will likely hold mostly unique hybrid systems of nationally driven mitigation efforts relying on a mixture of measures to adress competitiveness, lower domestic emissions and encourage foreign action. Jackson and McGoldrick share this sentiment. Jackson and McGoldrick, 18.
[158] Zelli and Van Asselt, 89.
[159] Ibid, 89.

permissiblity legally in the dispute settlement mechanism. Given enough time, there would eventually come to form a body of case law out of such occurrences that could set the tone for WTO treatment of such matters. Although there have been only few outright proponents for such an approach[160], it may be noted that many of the cases studied above have shown quite some leniency towards environmental measures and purposes in settling trade disputes. As I pointed out regarding the *Shrimp-Turtle* case above however, none of them had severe trade impacts even remotely close to what could follow from instituting permissibility for climate motivated border measures. In trade issues, the level of contentiousness and animosity can reasonably be expected to be directly correlated to the financial interests that are at stake. Under such circumstances, trade disputes that may make or break a country's entire export strategy could become very contentious indeed. Thus, I do not believe that the Appellate Body's past leniency regarding more minor environmental issues should be overemphasized in an issue where the consequences may disrupt national export strategy, if not the integrity of the trading system itself.[161]

Apart from the uncertainty regarding the influence of past decisions, the sheer amount of disputes that may come before the WTO can in and of itself constitute a serious problem. Supposing domestic climate regimes move at different speeds and employ different techniques for their mitigation and competitiveness measures, it would seem likely that also many different cases would be brought regarding a plethora of national responses. Apart from the stress this would put on the dispute settlement courts, it would also mean a very long road to walk before clear guidelines were available. A WTO dispute settlement running its full course can take many years to complete and much uncertainty, economic loss and trade friction could flare up during this time. Also, damaging "chill effects" could result from protracted legal disputes, creating anticipative effects wherein members continously engage in wait-and-see behaviour rather than focus on moving the regime as a whole forward.[162]

A subtle but very damaging effect may also result from defaulting into a dispute settlement approach. If nations become locked in long legal disputes, it is not unlikely that they will become more concerned with winning the case rather than focusing on climate change itself. Thus, the animosity and confrontational nature of the dispute settlement approach can serve as

[160] Green mentions Know and Howse. Green, 188.
[161] Also note that I am now only discussing the legal dimension for the purposes of this thesis. The intensity of the political scenario and lobbying situation can not be underestimated under a dispute settlement "route".
[162] Zelli and Van Asselt, 88.

a dangerous distraction from finding other avenues for a meaningful solution. For example, it may make it harder to ultimately reach a negotiated understanding due to the hostility created from disputes surrounding trade friction.[163] A coupling of this adversarial mindset with real occurrences of suspected misuses of climate measures such as protectionist border measures and hidden subsidies to domestic industries could potentially set climate cooperation even further back.

Although it is what will likely follow if no other action is taken, the default nature of dispute settlement should not be confused with it being an easy approach to undertake in establishing permissibility. A very careful balance would have to be struck by the WTO courts in their judgments. Too much strictness and the rigidity of the system would come under massive criticism for not keeping with the more climate conscious time. Too much leniency and it runs the risk of inviting opportunistic cases of protectionism. Even if a balance is struck somewhere in the middle, thereby avoiding the worst of these instances, one may ask if it is appropriate in the first place to have trade judges (that comprise the WTO courts) deciding these matters.[164] Perhaps the most important point is that the word 'balance' here depends on your perspective.[165] Thus hypothethically, even a perfectly reasonable legal balance based on cases and articles may be considered unreasonable by others who differ in their view of what constitutes a fair balance.

With such difficulties inherent in dispute settlement, negotiations to amend WTO law may seem like a less contentious avenue that is to be preferred. Calls for amendments of WTO legal text by invoking Article X have been made many times of course in a variety of matters.[166] However, the steep requirement of nothing less than consensus for change make such amendments very hard to get through in practice regarding complex matters. It should be noted that even 'normal' trade negotiations, as illustrated by the Doha-round standoff, are enormously complex and hotly debated. The chances for a consensus amendment to WTO law regarding a certain permissibility for climate change motivated border measures thus seem remote at best.[167]

[163] As is the case in the stalled Doha round of trade negotiations, WGBU Policy Paper, 6.
[164] Palmer and Tarasofsky, 10.
[165] Ibid, 11.
[166] Zelli and Van Asselt 85.
[167] Palmer and Tarasofsky, 30.

It is also possible to attempt a waiver of certain WTO obligations and indeed this was attempted as early as 1996 for environmental issues by the EU.[168] This technically 'only' requires three quarters of the members approval[169] (which is not an easy threshold to cross) but of course hinges on several rather limiting factors. Apart from getting the votes, there would have to be detailed consensus on what measures to approve a waiver for, basically anointing these to a standard of sorts. The recent difficulties to even get a meaningful discussion off the ground in the COP-15 talks[170] regarding these matters may lead one to conclude that the policy avenue of enacting waivers for border measures also look rather thin at the moment.[171]

Annex 4 of the WTO agreement also give interested members an opportunity to create plurilateral agreements that can be enforced in WTO disputes but that have no effect on non-participating members as stated in Article II:3 of the Agreement. Potentially, if enough members joined such a plurilateral approach it may carry some weight in starting to form rules between participants regarding climate border measures and other related issues. It is of course unlikely that all members would be interested in joining such an agreement but the fact that they would not be affected by it means they would be much more likely to formally vote it into the WTO agreement (which requires consensus). If such a plurilateral approach were to be added to the WTO agreement , albeit most likely only having effect for some of the more climate-forward members that draft it, it could still serve an important role as reference point and platform for consensus for future discussions regarding permissibility. The real test for this approach would be to get enough members on board for it to hold some substantial weight policy-wise.

Although it would perhaps be preferable to reach some form of agreement within the WTO as described in the policy options above, this may prove unfeasible for a variety of reasons connected to the overall complexity of climate and trade frictions. If this is the case, nothing

[168] Zelli and Van Asselt, 85.
[169] GATT Article IX.3.
[170] Jackson and McGoldrick, 6 and WGBU Policy Paper, 13.
[171] The EU attempt in 1996, attempting an extension of the environmental exceptions in Article XX, met with fierce resistance from developing countries that feared green protectionism, Zelli and Van Asselt, 85.

prevents a number of countries to try and negotiate a climate trade "code" outside the confines of the WTO.[172] This strictly speaking falls outside the WTO-specific nature of this thesis but should still be mentioned due to its potential as a leveraging tool of sorts. Although the WTO dispute mechanism could not be used to enforce such a code, it could very well prove instrumental in seizing a moral high-ground of sorts that could come to exert political pressure on other nations to allow its provisions into the WTO agreement as explained just above.[173]

Perhaps the most hoped-for approach is to create norms in a Multilateral Environmental Agreement (MEA) resulting from broad international cooperation that could then influence the WTO.[174] For instance, if an upcoming protocol resulting from the current UNFCCC negotiations included trade provisions then a WTO panel could leverage such provisions heavily if most of its member states have agreed to the MEA. In other words, the key question in such circumstances would be if the complainant country had agreed to the MEA, thereby prejudicing the panel to allow the measures contained therein in a potentially following WTO dispute settlement. This is the simple case. If a country does not agree to the MEA and then brings a dispute, the defendant who did agree and implemented trade provisions in accordance with the MEA will not be able to use it as a defense in a WTO dispute. Indeed, not being a party will likely make it more likely that a dispute is brought.[175] Nevertheless, the "cross-pollination" between environmental and trade norms previously mentioned in this thesis could still give an MEA with trade disciplines substantial value even if they are not universally binding to all countries. All else being equal, multilateral measures built on multilateral agreements should presumptively be considered stronger than unilateral measures built on unilateral policy with regards to ensuring the permissibility of trade rules such as border measures motivated by climate change. Difficulties aside, this should perhaps be considered the preferred approach in solving climate and trade conflicts, not only for determining the permissibility of the border measures discussed here but also for the very positive synergistic effects that may come from such agreement. Put simply, the horse of international agreement on climate responsibility should and must come before the cart of permissible trade measures

[172] Palmer and Tarasofsky, 30.
[173] Ibid, 30.
[174] Stern (2008), 6. Also see Frankel, 78.
[175] Zelli and Van Asselt, 88.

in the WTO. A climate system that lacks such overarching coordination will never satisfactorily adress fears over carbon leakage, free-riding or other trade concerns.[176]

Finally, a note should be inserted on the possibility of implementing discussions on climate measure permissibility in the Doha round of trade negotiations. In its paragraph 31(i), the Doha Ministerial Declaration, a document that provides the framework for discussions in the Doha round of trade negotiations, has included calls for negotiations on the relationship between existing WTO rules and MEA:s.[177] Progress in this area has been very slow however. This forum does have the procedural experience to formally carry a discussion of the sort.[178] Perhaps most feasibly, an option could be to include discussions of so called sectoral agreements for commodities that are presumed most effected by climate change mitigation efforts.[179] Thus, the usual suspects of sensitive industries such as steel, cement, certain chemicals and a few others may be afforded trade restricting rules based on the proggressiveness of a certain nation's mitigation measures.[180] This could potentially alleviate some competitiveness fears but would also likely encounter the same problems as with amending the WTO agreement discussed above. Consensus would be needed for an amendment that included the sectoral agreement and achieving this seems unlikely at this time. Trying to infuse the Doha round with climate concerns would likely also meet with resistance for other reasons. Firstly, although sectoral agreements are a theoretically viable path and have occurred for many years in WTO negotiations, there has been an attempted move away from this commodity based approach since the conclusion of the Uruguay round of trade negotiations. Many sectoral agreements were removed during this round which was considered a step forward for the trading regime at large. Although climate concerns may be regarded a special case, reintroducing a commodity approach for the sake of climate change would likely be very unpopular.[181] Second, and perhaps more impactfully, one may doubt whether member states will be willing to further complicate the already stalemated and

[176] WGBU policy paper, 13.
[177] WTO-UNEP Trade and Climate Change Report (2009), 82.
[178] Stern (2008), 45.
[179] Stern even argues for it. Stern (2008), 42.
[180] Zhang also argues for this sectoral approach (albeit not necessarily in a Doha context) in a working paper from this year and submits that such an effort coupled with a good-faith cooperative approach could make it a feasible route. I am less convinced as stated above. Zhang, 2.
[181] Fliess, (UNCTAD trade and environment review 2009/10), 194.

contentious nature of the current round of negotiations with equally contentious and complex climate concerns.[182] Some voices would likely be raised regarding the perceived inappropriateness of adding these issues to the negotiations.

Thus, the Doha round of trade negotiations may not be the best avenue available for exercises in permissibility regarding climate motivated border measures.[183]

In the end, this debate comes down to values, with neutrality generally being illusion. A poignant quote from Green may illustrate:

"The debate over climate change hinges on values – how we value the environment, how we value the relationships of humans and nature, how important we feel are the advantages of free trade. The institutional framework will determine whose values prevail. The decision cannot be left to a supposedly neutral appeal to science because of the lack of information but also because even with perfect information there will still remain a wide range of issues science cannot decide related, for example, to environmental values, preferences for risk, and intergenerational equity."[184]

[182] Zelli and Van Asselt, 87.
[183] Note however that the recent WTO-UNEP report entitled "Trade and climate change" made a recommendation on using the Doha round for permissibility discussions. WTO-UNEP (2009), 89.
[184] Green, 189.

5 Conclusion

As has been discussed throughout the thesis, several potential avenues for permissibility within the WTO legal structure does exist for border trade measures undertaken with a climate change rationale. Somewhat distressingly however, the current development within national climate change mitigation policy seems headed toward favoring some of the most WTO-contentious alternatives when choosing border trade measures for their national mitigation efforts. Measures such as emissions allowance purchase requirements at the border will become reality before long, yet their problematic status within the WTO system is still unresolved. Due to this state of affairs, immediate action in more satisfyingly determining permissibility is urgently needed to avoid the adversarial context that avoidable trade friction may bring with it. The results from studying the relevant alternatives for determining permissiblity from within the confines of the WTO were limited in both their appropriateness and chance for success. Political progress from the outside, most likely as a result of the work of the UN, can and must drive technical progress regarding WTO permissibility of these border measures. With international partnership and an atmosphere of collegiality within the debate as a whole preceding legal and technical progress from within the WTO, the very foundation for progress in the latter will be on more solid ground. Border trade measures undertaken with a climate change rationale is a small part of a greater whole, but the confusion surrounding them is symptomatic of the greater struggle that surrounds the international debate on climate change mitigation generally. Unfortunately,the most recent attempts at progress in the UN have been slow and it may cautiously yet prudently be predicted that further meaningful international political harmony lay still a few years away. Interesting times definitely lay ahead in the trade and environment field if this stalemate continues while national mitigation efforts continue to pick up in speed and aggressiveness.

Encouragingly, the current WTO leadership does seem to harbor a good understanding of the problems facing the organization with regards to the trade measures discussed in this thesis. This, of course, is a positive sign. Strong and able leadership, willing and able to withstand strong pressure from many directions is not just a factor of great importance in these matters,

it will be a compulsory part for any meaningful process towards much needed clarity and unity. It must be understood that, politically, these matters are potential minefields that unfortunately also often lend themselves all too well towards emotionally based populist arguments and politically motivated scare-tactics. Both trade and the equity debate inherent in international climate change mitigation discussions have strong political undertones. Thus, it is hard to overstate the overall importance strong political leadership backed by popular support holds for finding ways forward in this area.

This thesis has operated under what is the current regulatory environment of the WTO. It is not without hope I look forward to seeing this regulatory environment change in the years ahead, hopefully inching us ever closer to that most elusive goal: a policy environment where efforts within both trade and climate change find mutual supportiveness for the benefit of all.

Appendix A: Relevant Applicable GATT/GATS Articles

Article	Text
GATT Article 1:1 Most Favored Nation	"1.With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respects to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."
GATT Article II:1 (a), (b), and 2(a) Schedules of concessions	"1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement. (*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. 2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: (*a*) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;"
GATT Article III:1, 2, and 4 Internal taxation and Regulation	"1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

	"4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."
GATT Article XI:1 and 2(a), (b) and (c) Quantitative Restrictions	"1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. 2. The provisions of paragraph 1 of this Article shall not extend to the following: (*a*) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party; (*b*) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade; (*c*) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate… "
GATT Article XX:(b) and (g) General Exceptions	"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 by any contracting party of measures: …(*b*) necessary to protect human, animal or plant life or health; …(*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;…"
GATS Article XIV General Exceptions	"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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:" "…(b) necessary to protect human, animal or plant life or health;…"

Appendix B: Relevant ASCM Text

Article	Text
ASCM Annex I Illustrative List of Export Subsidies (w/o footnotes)	(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises. (g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption. (h) The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.
ASCM Annex II Inputs in the Production Process (w/o footnotes)	"1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste)." "2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate."

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