



INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 5 AND ISSUE 9 OF 2025

INSTITUTE OF LEGAL EDUCATION



INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 5 and Issue 9 of 2025 (Access Full Issue on – <https://ijlr.iledu.in/volume-5-and-issue-10-of-2025/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education

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Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

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ENVIRONMENTAL EXCEPTIONS UNDER GATT ARTICLE XX AND CLIMATE CHANGE: SCOPE AND LIMITATIONS

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BEST CITATION – DIVYANSHU RATHORE & DR. UJJAWAL SINGH, ENVIRONMENTAL EXCEPTIONS UNDER GATT ARTICLE XX AND CLIMATE CHANGE: SCOPE AND LIMITATIONS, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 5 (10) OF 2025, PG. 255-261, APIS – 3920 – 0001 & ISSN – 2583-2344.

Abstract

International trade and environmental protection have found their nexus in the age of climate change to become more controversial. At the centre of this discussion is Article XX of the General Agreement on Tariffs and Trade (GATT)¹⁵⁴, which contains general exceptions that allow member states to take measures that would otherwise be contrary to GATT obligations if they are required to safeguard the health or lives of people, animals, or plants, or if they have to do with conserving finite natural resources. This article scrutinizes the reach and boundaries of Article XX in relation to climate change measures, including carbon tariffs, border adjusters, and prohibition on high-carbon goods.

By doctrinal examination of WTO case law, in particular US–Shrimp, US–Gasoline, and EC–Seal Products, the article examines how the meaning assigned to the chapeau and subparagraphs (b) and (g) of Article XX determines the legality of environmental trade restrictions. It also examines whether existing WTO norms sufficiently allow for timely climate imperatives or set overly burdensome procedural and substantive requirements that unnecessarily restrict the regulatory freedom of states.

The article contends that although Article XX provides a prospective legal basis for climate action, it is constrained by strict requirements of necessity, non-discrimination, and good faith. The analysis identifies a lack of clarity, consistency, and reform of the WTO dispute resolution to reflect better the international community's consensus on environmental protection and sustainable development. Lastly, it provides suggestions for the interpretation and, if necessary, revision of GATT provisions to ensure they are compatible with global climate objectives under the Paris Agreement.

GRASP - EDUCATE - EVOLVE

¹⁵⁴ General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

Introduction

The fast-growing trend of climate change has prompted nations around the world to adopt more aggressive green policies, most of which intersect with international trade. As worldwide carbon emissions remain on the increase and accelerating environmental degradation, nations are setting up climate trade policies like carbon border duties, border restrictions on non-compliant products, and green technology subsidies. These steps, however environmentally driven, raise serious legal issues on their compatibility with the international trading system, in particular the General Agreement on Tariffs and Trade (GATT) within the World Trade Organization (WTO).

This point of intersection gives rise to a fundamental tension between two of the fundamental objectives of modern international regulation: liberalization of trade and protection of the environment. While trade law seeks to minimize restrictions and promote non-discrimination in the treatment of goods and services, environmental regulation has a tendency to require differential treatment based on means of production, carbon footprint, or country of origin environmental performance. The resulting legal tension has become increasingly salient as governments seek to harmonize their trade commitments with their climate commitments under instruments such as the Paris Agreement.

In this legal context, GATT Article XX is focal. It establishes general exceptions under which member states are able to justify trade-restrictive measures that are required to secure public health or to preserve exhaustible natural resources. This article critically evaluates the scope and limits of Article XX as a basis of law for trade measures related to the climate, with particular reference to WTO case law and emerging policies like carbon border adjustment mechanisms (CBAMs). It argues that while Article XX offers a potential legal mechanism for safeguarding environmental action, its efficacy is constrained by procedural

and substantive obstacles that might hinder forward-thinking climate action.

The analysis is doctrinal in its approach to law, referencing treaty interpretation, WTO disputes adjudications, and scholarly commentary. It also invokes policy-driven interpretation to assess the evolving interplay between trade and environmental regulation. In unearthing the parameters of Article XX and examining its adequacy in addressing such contemporary climate concerns, the article hopes to contribute to the general discourse on international trade law reform amidst a deepening global climate crisis.

Overview of GATT and Article XX

General Agreement on Tariffs and Trade (GATT), founded in 1947 and afterwards integrated into the institutional framework of the World Trade Organization (WTO) in 1995, is the foundation of the multilateral trading system. Its main objective is to increase liberalization of trade by lowering tariffs and removing all other forms of trade barriers, thus creating economic growth, efficiency, and international cooperation.

Two of the most basic principles of GATT are the Most-Favoured Nation (MFN) treatment under Article I and National Treatment under Article III. The MFN principle binds a WTO member to apply any preference or trade concession given to one member to all members. While National Treatment binds a member to treat goods imported into the market not less favourably than "like" domestic goods. Such provisions collectively aim to provide that trade goes smoothly, in a predictable manner, and justly between states.

Yet, such regulations are not absolute. Acknowledging the necessity to have some room to maneuver, especially in sectors such as public health and environmental protection, GATT has in-built some exceptions to its overall obligations.

Structure and Purpose of Article XX

If certain requirements are met, WTO members may implement actions that would otherwise

be in conflict with their trade responsibilities under the broad exceptions granted by Article XX of the GATT. There are two main parts to the article:

1. Substantive clauses (e.g., paragraphs (b) and (g)), which list the types of policies that may justify trade-restrictive measures. Of particular relevance to environmental and climate concerns are:
 - Article XX(b): Measures “necessary to protect human, animal or plant life or health.”¹⁵⁵
 - Article XX(g): Measures “relating to the conservation of exhaustible natural resources” if “such measures are made effective in conjunction with restrictions on domestic production or consumption.”¹⁵⁶
2. The Chapeau (introductory clause), which qualifies the use of the substantive exceptions. It requires that the measure not be applied in a manner that constitutes:
 - “Arbitrary or unjustifiable discrimination” between countries where the same conditions prevail; or
 - “A disguised restriction on international trade.”

Article XX seeks to achieve equilibrium between the GATT's trade-liberalization goals and governments' sovereign rights to pursue justifiable non-trade goals, such as environmental preservation. However, it is the invoking state's responsibility to demonstrate that the measure satisfies the chapeau's standards and is covered by one of the mentioned exceptions.

Environmental Dimensions of Article XX

Historically, the GATT framework was reluctant to explicitly accommodate environmental concerns, reflecting the post-war focus on economic recovery and trade growth rather than ecological sustainability. Environmental protection was viewed as a domestic issue, largely outside the scope of international trade law.

This perspective began to shift in the 1990s with the rise of global environmental consciousness and the increased use of trade measures to address cross-border environmental challenges. The WTO Dispute Settlement Body began to recognize that environmental objectives could be accommodated within the GATT framework—particularly through Article XX.

Seminal cases such as *US – Gasoline* (1996) and *US – Shrimp* (1998) marked a turning point by affirming that environmental measures can, in principle, be justified under Article XX(g). These cases expanded the interpretation of “exhaustible natural resources” to include clean air and marine life, thereby paving the way for broader environmental exceptions.

Nevertheless, WTO jurisprudence has also emphasized the strict procedural and substantive requirements of Article XX, particularly under its chapeau, which continues to limit the flexibility of member states to unilaterally impose environmentally motivated trade measures. This tension becomes even more pronounced in the context of climate change, where the urgency of action may conflict with the rigid structure of trade law.

Interpretation of Key Provisions under Article XX

Article XX(b) – Protection of Health and Life

Member states may enact policies “necessary to protect human, animal, or plant life or health,” according to Article XX(b). The necessity test, which determines whether the legislation is the least trade-restrictive option realistically available, is a crucial requirement.

¹⁵⁵ *General Agreement on Tariffs and Trade art. XX(b)*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194

¹⁵⁶ *General Agreement on Tariffs and Trade art. XX(g)*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194

In *Thailand – Cigarettes*, the panel ruled that Thailand's import restrictions on cigarettes were not "necessary" because less trade-restrictive alternatives were available, such as labeling or advertising controls.¹⁵⁷

In *Brazil – Retreaded Tyres*, the Appellate Body recognized the legitimacy of Brazil's environmental and health objective but scrutinized whether the ban on used tyre imports was necessary and applied fairly.¹⁵⁸

Article XX(g) – Conservation of Exhaustible Natural Resources

Article XX(g) supports measures aimed at conserving natural resources, so long as they are "related to" conservation and are accompanied by similar domestic measures. Jurisprudence has interpreted "exhaustible" to include renewable resources, such as marine wildlife and air quality.

In *US – Gasoline*, the Appellate Body held that a U.S. measure regulating gasoline quality could qualify under Article XX(g), but found that its discriminatory administration violated the chapeau.¹⁵⁹

In *US – Shrimp*, the Appellate Body accepted that endangered sea turtles constituted an exhaustible resource, and that trade restrictions aimed at their conservation could fall under Article XX(g), provided they were not applied in a discriminatory fashion.¹⁶⁰

The Chapeau of Article XX

A measure must adhere to the chapeau even if it is covered by a particular clause. This guarantees that policies are not implemented in a way that amounts to covert trade restrictions or arbitrary or unjustifiable discrimination. When it comes to the implementation of environmental trade

regulations, WTO panels constantly stress the importance of procedural fairness, adaptability, and collaborative participation.

The *US – Shrimp* ruling is pivotal in highlighting the chapeau's function. Though the environmental goal was accepted, the measure was ruled inconsistent due to its **unilateral application** and failure to offer meaningful negotiations to all affected states.¹⁶¹

Climate Change Measures and Their Compatibility with Article XX

Types of Climate-Related Trade Measures

In response to global climate imperatives, states are increasingly adopting trade-related climate measures designed to curb carbon emissions and incentivize green transitions. These measures include:

- **Carbon Border Adjustment Mechanisms (CBAMs):** These are charges or taxes on imported products in proportion to their carbon content in order to avert carbon leakage and make the level competitive for local producers who face more stringent environmental rules. EU's Carbon Border Adjustment Mechanism is a shining example.¹⁶²
- **Bans or Restrictions on High-Emission Products:** Some countries may prohibit or restrict the import of products deemed excessively carbon-intensive, such as coal-based steel or unsustainable palm oil.
- **Green Subsidies and Import Restrictions for Non-Compliant Products:** Measures may also involve granting subsidies to domestic industries that adopt sustainable practices, or restricting imports that fail to meet environmental standards.

¹⁵⁷ Report of the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT B.I.S.D. (37th Supp.) at 200, ¶¶ 74–75 (Nov. 7, 1990).

¹⁵⁸ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R, ¶¶ 139–146 (adopted Dec. 17, 2007).

¹⁵⁹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 14–16 (adopted May 20, 1996).

¹⁶⁰ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, ¶¶ 129–132, 171–186 (adopted Oct. 12, 1998).

¹⁶¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, ¶¶ 129–132, 171–186 (adopted Oct. 12, 1998).

¹⁶² See *Communication from the European Union, "Proposal for a Carbon Border Adjustment Mechanism," COM(2021) 564 final* (July 14, 2021).

While these instruments support legitimate climate objectives, their compatibility with WTO rules—especially under GATT—depends on how they are designed and applied.

Case Studies and Hypotheticals

1. CBAMs and Article XX(g)

CBAMs can be framed as measures “relating to the conservation of exhaustible natural resources,” such as the Earth’s climate or atmospheric stability, thus falling within Article XX(g). Climate, like biodiversity or clean air, is now widely accepted as an “exhaustible” resource.¹⁶³

However, to satisfy Article XX(g), the measure must:

- Be substantially related to conservation;
- Be non-arbitrary;
- Be accompanied by domestic restrictions, such as carbon taxes or emissions caps applied within the implementing country.

The EU CBAM, for instance, arguably fulfills these conditions by aligning import requirements with internal carbon pricing. Nonetheless, challenges arise under the chapeau, especially regarding:

- Unilateral application;
- Insufficient differentiation between countries with equivalent but different regulatory approaches;
- Procedural transparency and equitable treatment.¹⁶⁴

2. Unilateral Climate Sanctions

Unilateral import bans or sanctions imposed for climate non-compliance—such as prohibiting imports from countries that have not ratified the Paris Agreement—would likely face greater difficulty under the chapeau of Article XX.

The WTO Appellate Body in *US – Shrimp* warned against coercive or inflexible approaches that fail to consider different environmental conditions or allow sufficient consultation. Measures must offer process-based flexibility and avoid discrimination between “similarly situated” WTO members.

3. Hypothetical: Import Ban on Non-Green Steel

Suppose a country bans the import of steel produced without a defined minimum of green hydrogen usage. While the goal of reducing emissions in steelmaking could be justified under Article XX(g), a WTO panel would closely examine whether:

- Equivalent but different production standards abroad were unfairly excluded;
- The measure was applied consistently to both foreign and domestic products;
- Adequate procedural fairness and transparency were provided.

Such hypotheticals illustrate the difficulty of using trade restrictions as climate tools without violating WTO rules, especially the chapeau’s non-discrimination provisions.

Jurisprudential Trends

WTO jurisprudence has increasingly moved toward a broader and more environmentally conscious reading of Article XX:

- In *US – Shrimp*, the Appellate Body accepted that cross-border environmental harms justify extraterritorial environmental regulation, provided procedural fairness is maintained.¹⁶⁵
- In *Brazil – Retreaded Tyres*, the importance of balancing environmental objectives with trade obligations was reaffirmed, signaling growing deference

¹⁶³ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 14–16 (adopted May 20, 1996).

¹⁶⁴ See *Communication from the European Union, “Proposal for a Carbon Border Adjustment Mechanism,”* COM(2021) 564 final (July 14, 2021).

¹⁶⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, ¶¶ 121–186 (adopted Oct. 12, 1998).

to national regulatory autonomy for environmental purposes.¹⁶⁶

Despite this, significant pitfalls remain:

- The lack of binding precedent in WTO law means that prior Appellate Body rulings do not guarantee future outcomes.
- The complexity and evolving nature of climate policy—including scientific uncertainty and divergent national priorities—may test the limits of the current Article XX framework.
- Multilateral cooperation remains preferable, as unilateral measures risk falling foul of WTO scrutiny unless they are crafted with high procedural integrity and policy coherence.¹⁶⁷

The absence of climate-specific provisions within the WTO necessitates creative but careful application of existing exceptions, but also highlights the urgent need for reform or clarification to address climate change more explicitly within trade law.¹⁶⁸

Here's a detailed draft for **Section V: Limitations of the Current Framework** including suggestions on where to place the citations and a full list of Bluebook-style citations at the end:

Limitations of the Current Framework

Rigid Tests and Burdensome Justification Requirements

One of the primary limitations of using Article XX to justify climate-related trade measures lies in the stringent necessity test and the demand for demonstrating the “least trade-restrictive” alternative. This standard often forces countries to adopt complex and costly legal defenses, potentially discouraging innovative environmental measures.

WTO jurisprudence, especially in cases like *Thailand – Cigarettes* and *Brazil – Retreaded Tyres*, illustrates how panels strictly scrutinize necessity, often favoring trade liberalization over environmental policy space. This rigidity can hamper states' ability to adopt dynamic climate policies responsive to evolving scientific and policy needs.¹⁶⁹¹⁷⁰

Uncertainty in Chapeau Interpretation

The chapeau of Article XX, designed to prevent abuse of exceptions, remains vague and open to subjective interpretation. WTO dispute rulings have revealed inconsistencies and political influence in adjudicating what constitutes “arbitrary or unjustifiable discrimination” or “disguised restriction on trade.”

This challenge is exemplified by the US – Shrimp case: though the environmental goal was embraced, the application of the measure was invalidated for procedural shortcomings. This kind of uncertainty leaves states hesitant to forecast the result of trade conflicts over climate policies, eroding legal certainty and possibly discouraging strong climate action.¹⁷¹¹⁷²

No Explicit Recognition of Climate Change in WTO Agreements

There is a basic flaw in that the WTO agreements do not refer directly to climate change or associated environmental goals. The lack of direct reference creates a gap between international trade law and developing global environmental governance regimes, such as the Paris Agreement and other climate agreements.

The absence of WTO explicit climate provisions leads to piecemeal legal frameworks that find it difficult to reconcile trade and environmental objectives in a harmonious manner. This

¹⁶⁶ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R, ¶¶ 139–228 (adopted Dec. 17, 2007).

¹⁶⁷ Steve Charnovitz, *The WTO's Environmental Progress*, 10 J. Int'l Econ. L. 685, 690–95 (2007).

¹⁶⁸ Robert Howse & Antonia Eliason, *Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues*, 24 Geo. Int'l Envtl. L. Rev. 437, 441–60 (2012).

¹⁶⁹ Report of the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT B.I.S.D. (37th Supp.) at 200, ¶¶ 74–75 (Nov. 7, 1990).

¹⁷⁰ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R, ¶¶ 139–146 (adopted Dec. 17, 2007).

¹⁷¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, ¶¶ 121–186 (adopted Oct. 12, 1998).

¹⁷² Robert Howse & Antonia Eliason, *Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues*, 24 Geo. Int'l Envtl. L. Rev. 437, 441–60 (2012).

shortfall makes climate-related trade actions susceptible to challenge and makes it difficult to develop a single global response.^{173/174}

Need for Reform and Policy Recommendations

Clarifying Environmental Exceptions

In order to limit ambiguity and legal uncertainty, WTO members would do well to adopt an interpretative statement or waiver that forthrightly confirms the legitimacy of climate-related trade measures under Article XX. It could clarify the extent of environmental exceptions and allow for a clear framework on necessity test and chapeau application in the context of climate.

This would assist in harmonizing trade commitments with climate necessities and persuade states to accept more aggressive environmental policies without fear of WTO adjudication.¹⁷⁵

Incorporating Climate Considerations into WTO Rules

There is increasingly a consensus that WTO law should more accurately mirror international climate commitments, including the Paris Agreement and the UN Framework Convention on Climate Change (UNFCCC). Incorporating these values into WTO law—by amendment or interpretative guidance—would engender coherence between the trade and environmental regimes.

This alignment would make climate measures the legitimate trade-related policies and promote a friendlier legal regime for international climate action.¹⁷⁶

Promoting Multilateral Dialogue

Successful climate action involves multilateralism. WTO members are urged to

come together and create WTO-consistent multilateral environmental standards that set transparent, science-based standards for climate-related trade measures.

This process would de-escalate conflicts by aligning standards, limiting trade disputes, and increasing predictability. The success of such a dialogue relies on trust, transparency, and mutual willingness to balance trade and environmental interests.^{177/178}

Alternative Forums

In light of the challenges to changing WTO rules, preferential trade agreements (PTAs) have become crucial platforms for promoting climate goals. Most PTAs now contain special climate chapters that enable parties to use bold, binding environmental standards without the requirement of full WTO agreement.

Though PTAs do not substitute for the WTO, they are innovation laboratories and can induce more extensive multilateral changes by proving the viability of climate-compatible trade rules.¹⁷⁹

Conclusion

This article has examined the scope and limitations of Article XX of GATT as a legal foundation for climate-related trade measures. While Article XX provides valuable exceptions that can justify environmental and climate protection efforts, its stringent necessity tests, ambiguous chapeau, and lack of explicit climate recognition limit its effectiveness and predictability.

Given the urgent need to address climate change, the WTO must evolve—through clarifications, reforms, and enhanced multilateral cooperation—to better harmonize trade rules with sustainable development objectives. Only by doing so can the WTO continue to uphold a fair and rules-based trade

¹⁷³ Robert Howse & Antonia Eliason, *Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues*, 24 *Geo. Int'l Envtl. L. Rev.* 437, 441–60 (2012).

¹⁷⁴ Steve Charnovitz, *The WTO's Environmental Progress*, 10 *J. Int'l Econ. L.* 685, 690–95 (2007).

¹⁷⁵ Robert Howse & Kal Raustiala, *The Politics of International Regime Complexity*, 34 *Harv. Envtl. L. Rev.* 1 (2010).

¹⁷⁶ Robert Howse, *Climate Change and WTO Law*, in *Research Handbook on Environment, Health and the WTO* (A. Narlikar ed., 2020).

¹⁷⁷ Steve Charnovitz, *The WTO's Environmental Progress*, 10 *J. Int'l Econ. L.* 685 (2007).

¹⁷⁸ Robert Howse & Antonia Eliason, *Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues*, 24 *Geo. Int'l Envtl. L. Rev.* 437 (2012).

¹⁷⁹ Robert Howse & Kal Raustiala, *The Politics of International Regime Complexity*, 34 *Harv. Envtl. L. Rev.* 1 (2010).

system that supports global climate action,
rather than impeding it.

