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CHANGING REALITIES: EVOLUTION AND EXTRATERRITORIALITY WITHIN ARTICLE XX(G) OF GATT FOR GLOBAL ENVIRONMENTAL CONCERNS

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This paper aims to expand the environmental exception within General Agreement on Tariffs and Trade (GATT) to include limited extraterritoriality. The author poses an inquiry to ascertain whether the concept of common concern may be used for such inclusion, if one can import it into the Covered Agreements of the Marrakesh Agreement. The current environmental exception is unable to withstand the true pressure of global climate change. It leaves a World Trade Organization (WTO) Member with insufficient defence against another country's actions harming the environment. Through evolutionary interpretation, we can align the reality of the current environmental crisis with a Member's WTO obligations. The objective of sustainable development and the concept of common concern of humankind may be used to expand the scope of Article XX(g) through evolutive interpretation based on both ordinary meanings of a term and the living instrument approach. This style of interpretation cannot be used to infringe rights of other WTO Members. The paper, thus, advocates for a balanced approach through a limited form of extraterritoriality by expanding the scope of Article XX(g) to tackle these issues, without adding or diminishing their rights or obligations.

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I. INTRODUCTION

Since before the issuance of a 'code red' by the 6th Assessment Report of the International Panel of Climate Change's Working Group I,[1] the international community is focused on controlling the temperature rise on Earth.[2] For this purpose, many countries have pledged to reach net-zero carbon emissions level by 2050.[3] To reach this goal, and consequently fight against global warming, several WTO Members have begun to implement several environment-related trade

[1] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS (Valérie Masson-Delmotte et al. eds., 2021) [hereinafter IPCC REPORT] (A code red warning signifies that climate change is 'widespread, rapid, and intensifying', and that there is sufficient indication that the world would exceed the Paris target of limiting global warming to 1.5° Celsius pre-industrial levels by 2035); *see also* Montek Singh Ahluwalia & Utkarsh Patel, *Getting to Net Zero: An Approach for India at CoP 26* (Ctr. Soc. & Econ. Progress, Working Paper No. 13, 2021).

[2] *See COP 26: Together for Our Planet,* UNITED NATIONS [U.N.] CLIMATE ACTION (Nov. 2021), https://www.un.org/en/climatechange/cop26.

[3] *See For a Livable Climate: Net-Zero Commitments Must be Backed by Credible Action,* U.N. CLIMATE ACTION (Nov. 2021), https://www.un.org/en/climatechange/net-zero-coalition. For specific information on the more than fifty countries which have made commitments to reach net-zero carbon emissions by 2050, see *Interactive: Which Countries are Leading the Way on Net Zero?*, SPECIAL BROAD. SERV. [SBS] NEWS (Nov. 11, 2021), https://www.sbs.com.au/news/article/interactive-which-countries-are-leading-the-way-on-net-zero/5wokpx4cq.

measures to combat global warming and other concerns with respect to climate change.[4] In 2019, the European Union (EU) established a Green Deal, wherein they decided to implement several environment–related trade measures that are aimed at protecting the environment by attempting to regulate activities outside one's own territory.[5] One such example is the Carbon Border Adjustment Mechanism (CBAM).[6] It is aimed at preventing carbon leakage,[7] and levelling the playing field for European industries, which are working towards decarbonisation,[8] and production of goods in carbon-intensive sectors.[9] Under this measure, the EU has proposed a border adjustment tax which will be phased in from 2026.[10] This will be levied on foreign goods seeking market access into the EU if they have been produced with high carbon emissions.[11] Due to the trade restrictive nature of such measures, and the EU's Membership at the WTO, these measures would be

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[4] *See Carbon Tax Basics,* CTR. CLIMATE & ENERGY SOL. (2021), https://www.c2es.org/content/carbon-tax-basics/, for Carbon Tax Measures in many States; *see Cap and Trade Basics,* CTR. CLIMATE & ENERGY SOL. (2021), https://www.c2es.org/content/cap-and-trade-basics/, for Emissions Trading System. The United States [U.S.] recently introduced the Clean Competition Act, 2022 which is a variant of Carbon Border Adjustment Mechanisms [CBAMs]. *See Whitehouse and Colleagues Introduce Clean Competition Act to Boost Domestic Manufacturers and Tackle Climate Change*, SHELDON WHITEHOUSE (June 8, 2022), https://www.whitehouse.senate.gov/news/release/whitehouse-and-colleagues-introduce-clean-competition-act-to-boost-domestic-manufacturers-and-tackle-climate-change.

[5] *See Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, COM(2021)0564 – C9-0328/2021 – 2021/0214(COD) (May 23, 2022), https://www.europarl.europa.eu/doceo/document/A-9-2022-0160_EN.html#_section1 [hereinafter CBAM Draft Resolution]; *see also Delivering the European Green Deal*, EUR. COMM'N (2021), https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en#documents.

[6] CBAM Draft Resolution, *supra* note 5.

[7] Carbon leakage occurs when companies in the European Union [EU] move their carbon-intensive production outside EU to take advantage of weaker environmental norms on carbon emissions. Companies may also decide to import more of their carbon-intensive products than sell them locally. This leakage would shift emissions outside of EU but would still lead to increase in emissions globally. *See* Opinion of the European Economic and Social Committee on 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism', at 187, 2022 O.J. (C 152/181).

[8] *Id.* at 181, 184; *see also* Isabelle Durant et al., U.N. Conf. Trade & Dev. [UNCTAD], *A European Union Carbon Border Adjustment Mechanism: Implications for Developing Countries*, U.N. Doc. UNCTAD/OSG/INF/2021/2 (July 14, 2021) [hereinafter UNCTAD Report].

[9] UNCTAD Report, *supra* note 8, at 10.

[10] CBAM Draft Resolution, *supra* note 5.

[11] *Id.*

considered violative of the WTO Covered Agreements.[12] These types of violations are typically provisionally justified under Article XX(g) of the GATT.[13] These measures, however, may not fall under the scope of this exception because of their extraterritorial nature. This paper provides two different methods of expanding the scope of the exception to justify such measures, if proven not to be protectionist.[14]

The primary reason behind expanding the scope of Article XX(g), an exception catering to policy goals aimed at, "conservation of exhaustible natural resources",[15] is to accommodate the changing reality of our environment, and the new measures taken by WTO Members to acclimatise to this new reality. The new reality entails a definitive threat to humankind in the near future if no steps are taken to combat the rising temperatures.[16] Treaties have often been read by international courts in an evolutive manner to embrace a change of meaning[17] — including embracing of

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[12] The World Trade Organization [WTO] Covered Agreements are all the multilateral agreements annexed to the Marrakesh Agreement Establishing the WTO. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154. The WTO Members are bound by all these agreements as part of a 'single undertaking'. *See How the Negotiations are Organized*, WTO, https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm.

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

[14] The scope of the paper is limited to GATT. The CBAM only violates the GATT. However, other environment-related trade measures may also violate the Technical Barriers to Trade Agreement [TBT Agreement]. The analysis in this paper is also applicable to the TBT Agreement in theory since interpretations by the Appellate Body [AB] for both agreements are similar, even though the specific provision being analysed (Article XX(g)) is not a part of it. *See generally* Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes,* WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012).

[15] GATT 1994, *supra* note 13, art. XX(g). Article XX(g) of GATT 1994 states that subject to requirements of non-discriminatory application of measures, nothing in the agreement prevents the adoption of measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[16] IPCC REPORT, *supra* note 1.

[17] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21) [hereinafter ICJ Namibia]; Aegean Sea Continental Shelf (Gr. v. Turk.), Judgment, 1978 I.C.J. Rep. 3 (Dec. 19); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16) [hereinafter ICJ Costa Rica/Nicaragua]; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US — Shrimp* (AB)]; Panel Report, *Mexico — Measures*

new activities, scientific advances, technological developments, and new fields of law, such as environmental law[18] — in order to keep a treaty afloat to meet the decided objectives.[19] This paper contemplates whether such an evolutionary interpretation approach can be used to expand the scope of Article XX(g) to include similar environment-related trade measures with extraterritorial effect within the said provision.

The specific environment-related trade measures under inquiry in this paper are focused on the internal market of the measure-imposing State. However, the location of the subject of protection in question would be outside the territory of the measure-imposing State, making the measure extraterritorial.[20] To illustrate this further, one can refer to *United States — Shrimp* (*US — Shrimp*), where the United States (US) imposed a measure banning the entry of shrimp products imported from countries where shrimp harvesting is practiced using methods responsible for incidentally killing sea turtles.[21] However, shrimp products that were imported from countries who mandated the use of Turtle Exclusionary Devices designed according to the US' prescribed measure (hence reducing incidental killings of sea turtles) were allowed to enter the market. This measure was, thus, related to sea turtles outside the territory of the US. Thus, the extraterritorial event in this measure was the requirement for other countries to follow US' environmental measures regarding sea turtles in their territories to gain market access.

Affecting Telecommunications Services, WTO Doc. WT/DS204/R (adopted June 1, 2004) [hereinafter *Mexico — Telecom*]; Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [hereinafter *China — Audiovisuals*]; Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1 (1978) [hereinafter Tyrer v. U.K.]; Marckx v. Belgium, App. No. 6833/74, 2 Eur. H.R. Rep. 330 (1980) [hereinafter Marckx v. Belgium]; Rantsev v. Cyprus and Russia, App. No. 25965/04 (Jan. 7, 2010), https://rm.coe.int/16806ebd5e [hereinafter Rantsev v. Cyprus].

[18] *See* Richard Gardiner, *Criticisms, Themes, Issues, and Conclusions*, *in* TREATY INTERPRETATION 451 (2d ed. 2015); *see also* ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2007) [hereinafter LINDERFALK]; Pierre-Marie Dupuy, *Evolutionary Interpretation of Treaties: Between Memory and Prophecy*, *in* TREATY INTERPRETATION BEYOND THE VIENNA CONVENTION (Enzo Cannizzaro ed., 2011) [hereinafter Pierre-Marie Dupuy].

[19] Pierre-Marie Dupuy, *supra* note 18.

[20] INTERNATIONAL LAW ASSOCIATION, INTERIM REPORT ON EXTRATERRITORIAL JURISDICTION IN EXPORT CONTROL LAW, REPORT OF THE 64TH CONFERENCE 318 (1990); Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36(2) J. WORLD TRADE 365 (2002) [hereinafter Bartels].

[21] *US — Shrimp* (AB), *supra* note 17; *see* Public Law 101-162 § 609, 16 U.S.C. § 1537 (1989) (U.S.).

However, the WTO Appellate Body (AB) has been silent yet inconsistent regarding the acceptability of the extraterritoriality of such measures.[22] To clarify such acceptability, this paper uses 'evolutionary interpretation' and 'common concern of humankind' to bring extraterritorial environment-related trade measures within the scope of Article XX(g). The concept of common concern of humankind, found in many Multilateral Environmental Agreements (MEAs), legitimises actions involving concerns located outside one's territory since the danger associated to the concern has an impact that transcends boundaries.[23] This concept includes climate change,[24] and conservation of biological diversity,[25] which fit under the broad goal of conserving 'exhaustible natural resources' under Article XX(g).[26] Interpreting Article XX(g) evolutionarily to accommodate environmental concerns like global warming, which are a part of our new reality and require action across boundaries, would effectively water down the contended territorial limitation.

To explain the use of evolutionary interpretation to reinterpret Article XX(g), the author has divided this paper into three parts. Part I analyses current WTO jurisprudence on the ambiguity behind accepting the above-mentioned measures under WTO rules. Here, the author concludes that the current jurisprudence on Article XX(g) is inconsistent regarding inclusion of extraterritorial measures within the scope of the article and requires further examination.

Part II carries out extensive examination regarding whether Article XX(g) can be expanded to include limited extraterritorial measures. The author refers to Bartels,[27] Dobson,[28] and Cooreman,[29] who used the customary laws of jurisdiction

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[22] *US — Shrimp* (AB), *supra* note 17; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter *US — Tuna II (Mexico)* (AB)]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.173, WTO Doc. WT/DS400/AB/R (adopted June 18, 2014) [hereinafter *EC — Seal Products* (AB)] (these cases are elaborated upon in Part II).

[23] Dinah Shelton, *Common Concern of Humanity*, 39 ENV'T POL'Y & L. 83 (2009) [hereinafter Shelton].

[24] U.N. Framework Convention on Climate Change, Preamble, May 9, 1992, 1771 U.N.T.S. 107, 165 [hereinafter UNFCCC].

[25] Convention on Biological Diversity, Preamble, June 5, 1992, 1760 U.N.T.S. 79, 143 [hereinafter CBD].

[26] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline,* WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *US — Gasoline* (AB)]; *US — Shrimp* (AB), *supra* note 17; Appellate Body Report, *Brazil — Certain Measures Concerning Taxation and Charges*, WTO Doc. WT/DS472/AB/R (adopted Jan. 11, 2019).

[27] Bartels, *supra* note 20, at 353.

to include certain extraterritorial measures within the scope of Article XX(g). The paper contributes to this existing scholarship by highlighting the legality of these measures by expanding the scope of Article XX(g) through: a) evolutionary interpretation based on generic terms; and b) European Court of Human Rights' (ECtHR) 'living instrument' doctrine.[30] The generic term-based approach focuses on expanding the term 'conservation' in Article XX(g) to include conservation measures that respond to concerns transcending boundaries, as showcased in many MEAs. The living instrument approach focuses on the objective of sustainable development to refer to treaties, even if they have not been ratified by all Members. This helps understand the evolved context around Article XX(g) which includes concerns that transcend boundaries and should also be included under the Article for effective interpretation, like the ECtHR's approach.

Finally, Part III analyses the risks of the approach taken — both for legitimising extraterritoriality and using evolutionary interpretation to do it. It emphasises the requirements that need to be fulfilled to balance free trade with sustainable development to ensure that it would not result in adding or modifying obligations of WTO Members.[31] The scope of this paper is, however, limited to analysing the legality of extraterritorial environment-related trade measures. It does not delve in detail into the question of whether such measures, paired with their unilateral application, 'ought to' be used in a coercive manner.[32]

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[28] Natalie Dobson & Cedric Ryngaert, *Provocative Climate Protection: EU 'Extraterritorial' Regulation of Maritime Emissions*, 66(2) INT'L & COMPAR. L. Q. 295 (2017) [hereinafter Dobson & Ryngaert].

[29] Barbara Cooreman, *Addressing Environmental Concerns Through Trade: A Case for Extraterritoriality?*, 65(1) INT'L & COMPAR. L. Q. 229 (2016) [hereinafter Cooreman].

[30] For a detailed distinction behind both these approaches, *see* Pierre-Marie Dupuy, *supra* note 18.

[31] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. Article 3.2 of the Understanding of the Rules of Dispute Settlement Procedures [DSU] prohibits adding, modifying, or diminishing the rights and obligations of WTO Members. It states,

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves . . . to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

[32] This question is more important from a developing country perspective as a misbalance in application can put the developing countries in an unfavourable position. *See generally* Bhupinder Singh Chimni, *WTO and Environment: Legitimisation of Unilateral Trade Sanctions*, 37(2) ECON. & POL. WKLY. 133 (2002) [hereinafter Chimni]; Pallavi Kishore, *Revisiting the*

The author's original contribution in this paper is to link trade and environment in terms of extraterritoriality using evolutionary interpretation. This approach avoids the complications created while importing the concept of common concern of humankind specifically through either customary law of jurisdiction or Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT); approaches which have been used before to justify extraterritoriality. Instead, the approach uses evolutionary interpretation to include the concept, based on both Article 31(1) of the VCLT and the living instrument approach by the ECtHR. Both these styles can be depended upon to import the concept of common concern of humankind into WTO Law to re-interpret the scope of Article XX(g) measures.

II. ACCEPTANCE OF EXTRATERRITORIALITY WITHIN THE GATT

The AB has had the chance to decide on the legality of extraterritorial measures within GATT Article XX on several occasions.[33] They have laid down specific requirements for seemingly extraterritorial measures to be justified under Article XX(g). This part focuses on detailing and analysing such requirements to determine whether they, in fact, support all extraterritorial measures, or only those with territorial connections. The author first explains the current tests involved to determine the lawfulness of a measure. The discussion then focuses on determining acceptability of extraterritorial measures under WTO jurisprudence, especially dissecting the silences of the AB. The author concludes that while the requirements only support remotely territorial measures, these requirements have not been applied by the AB consistently, resulting in many instances of silent and inconsistent acceptances.

Testing the legality of a WTO Member's measure within the GATT is a two-pronged analysis — first, we analyse whether the measure is discriminatory in design or impedes on market access; and second, in case of failing the first prong, we analyse if the violation of the first prong may be justified by the exceptions under GATT.[34]

As an illustration, let us consider a measure which prohibits the sale of products manufactured from companies with high greenhouse gas (GHG) emissions

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WTO Shrimps Case in the Light of Current Climate Protectionism: A Developing Country Perspective, 3(1) GEO. WASH. J. ENERGY & ENV'T L. 13 (2012).

[33] *US — Shrimp* (AB), *supra* note 17; *US — Tuna II (Mexico)* (AB), *supra* note 22; *EC — Seal Products* (AB), *supra* note 22.

[34] *See generally* Peter Van den Bossche & Werner Zdouc, *General and Security Exceptions*, *in* THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS 1508 (5th ed. 2021) [hereinafter VAN DEN BOSSCHE & ZDOUC].

beyond a specific threshold.[35] Products manufactured by companies who use cleaner technology with low emissions would, thus, have more competitive opportunities in the market compared to those manufactured by companies who use dirty technology leading to high emissions which cannot be sold in the market. This differential treatment may amount to discrimination against products by companies with higher emissions.

Firstly, this measure may be violative of both most-favoured-nation and national treatment obligations under GATT, namely Article I:1 and Article III:4 of GATT, for being discriminatory.[36] The national treatment obligation focuses on favourable treatment provided to domestic products over foreign products. Under the measure, 'less favourable treatment' is accorded to products from companies with higher emissions, potentially established in countries with weaker environmental regulations relative to the measure-imposing country.[37] This showcases clear discrimination in treatment of more carbon-intensive products from countries with weaker regulations in comparison to products from the measure-imposing country with cleaner technology, because of stricter environmental regulations.[38] Thus, this

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[35] This is a product-based restriction, not a country-based restriction. Country-based restrictions prove to be more problematic because even cleaner technology products would not be placed on the market. Robert Howse & Antonia L. Eliason, *Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues*, *in* INTERNATIONAL TRADE REGULATION AND THE MITIGATION OF CLIMATE CHANGE: WORLD TRADE FORUM 48 (Thomas Cottier et al. eds., 2009).

[36] Just for this example, let us assume that the scope of the national treatment clause includes measures that are non-product related process and production methods [NPR PPMs] as well. *See generally* Robert Howse & Donald Regan, *The Product/Process Distinction: An Illusory Basis for Disciplining Unilateralism in Trade Policy*, 11(2) EUR. J. INT'L L. 249, 259 (2000) [hereinafter Howse & Regan] (Howse and Regan argue that there is no textual support for not testing NPR PPMs under Article III of GATT); *see also* Joel P. Trachtman, *WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe*, 58(2) HARV. INT'L L. J. 273, 276 (2017) [hereinafter Trachtman].

[37] The test for national treatment for laws, regulations, and requirements (under Article III:4 of GATT) is to determine whether 'less favourable treatment' is accorded to foreign like products. In this case, we draw a presumption of likeness for the like products analysis and directly move on to the 'less favourable treatment' analysis. *See* Report of the Panel, *Belgian Family Allowances* (Nov. 7, 1952), GATT B.I.S.D. 1S/59 1952 (1952) [hereinafter *Belgian Family Allowances*]; Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, WTO Doc. WT/DS366/R (adopted May 20, 2009). The 'less favourable treatment' analysis focusses on whether there is an effective equality of opportunities. If the analysis determines that it has been impeded, we can conclude that there is less favourable treatment. *See* Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001).

[38] For this analysis, let us assume that consumer preferences would not play a big role in analysing likeness of products. It is beyond the scope of this paper to debate on how

measure would violate the national treatment obligation. It would also violate the most-favoured-nation obligation because a conditional advantage of selling products in the domestic market of the measure-imposing country has been accorded only to companies with lower emissions,[39] violating Article I:1 of GATT.[40]

Secondly, Article XX may be used to justify the discriminatory treatment within the measure. To provisionally defend a measure under a general exception under Article XX, the measure must first be related to or be necessary for one of the specific legitimate aims listed as sub-paragraphs in Article XX.[41] The measure at hand is about stopping global warming by reducing the amount of GHG emissions which pollute the atmosphere and create a greenhouse effect. Article XX(g) of GATT, aimed at conservation of natural resources, is most relevant for this policy objective. To prove whether the measure can be defended under Article XX(g), we must prove: a) that the measure is about 'conservation of an exhaustible natural resource'; b) that the measure is 'related to' conservation of an exhaustible natural resource; and c) the measure has been imposed "in effective conjunction with similar restrictions on domestic production".[42] Firstly, the measure is about conservation of the atmosphere generally, and clean air specifically. With increasing knowledge of air pollution and concentrated levels of GHGs in our atmosphere, one can conclude that clean air, which is naturally occurring, can be

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consumer preferences play an important role in determining likeness of products divided by an environmental protection measure. *See generally* Petros C. Mavroidis, *Driftin' Too Far from Shore – Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body is Wrong, and What Should the AB Have Done Instead*, 12(3) WORLD TRADE REV. 509 (2013) (Mavroidis explains how the consumers may actually differentiate between these two groups of products).

[39] Article I:1 of GATT requires that measures which treat products from one country differently from the like products from another country are discriminatory. Such different treatment includes providing a conditional advantage, such as providing duty free treatment to goods that are produced with lower carbon emissions. *See Belgian Family Allowances*, *supra* note 37.

[40] *Id.*

[41] The various legitimate aims are public morals or public order; human, animal, or plant life or health; importations or exportations of gold or silver; necessity to secure compliance with other WTO consistent laws or regulations; prohibition on prison labour; protection of national treasures; conservation of exhaustible natural resources; to pursue obligations under a WTO consistent intergovernmental commodity agreement; regarding domestic materials necessary to ensure essential quantities of specific materials; and, regarding acquisition or distribution of products in general or local short supply. *See* GATT 1994, *supra* note 13, art. XX.

[42] *Id.*, art. XX(g).

depleted to levels that are irreversible.[43] Thus, it should be considered as an exhaustible natural resource. This argument was also accepted by the Panel and AB in *US — Gasoline*.[44] Secondly, the measure is focused on conserving clean air by prohibiting carbon-intensive companies from selling their products. It is therefore genuinely related to the policy goal of conservation. Thirdly, the measure also applies to domestic production, thus applies in effective conjunction with domestic restrictions.[45] Therefore, all tiers are *prima facie* satisfied.

Many WTO Members have, however, argued that the scope of Article XX(g) does not include extraterritorial measures,[46] thus *prima facie* excluding the measure from being justified under Article XX(g). Additionally, even if it is accepted at the Article XX(g) stage, it may not be accepted at the chapeau stage,[47] which tests whether a measure has been applied in a manner that is arbitrarily or unjustifiably discriminatory.[48] The unilateral nature of the measure may be perceived as arbitrarily or unjustifiably discriminatory,[49] if no good faith negotiations were carried out or if the measure was applied in a 'rigid' manner.[50] Thus, clarity needs to be sought regarding the status of the legality of such extraterritorial measures to understand how to defend them at the WTO under the GATT.

The following sub-parts are aimed at judging the acceptability of these measures under the current interpretation of Article XX(g) of GATT through relevant GATT/WTO jurisprudence and public international law relevant to extraterritorial measures. The obstacles faced at the chapeau stage have been analysed briefly in

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[43] *Climate Change Widespread, Rapid, and Intensifying*, INTERGOVERNMENTAL PANEL CLIMATE CHANGE (Aug. 9, 2021), https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/.

[44] Clean air has been identified as an exhaustible natural resource by the AB that requires conservation and falls within the policy objective of Article XX(g) of GATT. *See US — Gasoline* (AB), *supra* note 26.

[45] *See generally id.*

[46] Report of the Panel, *United States — Restrictions on Imports of Tuna* (Sept. 3, 1991), GATT B.I.S.D. 39S/155 (unadopted), at ¶ 5.30 (1991) (Mexico had raised this argument) [hereinafter *US — Tuna I (Mexico)*]; Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products,* ¶¶ 7.43-45, WTO Doc. WT/DS58/R (adopted Nov. 6, 1998) (India, Pakistan, Malaysia, and Thailand had also raised this argument) [hereinafter *US — Shrimp* (Panel)].

[47] Under Article XX, a measure is first provisionally justified under an appropriate sub para of Article XX, and then tested further under the chapeau. *See US — Gasoline* (AB), *supra* note 26.

[48] GATT 1994, *supra* note 13, art. XX.

[49] *US — Shrimp* (Panel), *supra* note 46; *cf. US — Shrimp* (AB), *supra* note 17, ¶ 121; *US — Tuna II (Mexico)* (Panel), *supra* note 22, at ¶ 7.371.

[50] *See* Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — Recourse to Article 21.5 of the DSU by Malaysia,* ¶¶ 129-132, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001) [hereinafter *US — Shrimp (Art. 21.5)* (AB)].

Part IV; however, a detailed analysis on the chapeau is outside the scope of this paper.[51]

A. Relevant GATT/WTO Jurisprudence about Extraterritorial Measures

Before the establishment of the WTO,[52] extraterritorial measures were first discussed in the GATT *US — Tuna* panel reports.[53] The *US — Tuna (Mexico)* (1991) (1991 *Tuna*),[54] and the *US — Tuna (EEC)* (1994) (1994 *Tuna*),[55] (collectively referred as *US — Tuna*), panel reports created contradictions about a jurisdictional limitation to environmental measures. Both the cases are about an import prohibition imposed by the US on tuna and tuna products which have been caught using commercial fishing technology which results in incidental killing or causing of serious injury to dolphins. Studies showed that in many areas dolphins and tuna are found together, and many fishermen tracked dolphins to catch tuna. This often resulted in the incidental taking of dolphins while using purse seine nets to catch tuna. This practice, consequently, led to increased dolphin mortality. To curb this practice domestically and internationally, the US imposed an import prohibition on tuna and tuna products caught through this practice. Under Section 101(a)(2) of the Marine Mammal Protection Act, the importation of tuna and tuna products was prohibited, except in cases where the Secretary of Commerce found that either the government of the exporting country has a program regulating taking of dolphins which is comparable to the US or their average rate of incidental taking of dolphins is comparable to the US.[56] The US also included a labelling measure which stated that tuna and tuna products which were approved for importation by the Secretary of Commerce would be eligible for the 'Dolphin Safe' label.[57]

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[51] For a detailed analysis on unilateralism, see Marieke Koekkoek, *In Search of the Final Frontier – An Analysis of the Extraterritorial Effect of International Trade Measures from a Jurisdictional Perspective,* 10(1) TRADE L. & DEV. 65 (2018) [hereinafter Koekkoek]; Cooreman, *supra* note 29.

[52] Before the establishment of the WTO in 1994, GATT Contracting Parties used the GATT as a *de facto* dispute settlement system where adoption of reports was on a positive consensus basis, which allowed States to reject reports for political reasons. *See* Thomas J. Dillon Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16(2) MICH. J. INT'L L. 349, 364 (1995).

[53] *US — Tuna I (Mexico)*, *supra* note 46; Report of the Panel, *United States — Prohibitions of Imports of Tuna and Tuna Products from Canada* (Feb. 22, 1982), GATT B.I.S.D. 29S/91 (1982) [hereinafter *US — Tuna (Canada)* (GATT Panel)]; Report of the Panel, *United States — Restrictions on Imports of Tuna (EEC)* (June 16, 1994), GATT B.I.S.D. DS29/R (unadopted) (1994) [hereinafter *US — Tuna (EEC)* (GATT Panel)].

[54] *US — Tuna I (Mexico)*, *supra* note 46.

[55] *US — Tuna (EEC)* (GATT Panel), *supra* note 53.

[56] Marine Mammal Protection Act, 16 U.S.C. §§1361-1407 (1972) (U.S.).

[57] Dolphin Protection Consumer Information Act, 16 U.S.C. §1385 (1990) (U.S.).

In 1991, the GATT panel in 1991 *Tuna* interpreted Article XX(g) to include an implied territorial limitation.[58] Thus, the measures directing States to regulate the taking of dolphins in a manner comparable to the US could not be defended under Article XX(g) because the location of the natural resource the US sought to conserve, which is dolphins, was outside its territory. The Panel feared that without this territorial limitation, the GATT would lose its multilateral nature and provide, "legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."[59]

In 1994 *Tuna*, the GATT Panel disagreed with the 1991 *Tuna* Panel report and stated that there is no such limitation.[60] They stated that no textual limitation was created with respect to the location of the exhaustible natural resource. They further relied on previous panel reports which did not indicate any such limitation, or even any differential treatment, for migratory species.[61] Additionally, they stated that, in the absence of a specific territorial limitation under Article XX(g), there was also no such absolute restriction on Article XX as a whole — several other provisions, such as Article XX(a) which protected public morals, and Article XX(e) which justified a ban on importation of items made from slavery, relied on material or events that existed outside the territorial border of the measure-imposing country.[62] The Panel also highlighted that States are not, in principle, barred from regulating conduct of their nationals, including natural resources, outside their territory, or barred from regulating any vessels bearing their nationality, including any natural resources on these vessels.[63] Relying on these reasons, they concluded that there was no jurisdictional limitation under Article XX. The measures were still considered to be violative of the GATT, but because of their coercive nature to demand States to shape their environmental policy in the same manner as the US.[64]

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[58] *US — Tuna I (Mexico)*, *supra* note 46.
[59] *Id.* ¶ 5.27.
[60] *US — Tuna I (EEC)* (GATT Panel), *supra* note 53.
[61] Report of the Panel, *Canada — Measures Affecting the Exports of Unprocessed Herring and Salmon* (Mar. 22, 1988), GATT B.I.SD. 35S/98 (1988) [hereinafter *Canada — Herring* (GATT Panel)]; *US — Tuna* (*Canada*) (GATT Panel), *supra* note 53, at ¶ 5.15.
[62] *Id.* ¶ 5.16.
[63] *Id.* ¶ 5.17.
[64] *Id.* ¶ 5.26; *see generally* Donald H. Regan, *How to Think About PPMs (and Climate Change)*, *in* INTERNATIONAL TRADE REGULATION AND THE MITIGATION OF CLIMATE CHANGE 97 (Thomas Cottier et al. eds., 2009). The author distinguishes between country-based measures and product-based measures, identifying that the unilateral and coercive nature of the former cannot be defended under GATT.

The explicit acceptance, or rejection, of extraterritorial measures was, however, not repeated by any AB since then, because both the GATT *US — Tuna* reports were not adopted by the Dispute Settlement Body, and thus, are not a part of the GATT/WTO jurisprudence.

With the advent of the WTO, the approach to extraterritorial trade measures changed. In 1998, the WTO Panel was first confronted with the question of extraterritoriality in the *US — Shrimp* dispute. The Panel did not allow for extraterritorial measures because it was a, "threat to the multilateral trading system".[65] The AB overruled this move.[66] They allowed the inclusion of a *prima facie* extraterritorial measure in *US — Shrimp,* albeit only in connection with a 'sufficient nexus' with a measure-imposing State.[67] In this case, the AB focused on the migratory nature of the species, adding that they spend sufficient time in the US territorial sea.[68] The focus on the time spent in the US waters implies a territorial connection. The AB explicitly refrained from commenting on extraterritoriality generally and focused on a territorial connection.[69] Hence, it implicitly excluded the possibility of sufficient nexus encapsulating non-territorial connections to the State, such as the concept of common concern of humankind providing a general basis for global responsibility/collective action, and from being a defence.[70] Some scholars have, however, interpreted the 'sufficient nexus' test to allow extraterritorial application of environmental measures through the backdoor,[71] but it seems more of an expansive reading since the nexus test focused solely on a territorial connection.[72]

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[65] *US — Shrimp* (Panel), *supra* note 46, at ¶¶ 7.43-7.45.

[66] *Id.* ¶ 7.45; *US — Shrimp* (AB), *supra* note 17, at ¶ 10.

[67] *US — Shrimp* (AB), *supra* note 17, at ¶ 133. The 'sufficient nexus' requirement may be read as a territorial connection requirement since the AB focused on how the turtles traversed through US waters, thus belonging to the territory of the US for a significant period. *See* Cooreman, *supra* note 29; Dobson & Ryngaert, *supra* note 28.

[68] *US — Shrimp* (AB), *supra* note 17, at ¶ 133.

[69] *Id.*; *see generally* Erich Vranes, *Carbon Taxes, PPMs and the GATT*, *in* RESEARCH HANDBOOK ON CLIMATE CHANGE AND TRADE LAW 77, 100 (Panos Delimatsis ed., 2016) [hereinafter Vranes].

[70] In *US — Tuna I (EEC)* (GATT Panel), *supra* note 53, the Panel declared that the dolphins should be protected since they are a part of the global commons. However, this logic was not opted by the AB in *US — Shrimp* (AB), *supra* note 17.

[71] MITSUO MATSUSHITA, WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY n.4 (2d ed. 2006); Koekkoek, *supra* note 51.

[72] *US — Shrimp* (AB), *supra* note 17, at ¶ 133; Cooreman, *supra* note 29; Dobson & Ryngaert, *supra* note 28.

In 2012, Mexico brought back the *US — Tuna* debate in *US — Tuna II (Mexico)*,[73] albeit this time within the Agreement on Technical Barriers to Trade (TBT Agreement). The measure concerned itself with only a dolphin safe label. There were no other restrictions in the form of import prohibitions. This label measure was, however, considered unlawful by the AB,[74] because of lack of even-handedness, and not because of its extraterritorial nature.[75] Mexico had, however, questioned both the unilateral and extraterritorial nature of the measure, drawing similarity with the measure in *US — Shrimp*.[76] While the AB took note of this argument,[77] they did not address the legality of the extraterritorial nature of the measure, perhaps because Mexico had argued it incorrectly under Article 2.2 of the TBT Agreement, instead of Article 2.1.[78] They did, however, rely on the AB's acceptance of unilateral measures in *US — Shrimp* when they stated that a measure is not *a priori* excluded from Article XX because it requires exporting countries to follow certain policies imposed by importing countries.[79] Despite showcasing explicit acceptance of unilateral measures by citing *US — Shrimp*, the Panel and AB refrained from citing the 'sufficient nexus' doctrine, implicitly accepting the extraterritoriality, even without any territorial connection.[80]

In 2014, the AB silently accepted another extraterritorial measure in *European Communities — Seal Products (EC — Seal Products).* The measure was about the prohibition on importation and marketing of seal products. The location of the seals whose welfare needed to be protected were outside the territory of the EU, making the measure extraterritorial in nature. The measure was defended under Article XX(a) of the GATT for protecting public morals of a community, a section which was already identified by the Panel in 1994 *Tuna* to necessarily include extraterritorial concerns.[81] The Panel found that the protection of seals is of high importance to the people of Europe. This was in reaction to the European Communities' (EC) argument that the presence of seal products in the EU market

[73] *US — Tuna II (Mexico)* (AB), *supra* note 22, at ¶ 7.371.
[74] For lucidity, the author does not consider the Panel report of this case because of incorrect application of the law by the Panel.
[75] *US — Tuna II (Mexico)* (AB), *supra* note 22, at ¶ 297.
[76] *Id.* at ¶ 86.
[77] *Id.* at fn 675.
[78] *Id.* at ¶ 339.
[79] *US — Tuna II (Mexico)* (Panel), *supra* note 46, at ¶ 7.371 (citing *US — Shrimp* (AB), *supra* note 17, at ¶ 121).
[80] Jakir suggests that because of the conduct of the AB, the issue of extraterritoriality has ceased to be a concern. *See* Vanda Jakir, *The New WTO Tuna Dolphin Decision: Reconciling Trade and Environment?*, 9(3) CROATIAN Y.B. EUR. L. & POL'Y 143, 175 (2013).
[81] *US — Tuna I (EEC)* (GATT Panel), *supra* note 53, at ¶ 5.16.

is ethically and morally repulsive to them.[82] The AB upheld this explanation as necessary to protect public morals of the EC.[83] The justification was not about protection of seals being a common concern of humankind or any other ground legitimising extraterritoriality. It was tethered to the EC — to the nationals of the WTO Member.[84] The AB could, potentially, justify an extraterritorial measure by embracing legitimate forms of extraterritoriality. However, the AB connected it to the morals of the EC. It stayed silent on the explicit extraterritorial character of the measure because the parties to the dispute did not include this issue in their submissions.[85]

Thus, after 2012, the WTO seems more accepting of extraterritorial measures than before, however, without providing an explanation about deviating from the standards set earlier. The unadopted *US — Tuna* GATT Panel reports made it clear that coercive measures attempting to dictate another Member's domestic policies were not lawful under GATT. But they contradicted each other about the acceptance of extraterritorial measures. The 1991 *Tuna* report collated unilateralism with extraterritoriality, while the 1994 *Tuna* report distinguished between the two concepts, accepting extraterritoriality while rejecting coercive dictating of environmental policies, a subset of unilateralism. The Panel in *US — Shrimp* made the same mistake of collating extraterritoriality with unilateralism, while the AB created a distinction between the two. However, the AB did not accept all forms of extraterritorial measures, unlike in the 1994 *Tuna* GATT Panel Report. It created a 'sufficient nexus' requirement. This was, however, not applied by the Panel and AB in both *US — Tuna II (Mexico)* and *EC — Seal Products*. Instead, they silently accepted the extraterritorial nature of the measures without a sufficient nexus test.

Therefore, there is a lack of consensus about the legality of extraterritorial measures under WTO Law. While extraterritorial measures, such as the illustration on low emission products or CBAM would be accepted under GATT,[86] but based

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[82] *EC — Seal Products* (AB), *supra* note 22; Robert Howse et al., *Sealing the Deal: The WTO's Appellate Body Report in EC — Seal Products*, AM. SOC'Y INT'L L.: INSIGHTS (June 4, 2014), https://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto's-appellate-body-report-ec-—-seal-products [hereinafter Howse et al.].

[83] *EC — Seal Products* (AB), *supra* note 22, at ¶ 5.140. For an ideal WTO-compliant CBAM, *see generally* Vranes, *supra* note 69; *see also* Joel P. Trachtman, *WTO Law Constraints on Carbon Credit Mechanisms and Export Border Tax Adjustments*, *in* RESEARCH HANDBOOK ON CLIMATE CHANGE AND TRADE LAW 109 (Panos Delimatsis ed., 2016).

[84] The AB implied that, "the public morals which were the object of the measure were held by all citizens within the territory". *See* Dobson & Ryngaert, *supra* note 28, at fn 195; *see generally* Howse et al., *supra* note 82.

[85] *EC — Seal Products* (AB), *supra* note 81, at ¶ 5.173.

[86] *See generally* Ingo Venzke & Geraldo Vidigal, *Are Trade Measures to Tackle the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism*

on the silent acceptances under *US — Tuna II (Mexico)* and *EC — Seal Products,* we are unclear why.

WTO law cannot be read in clinical isolation from other fields of public international law.[87] The International Law Commission's (ILC) sixty-sixth session in 2006 focussed on the risks of fragmentation of international law and studied the different specific regimes with their separate legal systems. While analysing the WTO, Martii Koskenniemi argued that the WTO Agreement shares a special relationship with other rules of public international law,[88] and the Panel and AB reiterated this in *US — Gasoline*.[89] Legality of extraterritorial measures has been explored in detail within customary rules of laws of jurisdiction. Additionally, one can depend upon international environmental law to specifically justify certain forms of extraterritorial environmental measures taken to fight climate change. Thus, enquiring about the acceptance of extraterritorial environment-related trade measures within these fields is the ideal next step. This inquiry should prove helpful to understand whether Article XX(g) 'could' include or 'implicitly' includes limited extraterritorial measures. The following sub-part conducts this investigation, focusing on both customary laws of jurisdiction and concepts within international environmental law, specifically common concern of humankind.

B. Public International Law regarding Measures with Extraterritorial Effect

Prescriptive extraterritorial jurisdiction is considered legitimate where a State is affected by the actions of another State,[90] or shares a 'substantial and genuine connection'.[91] The idea was first captured in the *Lotus* case wherein the Permanent Court of International Justice stated that there is no rule prohibiting a State to make a law effective in its own territory about acts that take place abroad.[92] This

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(CBAM), 51 NETH. Y.B. INT'L L. 187 (2020); Alice Pirlot, *Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?,* 34 J. ENV'T L. 25 (2022).

[87] *US — Gasoline* (AB), *supra* note 26, at 17.

[88] Int'l L. Comm'n, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC Fragmentation Report].

[89] *US — Gasoline* (AB), *supra* note 26, at 17.

[90] *See* Menno T. Kamminga, *Extraterritoriality*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (Rüdiger Wolfrum ed., 2020) [hereinafter Kamminga].

[91] *Id.*; OPPENHEIM'S INTERNATIONAL LAW 456-458 (Robert Jennings & Arthur Watts eds., 9th ed. 2008); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 486 (8th ed. 2012) [hereinafter CRAWFORD]. F.A. Mann defined this requirement as a 'meaningful connection'; *see* F. A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years,* 186 RECUEIL DES COURS 28 (1984) [hereinafter Mann].

[92] S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. Rep. (ser. A) No. 10 (Sept. 7).

principle was reiterated in the *Arrest Warrant* case by Justices Kooijman and Higgins, stating further that, "[t]he movement is towards bases of jurisdiction other than territoriality", as a reaction to globalisation.[93]

The following two sub-parts focus on two rules of jurisdiction — 'effects doctrine' and 'legitimate state interest' — and their interplay with the concept of 'common concern of humankind' to prove the legality of extraterritorial measures at the WTO. The first sub-part analyses how academic scholars have used these rules of jurisdiction to defend extraterritorial measures at the WTO. The second sub-part focuses on the use of common concern of humankind, to fulfil the criteria set by these rules, to defend extraterritorial measures.

1. Legitimate State Interest, Effects Doctrine, and Extraterritorial Trade Measures — Relevant Academic Literature

This sub-part focuses on establishing a 'substantial and genuine connection' between the State exercising such jurisdiction and the extraterritorial event.[94] F. A. Mann stated that this connection, which he defined as a 'meaningful connection', cannot be established through 'merely' an "economic, political, commercial, or social interest".[95] Lorand Bartels identified this connection more specifically as 'legitimate state interest'.[96] According to Bartels, one must determine whether a State has a 'legitimate state interest' — determined in accordance with the rules of public international law — to justify the use of extraterritorial elements within a measure. This can be initially established based on general principles of jurisdiction.[97] With respect to extraterritorial environment-related trade measures, the two relevant principles of jurisdiction are the 'protective principle' and the 'effects principle'.

The type of measures being analysed in this paper are not typically an exercise of prescriptive extraterritorial jurisdiction. Prescriptive extraterritorial jurisdiction is about a state's authority to lay down rules of conduct about events beyond its territory, whereas the extraterritorial environment-related trade measures are restricted to making entry of products or treatment regarding sale of products conditional within one's own domestic market. However, since these measures are

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[93] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, at 78 (Apr. 11) (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal); *see also* Kamminga, *supra* note 90.

[94] Kamminga, *supra* note 90.

[95] Mann, *supra* note 91.

[96] Bartels, *supra* note 20.

[97] Ilias Bantekas, *Criminal Jurisdiction of States under International Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (Rüdiger Wolfrum ed., 2020).

also prescriptive in nature, even though relatively limited, the logic behind lawfulness of prescriptive extraterritorial jurisdiction is transferable to such measures.

The protective principle focuses on justifying exercise of extraterritorial jurisdiction when a State's essential interests are threatened.[98] Environmental harm can be covered as an essential interest of a State to legitimise extraterritorial action. Effects principle justifies extraterritorial jurisdiction when an extraterritorial event has a 'substantial effect' within the territory of a State.[99] While mapping the state practice and *opinio juris* for this principle, one can trace its effective usage in anti-trust cases, addressing foreign anti-competitive behaviour harming domestic interests.[100] Effects faced by countries because of climate change can be understood to be substantial in nature, to apply the doctrine. However, both these principles are ill equipped to tackle the current environmental reality.[101] The threshold of both 'threat' under the protective principle and 'substantial effect' under the effects principle is high enough to not include indirect effects from climate change.[102] Thus, broadening the scope of both the principles to include indirect effects from climate change is needed, which is currently lacking in state practice.[103]

Recently, scholars have identified methods to legitimise extraterritorial measures while doctrinally focusing on the idea of establishing a sufficient connection. Barbara Cooreman states that the inwardness or outwardness of a measure can help ascertain whether the addition of extraterritorial elements to the scope of GATT Article XX is reasonable.[104] The inwardness/outwardness of a measure is dependent on the location of the concern and the location of the effects of the concern — if it is inside the territory, it is inward, otherwise outward. If the extraterritorial element is inward in terms of effect, even if the location is outside the territory, it can be justified.

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[98] CRAWFORD, *supra* note 90.

[99] *Id.*; INT'L L. ASS'N, REPORT OF THE FIFTY-FIRST CONFERENCE HELD AT TOKYO 369 (1964).

[100] Cooreman, *supra* note 29 (cites C-231/14P, Innolux Corp. v. European Commission, (July 9, 2015), https://curia.europa.eu/juris/liste.jsf?num=C-231/14&language=EN).

[101] Dobson & Ryngaert, *supra* note 28 (Dobson cites Kamminga, *supra* note 90).

[102] *Id.* at 327.

[103] *Id.* at 326.

[104] Cooreman, *supra* note 29. For the relevance of common concern in judging WTO compliance of climate change mitigating measures, *see generally* Thomas Cottier & Tetyana Payosova, *Common Concern and the Legitimacy of the WTO in Dealing with Climate Change*, *in* RESEARCH HANDBOOK ON CLIMATE CHANGE AND TRADE LAW 9 (Panos Delimatsis ed., 2016).

In the same vein, Natalie Dobson and Cedric Ryngaert have focused on the inwardness of the effects of an extraterritorial decision by broadening the scope of the effects doctrine to justify extraterritoriality of the EU's maritime emissions monitoring, reporting, and verifications scheme by linking the principle with precautionary principle and the due diligence obligations of a State in environmental law.[105] They have observed that, in terms of jurisdiction, "causality serves to demonstrate an interest in legislating to mitigate harm", thus, it is a part of a State's due diligence obligations.[106] Therefore, viewing substantial effects in terms of degree of contribution to cause injury is more appropriate than viewing it as a direct effect. Additionally, apart from including indirect effect, they have also reinterpreted the location of harm — diluting the need to face injury inside the territory of a State — by focusing on the concept of common concern of humankind, where the impact of the concern would eventually transcend boundaries.[107] They have drawn support from Section 403(2) of the US Third Restatement for this reinterpretation, which provides that the State must consider the importance of international political and economic regulations and the regulations' consistency, "with the traditions of the international system",[108] an approach which fundamentally accommodates the jurisdictional rights to respond to common concerns.

Both Cooreman's and Dobson's approaches lean on the fact that if the effect of a concern is inward, and classified as a common concern of humankind, where the injury caused transcends boundaries — thus, eventually reaching one's own State — then the exercise of extraterritorial environment-related measures may be justified. Therefore, by using a broader effects doctrine, one can justify the extraterritorial nature of a measure targeted to mitigate the harm caused from a common concern of humankind, like climate change.

In the next sub-part, the author elaborates upon the concept of common concern of humankind to elucidate further its relation to climate change and Article XX(g) of the GATT, specifically the term 'conservation of exhaustible natural resources'.

2. The Concept of Common Concern of Humankind

Dinah Shelton defines the concept of common concern of humankind as encapsulating those issues that, "inevitably transcend the boundaries of a single State and require collective action in response".[109] The transcending nature of the

[105] Dobson & Ryngaert, *supra* note 28.
[106] *Id.* at 328.
[107] *Id.* at 329.
[108] *Id.*
[109] Shelton, *supra* note 23.

issue implies that this problem is shared by all individuals across the world.[110] In addition to transcending boundaries, issues of common concern, by definition, have long-lasting adverse effects, especially for future generations.[111] The term featured prominently in the 1987 Report of the World Commission on Environment and Development, where Gro Harlem Brundtland iterated that many diverse nations have united over, "a common concern for the planet and the interlocked ecological and economic threats".[112]

Many environmental treaties have used phrases which foreshadow the language of common concern. The Whaling Convention of 1946 stated that wild animals must be conserved "for the good of mankind".[113] Later, the Convention of Biological Diversity of 1992 (CBD)[114] and United Nations Framework Convention on Climate Change of 1992 (UNFCCC) categorised concerns regarding biological diversity and climate change as common concerns of humankind.[115] This was further emphasised in the Paris Agreement in 2015.[116] The concept also appears in the International Treaty on Plant Genetic Resources for Food and Agriculture of 2001,[117] and the Convention for the Safeguarding of the Intangible Cultural Heritage of 2003.[118]

In relation to Article XX(g) of GATT and its 'conservation of exhaustible natural resources', conservation of some natural resources would be considered as common concerns of humankind. Castillo-Winckels suggests that protection of the global atmosphere as a whole should be considered a common concern, since atmospheric degradation entails both harm to humanity and to the global

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[110] Dobson & Ryngaert, *supra* note 28.

[111] Chelsea Bowling et al., *The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas*, U.N., https://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf [hereinafter Bowling et al.].

[112] Rep. of the World Commission on Environment and Development, U.N.G.A., U.N. Doc. A/42/427 (Aug. 4, 1987); *id.*

[113] International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72 [hereinafter Whaling Convention]; Bowling et al., *supra* note 111.

[114] CBD, *supra* note 25.

[115] UNFCCC, *supra* note 24.

[116] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. 16-1104, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 [hereinafter Paris Agreement].

[117] International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, 2400 U.N.T.S. 303.

[118] Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3.

environment — two issues that are common to all common concerns of humankind recognised by the international community till now.[119] There is, however, no consensus on this.[120] The ILC removed the protection of the global atmosphere as a common concern from its draft guidelines at the 2015 ILC Session,[121] because of insufficient clarity on the concept of atmospheric degradation and lack of support in state practice for its inclusion.[122] In contravention however, the Earth Charter states that the global environment is a common concern because of the importance of a healthy biosphere.[123] The Hague Recommendations on International Environmental Law considers the preservation of the global environment and the conservation and sustainable use of biodiversity to be issues of common concern.[124] The 2002 International Law Association New Delhi Declaration of Principles of International Law Relating to Sustainable Development recognises sustainable development and the protection, preservation, and enhancement of the natural environment to be issues of common concern as well.[125] While these are soft law instruments, they display consensus that the conservation of most elements that are resourceful for the well-being of the anthropocentric environment should be understood as common concerns.

Thus, there is sufficient international support to conclude conservation of most exhaustible natural resources — that form part of the 'atmosphere, global environment, or natural environment' — are common concerns of humankind. Extraterritorial environment-related trade measures for these concerns, especially climate change, would be justified as it establishes a legitimate state interest between the measure imposing state and the measure.

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[119] Nadia Sanchez Castillo-Winckels, *Why Common Concern of Humankind Should Return to the Work of the International Law Commission on the Atmosphere*, 29(1) GEO. ENV'T L. REV. 131, 147 (2016) [hereinafter Castillo-Winckels].

[120] *Id.*

[121] The former draft guideline 3 stated, "the atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of the atmosphere is a common concern of humankind". *See* U.N.G.A. Special Rapporteur, Second Rep. on the Protection of the Atmosphere, U.N. Doc. A/CN.4/ 681, at 49 (2015).

[122] Int'l L. Comm'n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 26, 27 (2015).

[123] *The Earth Charter,* EARTHCHARTER (June 29, 2000), https://earthcharter.org/wp-content/uploads/2020/03/echarter_english.pdf?x79755; *see also* Castillo-Winckels, *supra* note 119.

[124] Int'l Conf. Env't L., *The Hague Recommendations,* 21 ENV'T POL'Y & L. 242, 276 (1991).

[125] World Summit on Sustainable Development, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, at 7, U.N. Doc. A/Conf.199/8 (Aug. 9, 2002).

The next step delves into the various methods of importing this concept into WTO Law to reinterpret GATT Article XX(g) regarding permissible extraterritoriality. The Panel and AB take into consideration rules within general international law that the WTO rules have not contracted out of.[126] Article 3.2 of the Dispute Settlement Understanding (DSU) specifically lays down that all interpretations of provisions of the WTO Agreements need to be in accordance with customary rules of interpretation of international law, including Articles 31 to 33 of the VCLT,[127] while not adding or diminishing rights and obligations of WTO Members. Relying on customary Articles 31 and 32 of the VCLT, however, is easier said than done — these rules, identified as Articles 31 and 32 of the VCLT, are notorious for being ambiguous.[128]

Cooreman and Dobson have used Article 31(3)(c) of the VCLT to import the common concern of humankind by depending on the customary laws of jurisdiction. The author contends that this provision within the VCLT is fraught with obstacles, showcasing the need for a more direct approach. These obstacles will be elaborated upon in Part III(A). This direct approach is based on evolutionary interpretation through two different means — Article 31(1) of the VCLT based on the ordinary meaning of the term and the living instrument approach based on the object and purpose of the clause or agreement — to import common concern of humankind to reinterpret extraterritoriality, elaborated upon in Parts III(B) and III(C). The following part focuses on these methods.

III. IMPORTING COMMON CONCERN

The concepts within international environmental law that are relevant to the interpretation of WTO Law, specifically GATT Article XX(g), for extraterritorial environment-related trade measures have evolved. This evolution necessitates Article XX(g) to evolve with it. This requires a reinterpretation of Article XX(g) in a manner which allows expanding the scope of the clause to include common concerns of humankind and justifies trade responses to these concerns that are necessarily extraterritorial in nature. This part focuses on the appropriateness of using Articles 31(3)(c) and 31(1) of the VCLT, and the living instrument approach to achieve this expansion.

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[126] JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 25-29, 445 (2003) [hereinafter PAUWELYN].

[127] DSU, *supra* note 31, art. 3.2; *see also US — Gasoline* (AB), *supra* note 26.

[128] Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74(3-4) NORDIC J. INT'L L. 405 *passim* (2005) [hereinafter Klabbers].

A. Importing the Concept of Common Concern of Humankind as a 'Relevant Rule of International Law Applicable between the Parties'

Article 31(3) of the VCLT aims at providing context to the interpretation of a treaty by looking at other relevant treaties, state practice, and other rules within general international law that are applicable to the parties to the treaty. Article 31(3)(c) is the most appropriate for considering other rules within general international law that are relevant and applicable to the relations between the parties, since this paragraph is used for systemic integration.[129]

The first condition within Article 31(3)(c) VCLT requires that the chosen rules should be relevant for interpretation of the terms of the treaty. The second condition requires that the relevant norm, for example, the concept of common concern, is applicable between the parties — that the parties are required by law to abide by that norm.[130]

The first condition is easily proved because of the established link between common concern of humankind and conservation of natural resources, and the WTO objective of 'sustainable development' which makes the concept of common concern relevant to interpreting any WTO Agreement.[131]

The second requirement of proving the norm to be, 'applicable between the parties', is trickier in this situation. The term 'parties' has been interpreted by the WTO Panel in *EC — Biotech Products* to mean parties to the treaty.[132] This implies

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[129] *See* ILC Fragmentation Report, *supra* note 88; Appellate Body Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011) [hereinafter *EC — Large Civil Aircraft* (AB)]; Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54(2) INT'L & COMPAR. L. Q. 279, 309 (2005) [hereinafter McLachlan].

[130] *See generally* Ben McGrady, *Fragmentation of International Law or 'Systemic Integration' of Treaty Regimes: EC — Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties*, 42(4) J. WORLD TRADE 589 (2008) [hereinafter McGrady]; McLachlan, *supra* note 129.

[131] The concept of 'sustainable development' is one of the guiding principles for the concept of common concern in all its treaties and international instruments. *See* Castillo-Winckels, *supra* note 119.

[132] Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R (adopted Sept. 29, 2006) [hereinafter *EC — Biotech* (Panel)]. For a more balanced reading of 'parties', *see EC — Large Civil Aircraft* (AB*)*, *supra* note 129, at ¶ 845. They stated that while referring to a non-WTO rule, "a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members."

that any relevant rule of international law must be applicable to all WTO Members.[133] The few rules in international law that would be applicable to all 164 Members of the WTO (as of 2021) would be those of customary international law and a few multilateral treaties with ratification by all the WTO Members. Common concern of humankind has not been adjudged to be customary international law, and the treaties that it cohabits have not been ratified by all WTO Members.[134]

The AB in *EC — Large Civil Aircraft* did not follow the stance set by *EC — Biotech Products*.[135] They stated that the *EC — Biotech Products* Panel's stance was not in consonance with the goal of systemic integration. They concluded that, "a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members".[136] This stance is a middle ground approach between two extremes — understanding parties as parties to the treaty as one extreme and parties to the dispute as another.[137] Merkouris suggests that this approach shifts the focus from 'parties' to relevance of the rules.[138] If the rules are sufficiently relevant, and most Members are parties to the treaty, the rule should qualify the requirements of Article 31(3)(c) of the VCLT.[139] Despite this being the most effective interpretation for Article 31(3)(c), it remains ambiguous.

The ambiguous stance of *EC — Large Civil Aircraft* implies that the WTO Members' international obligations should be respected while ensuring consistency in interpretation. This excludes the understanding that parties would mean 'parties to the dispute'. It may imply that most Members of the WTO should be party to the extraneous treaty so that we can ensure both respect for their international obligations and a harmonious and consistent interpretation of WTO rights and

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133 PAUWELYN, *supra* note 126; McLachlan, *supra* note 129; McGrady, *supra* note 130.

134 The US has not ratified the CBD, which recognises that conservation of biological diversity is a common concern of humankind. The UNFCCC and Paris Agreement enjoy wide ratification by most countries, however the special autonomous bodies like Taiwan and Taipei, which are WTO Members, are not independently parties to these Agreements. *See* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) EUR. J. INT'L L. 753, 781 (2002).

135 *EC — Large Civil Aircraft* (AB*)*, *supra* note 129.

136 *Id.* at ¶ 845.

137 Bartels, *supra* note 20.

138 P. Merkouris, *Keep Calm and Call (No, Not Batman, But . . .) Articles 31-32 VCLT: A Comment on Istrefi's Recent Post on R.M.T. v. The UK*, EUR. J. INT'L L.: TALK (June 19, 2014), https://www.ejiltalk.org/keep-calm-and-call-no-not-batman-but-articles-31-32-vclt-a-comment-on-istrefis-recent-post-on-r-m-t-v-the-uk/.

139 *Id.*

obligations.[140] But it is unclear, and beyond the scope of this paper to draw the line on how many Members is enough.

UNFCCC, CBD, and Paris Agreement enjoy the ratification of most WTO Members, if not all.[141] However, we cannot decide whether this will allow the importation of common concern of humankind definitively because of the ambiguity of how to assess the *EC — Large Civil Aircraft* statement while drawing this delicate balance.

The customary status of the concept of common concern is also not clear,[142] though some scholars suggest that it may be *erga omnes* in nature. Since a common concern is identified to be common because of the immediate need for collective action, Friedrich Soltau argues that a common concern may raise an *erga omnes* obligation.[143] *Erga omnes* is defined as, "the concern of all States".[144] Soltau states that protection of the global environment may be understood as a concern of all States as well. Identifying a norm as *erga omnes* would attach an implementation method within the obligation, since all States would be entitled to act in any such situation. This would attach a universality to the norm. However, there is no binding instrument which clarifies that the concept may be identified as *erga omnes*,[145] although the crystallisation of the right to a healthy environment is a start.[146]

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[140] PAUWELYN, *supra* note 126.

[141] *See List of Parties*, CBD, https://www.cbd.int/information/parties.shtml (for list of parties for CBD); *see Chapter XXVII: Environment – 7(d) Paris Agreement*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (for list of parties to the UNFCCC and Paris Agreement).

[142] Friedrich Soltau, *Principles and Emerging Norms Concepts in International Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW ch. 10 (Cinnamon P. Carlarne et al. eds., 2016).

[143] *Id.*

[144] *Id.*

[145] There are only a few judicial decisions vaguely supporting this claim. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996*,* 1996 ICJ Rep 226 (July 8). *See also* Shelton, *supra* note 23; Laura Horn, *The Implications of the Concept of Common Concern of Humankind on a Human Right to a Healthy Environment,* 1 MACQUARIE J. INT'L & COMPAR. ENV'T L. 233 (2004); Bowling et al., *supra* note 111; Prof. Nicholas A. Robinson, Panel Discussion at the U.N.: Environmental Law — Is an Obligation Erga Omnes Emerging?, INT'L UNION CONSERVATION NATURE (June 4, 2018), https://www.iucn.org/sites/default/files/content/documents/2018/environmental_law_is_an_obligation_erga_omnes_emerging_interamcthradvisoryopinionjune2018.pdf.

[146] U.N. Human Rights Council, Rep. of the Forty-Eighth Session, The Human Right to a Safe, Clean, Healthy, and Sustainable Environment, U.N. Doc. A/HRC/48/L.23/Rev.1 (2021).

Another tool, used by Bartels, Cooreman, Dobson, and Ryngaert, is to import the concept of common concern through the laws of jurisdiction.[147] Dobson specifically used the effects principle to indirectly import the concept of common concern to legalise extraterritoriality for environmental crises. But the customary nature of the laws of jurisdiction are not transferrable to the concept of common concern of humankind. Identifying a situation as common concern of humankind is not sufficient to justify extraterritoriality under the five customary bases.[148] While the effects principle may justify extraterritoriality, the recognised indirect effect of common concern may not be understood as customary in nature, to which Dobson agrees.[149] Thus, it cannot be imported through the customary laws of jurisdiction. Finding other approaches is necessary to set aside these obstacles and bring common concern under GATT Article XX(g).

B. Importation through the Ordinary Meaning Approach

The Panel in *Biotech Products* provided an alternate approach to harmonise WTO Laws with other relevant rules of international law — depending on ordinary meaning. Instead of using treaty language as binding obligations on parties, one can use them as specialised dictionaries to determine the ordinary meaning of a term in a specialised field.[150]

To analyse the Panel's statement in *EC — Biotech Products,* it is necessary to first analyse how the AB depended on several MEAs and international instruments in *US — Shrimp.* In the case of *US — Shrimp,* the Panel was faced with a quantitative restriction on the importation of certain shrimp products. If the shrimps were trawled with commercial fishing technology which adversely affected the endangered sea turtles by incidentally trapping them in the fishing net, these shrimp products would not be eligible for importation into the US.[151] The ban's

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[147] Bartels, *supra* note 20; Cooreman, *supra* note 29; Dobson & Ryngaert, *supra* note 28, at 330.

[148] Dobson & Ryngaert, *supra* note 28, at 326 (the five customary bases are territory, nationality, protection, effects, and universality.)

[149] Dobson and Ryngaert agree that the current customary laws of jurisdiction are ambiguous and are not fit to be used as a basis to respond to current environmental concerns without broadening their scope, which is not supported by state practice. *See* Dobson & Ryngaert, *supra* note 28, at 326, 327.

[150] *EC — Biotech* (Panel), *supra* note 132, at ¶ 7.92.

[151] Section 609(b)(1) of Public Law 101-162 imposed the ban on importation of certain shrimp products on the basis of the fishing technology used. *See* Public Law 101-162 §609, *supra* note 21; *see also US — Shrimp* (AB), *supra* note 17, at ¶ 3.

discriminatory effect could be justified under GATT Article XX(g).[152] However, the AB was required to adjudge if sea turtles are exhaustible natural resources. They interpreted 'exhaustible' to include biological resources since modern biological science states that biological resources are also, "susceptible to depletion, exhaustion[,] and extinction".[153] They interpreted 'natural resources' as including living resources by referring to the United Nations Convention of Law on the Sea,[154] CBD,[155] United Nations Convention on International Trade in Endangered Species,[156] and Agenda 21,[157] which consider 'living resources' to be natural resources, alongside a 1988 GATT era report.[158] Through these references, the AB acknowledged that the international community recognised the importance of concerted bilateral or multilateral action to protect living natural resources.[159]

The AB did not state explicitly how they referred to these international conventions and instruments. One can make an intelligent guess that these international conventions must have been imported by reference under Article 31(3)(c) of the VCLT,[160] since it is most appropriate for systemic integration. However, since the parties to the dispute were not, in fact, parties to all the treaties referred to, it does not seem likely that they referred to Article 31(3)(c) of the VCLT.[161] While some scholars argue that the AB considered these treaties and

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[152] The AB debated whether the measure falls under Article III or Article XI of the GATT. Since the measure was regarding a production process, not a product, the AB decided that the measure should be considered a quantitative restriction under Article XI. This decision has been contested by many scholars. *See* Howse & Regan, *supra* note 36.

[153] *US — Shrimp* (AB), *supra* note 17, at ¶ 128; *see generally* The Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Cases No. 3 and 4, Order on Provisional Measures, (1999) 38 ILM 1624–1656 Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[154] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

[155] CBD, *supra* note 25.

[156] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

[157] U.N. Conference on Environment and Development, *Agenda 21,* U.N. Doc. A/CONF.151/26/Rev.1 (June 14, 1992).

[158] *US — Shrimp* (AB), *supra* note 17, at ¶ 131 (citing *US — Tuna (Canada)* (GATT Panel), *supra* note 53, at ¶ 4.9, and *Canada — Herring* (GATT Panel), *supra* note 61, at ¶ 4.4).

[159] *US — Shrimp* (AB), *supra* note 17, at ¶ 131.

[160] The AB referred to the principle of effectiveness in treaty interpretation, and to the objective of sustainable development while importing the interpretation from the Multilateral Environmental Agreements [MEAs]. *See US — Shrimp* (AB), *supra* note 17, at ¶ 131.

[161] *EC — Biotech* (Panel), *supra* note 131, at ¶¶ 7.53, 7.74. The paragraphs state that the US has not ratified the CBD and had not done so during the *US — Shrimp* dispute as well.

instruments under Article 31(3)(c) of the VCLT,[162] the panel for *EC — Biotech Products* categorised this exercise to fall under Article 31(1), by using these international treaties and instruments as dictionaries to determine the ordinary meaning, to be used only as an evidence of ordinary meaning, and not as a legal rule.[163]

This approach is similar to Ben McGrady's suggested method of, 'only taking into account', the extraneous treaty, and not a specific enabling rule (with binding force) — for example, only taking into account the instance that biological resources have been identified as natural resources, and not directly applying the precautionary principle and the other specific obligations attached to it.[164] McGrady preferred this approach because it aimed at reducing divergence in interpretation and fragmentation of international law.[165] This was, however, aimed at re-interpreting Article 31(3)(c) of the VCLT, but McGrady recognises the similarity it bares with determining the ordinary legal meaning of a term.[166]

Using the ordinary meaning approach, an interpreter can refer to the concept of common concern even as a treaty rule. The Paris Agreement, the UNFCCC, and the CBD are the most common MEAs cited when one discusses the concept of common concern. While this concept arose before these treaties, the concept has been used to establish a legal regime in these treaties to combat global problems with severe adverse effects.[167] Hence, the WTO interpreter can refer to the concept of common concern of humankind as a treaty rule within any of the above international instruments.

Importing the common concern entails importing the idea that certain global crises have effects transcending boundaries. Thus, the focus of the importation is on the concept's relationship with conservation of exhaustible natural resources. The focus is not on applying any obligation within the legal regime created within any of the MEAs.

Like in *US — Shrimp,* using this imported concept requires exercising evolutionary interpretation since it was recognised after the drafting of the GATT. It would be excluded from the scope of the Agreement because of temporal limitation.

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[162] McLachlan, *supra* note 129.
[163] *EC — Biotech* (Panel), *supra* note 132, at ¶ 7.92-7.94.
[164] McGrady, *supra* note 130; *cf.* PAUWELYN, *supra* note 126; McLachlan, *supra* note 129; Margaret Young, *The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case,* 56 INT'L & COMPAR. L. Q. 929 (2007).
[165] McGrady, *supra* note 130, at 611.
[166] *Id.* at 612.
[167] Castillo-Winckels, *supra* note 119; Bowling et al., *supra* note 111.

However, in the face of evolved circumstances, specific terms allow taking newer concerns into account despite temporal limitations. The next part analyses how the Panel and AB have used evolutionary interpretation and using it to interpret the term 'conservation of exhaustible natural resources', within GATT Article XX(g) under the limits of the ordinary meaning approach.[168]

1. Evolutionary Interpretation in the WTO Jurisprudence

This sub-part analyses how the Panel and AB have applied evolutionary interpretation in light of trade/environment issues involving evolving environmental concerns.[169] The next sub-part discusses the application of this style to determine permissibility of extraterritorial environment-related trade measures.

In 1995, the Panel and AB in *US — Gasoline* were confronted with a measure regulating the quantity of dirty gasoline produced.[170] The measure mandated domestic producers to maintain sulphur for reformulated gasoline below 1990 baseline. Stricter measures were imposed for foreign producers by mandating a standard baseline for gasoline production, instead of determining the sulphur level before 1990.[171] The Panel noted that this was discriminatory. The US justified this discrimination under Article XX(g) of the GATT, claiming that clean air was an exhaustible natural resource which they wanted to conserve. The Panel agreed that clean air was an exhaustible natural resource since it had value, was natural, and could be depleted,[172] basing their logic on an evolved understanding of clean air.[173]

In 1996, the AB in *US — Shrimp* relied on evolutionary interpretation to expand the term 'exhaustible natural resources' to include endangered sea turtles. They

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[168] The Panel and AB are restricted by Article 3.2 of the DSU wherein one may not add or diminish or modify rights or obligations of WTO Members, while ensuring that all interpretations are harmonious and continue to create a secure and predictable atmosphere.
[169] *See generally* Gabrielle Marceau, *Evolutive Interpretation by the WTO Adjudicator,* 21 J. INT'L ECON. L. 791 (2018) [hereinafter Marceau].
[170] Panel Report, *United States — Standards for Reformulated and Conventional Gasoline,* WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter *US — Gasoline* (Panel)]; *US — Gasoline* (AB), *supra* note 26.
[171] Instead of determining their own baseline based on their historical data, foreign producers were mandated to follow a standard baseline set by the US. The respondent claimed that this distinction was because the US government did not have access to the data of foreign producers' historical performance.
[172] First step under Article 31 VCLT. *See* Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.
[173] The Panel referred to *US — Tuna (Canada)* (GATT Panel)*, supra* note 53, at ¶ 4.4, to argue that renewable resources can reach exhaustion. *See US — Gasoline* (Panel)*, supra* note 170, at ¶ 6.37.

reasoned that the term 'natural resources' was by definition, evolutionary,[174] and it was, "too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources", without including contemporary environmental and community concerns.[175]

In both *US — Shrimp* and *US — Gasoline*,[176] the Panel and AB have restricted themselves to interpreting only generic references in an evolutive manner. A generic reference belongs to an indeterminate class of referents with unlimited referring possibilities.[177] On the other hand, singular or general references are fixed and, "limited to the linguistic conventions of that time".[178] Due to unlimited referring possibilities for generic references, these possibilities are not limited by temporal scope. For example, it was implicit that the meaning of the term 'weapons of mass destruction' in the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty) would most likely evolve through the life span of treaties.[179] Similarly, the term 'exhaustible natural resources' is a generic reference which was read in an evolutive manner.

The AB has also relied on the objective of sustainable development to justify using evolutionary interpretation in trade/environment cases. The AB stated that, "from the perspective embodied in the preamble of the WTO Agreement", while referring to the objective of sustainable development, the term must be read evolutionarily.[180] This acts as further justification for using evolutionary interpretation, since keeping up with the objective of sustainable development requires taking into account newer risks while interpreting old provisions.[181] This provided a layer of legitimacy to the AB's interpretative decisions — to not seem as judicial activism, but as upholding the objectives of the preamble.[182]

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[174] *US — Shrimp* (AB), *supra* note 17, at ¶ 130.
[175] *Id.* at ¶¶ 129, 130.
[176] *See also Mexico — Telecom*, *supra* note 17; *China — Audiovisuals*, *supra* note 17. These two cases witness usage of evolutionary interpretation because of technological advancement.
[177] Sondre Torp Helmersen, *Evolutive Treaty Interpretation: Legality, Semantics and Distinctions*, 6 EUR. J. LEGAL STUD. 161 (2013) (citing LINDERFALK, *supra* note 18).
[178] LINDERFALK, *supra* note 18.
[179] *Id.*
[180] *US — Shrimp* (AB), *supra* note 17, at ¶ 130.
[181] Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT'L L. 377 (2012) (Barral states that the objective of sustainable development opens your treaty to evolutionary interpretation since the objective is evolutionary by definition).
[182] *Id.* at 395. The term 'sustainable development' is also evolutionary and makes agreements which mention the term open to evolutionary interpretation. *See also* Marceau, *supra* note 169.

The reference to sustainable development may also be an attempt to highlight the implicit logical connection between sustainable development and the MEAs. The AB failed to mention whether they depended on Article 31(3)(c) of the VCLT to refer to extraneous treaties. The link highlighted by evoking sustainable development provided the much-needed logical connection, although it is not sufficient.[183]

The generic terms based evolutionary interpretation style is akin to the 'memory bound' evolutionary interpretation, coined by Pierre-Marie Dupuy.[184] Memory bound evolutionary interpretation is limited to generic references, so that amidst evolutionary circumstances, judges remain loyal to the will of the parties and not rewrite history, hence, driven by the memory of the intention of the parties.[185] This type of evolutionary interpretation is most used by judges adjudging treaties outside of an institutional context,[186] except for the WTO AB which evidently uses this approach.[187] The following sub-part explains how this approach would be applied in cases of extraterritorial environment-related trade measures.

2. Applying the 'Memory Bound' Evolutionary Interpretation

To utilise this memory bound approach to determine the permissibility of extraterritoriality, we need to: a) prove a term to be a generic reference;[188] and b) showcase that the term has undergone evolution.[189] To understand whether

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[183] The WTO objective of sustainable development does not allow importation for all MEAs, only those that may be relevant as per Article 31(3)(c) of the VCLT. *See* Isabelle Van Damme, *WTO Treaty Interpretation Against the Background of Other International Law, in* TREATY INTERPRETATION BY THE WTO APPELLATE BODY 355 (2009) [hereinafter VAN DAMME].

[184] PIERRE-MARIE DUPUY, *supra* note 18.

[185] *Id.*

[186] *Id.* (Dupuy cites ICJ Namibia, *supra* note 17); *ICJ Costa Rica/Nicaragua*, *supra* note 17. *See also* LINDERFALK, *supra* note 18.

[187] *US — Shrimp* (AB), *supra* note 17; *Mexico — Telecom*, *supra* note 17; *China — Audiovisuals*, *supra* note 17.

[188] *See US — Shrimp* (AB), *supra* note 17, at ¶ 130, fn 109. The AB cited the International Court of Justice [ICJ] Namibia case (ICJ Namibia, *supra* note 17) while stating that the term 'exhaustible natural resources' was not "static, but by definition evolutionary", by referring to the term's generic nature. In Namibia*,* the ICJ stated that concepts which are, "by definition, evolutionary [their] interpretation cannot remain unaffected by the subsequent development of law . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation".

[189] *Id.* (citing ICJ Namibia, *supra* note 17); *see also* LINDERFALK, *supra* note 18.

extraterritorial measures may be under the scope of GATT Article XX(g), the term 'conservation' proves helpful. The concept of common concern permits including extraterritoriality in Article XX(g) since it encapsulates those issues that, "inevitably transcend the boundaries of a single State and require collective action in response",[190] thus making extraterritorial actions a part of 'conservation'. Thus, interpreting this term in an evolutive manner would extend to the scope of Article XX(g) to include extraterritorial measures. To do this, we need to determine if this term is evolutionary by following the two steps mentioned above.

Firstly, the term 'conservation' is a generic reference since it may include methods presently unknown. It is dependent on how life, including science, progresses. Scientists would continue to develop new methods of conservation as their knowledge about ecosystems improve, and as ecosystems change. These new methods of conservation would still be covered under the category of 'conservation', just like newer chemical weapons continue to belong to the category of 'weapons of mass destruction'. Therefore, the first condition is fulfilled for 'conservation'.

Secondly, the term has witnessed evolution. Evolution includes exogenous or endogenous changes which create a conflict of meanings at two ends of time.[191] Endogenous changes may include factual changes, legal changes, or a mixed evolution in fact and law with respect to the term to be interpreted itself.[192] Exogenous changes may include changes in circumstances around the term, especially environmental surroundings — these circumstances may be society related, legal, or both.[193] The AB referred to modern international conventions in *US — Shrimp* to showcase evidence of evolution of the term endogenously as a factual change (based on science) to include living resources since they can become extinct as well. Similar evidence can be used for 'conservation'. The addition of several legal obligations regarding conservation from 1947 to the present has changed the legal meaning of conservation exogenously and endogenously. Many MEAs and international instruments like CBD, UNFCCC, and Paris Agreement elaborate on the duties of the States regarding conservation since the GATT was drafted. Specifically, the common concern legal regime encapsulating the conservation of natural resources in CBD, UNFCCC, etc.,[194] has exogenously

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[190] Shelton, *supra* note 23.

[191] Robert Kolb, *Evolutionary Interpretation in International Law: Some Short and Less than Trail-Blazing Reflections*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 16, 17 (Georges Abi-Saab et al. eds., 2019).

[192] *Id.*

[193] *Id.*

[194] Castillo-Winckels, *supra* note 119.

changed the legal circumstances of such conservation. Thus, the second condition is also fulfilled.

Thus, the term 'conservation' is generic and there is evidence of its evolution. This justifies reading it in an evolutive manner, referring to the concept of common concern to determine permissibility of extraterritoriality. The concept effectively connects the measure-imposing country with global concerns affecting humankind. Once identified as a common concern, States have a due diligence obligation, "to anticipate, prevent, and minimize the aggravation of common environmental concerns".[195] This legalises extraterritorial effect of environment-related trade measures targeting global concerns like climate change. This extraterritorial effect must be limited — not arbitrarily or unjustifiably discriminatory — to comply with other WTO obligations of non-discrimination. But it should be allowed to be within the scope of GATT Article XX(g) to effectively respond to concerns transcending boundaries. Thus, with this ordinary-meaning based evolutionary interpretation, the concept of common concern of humankind can be imported into WTO Law to expand the scope of Article XX(g) as a response to evolving environmental concerns.

There are circumstances where a situation has in fact evolved, but it cannot be reflected through specific terminology. For example, while evolving conservation techniques allowed the scope of Article XX(g) to be expanded, this limited approach cannot be used to further define the extent of an extraterritorial measure. It does not draw limitations on coerciveness and excessive unilateralism since these issues are not connected to conservation. The CBAM has been termed as coercive and unilateral.[196] Like CBAM, many extraterritorial measures are often unilateral in nature.[197] While some degrees of unilateralism may be curbed by the chapeau of Article XX, as seen in *US — Shrimp,*[198] some issues like affordability or neo-imperialism have not been considered under the chapeau yet.[199] In such situations, we may require a different type of method — the living instrument approach.

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[195] Dobson & Ryngaert, *supra* note 28. Dobson cites Int'l L. Assoc., Resolution 2/2014 of the Committee on Legal Principles Relating to Climate Change: Declaration of Legal Principles Relating to Climate Change, Annex: ILA Principles Relating to Climate Change: Draft Articles, art. 7A (Apr. 2014).

[196] Yanzhu Zhang, *Is the EU's Carbon Border Tax a Good Approach?*, VOICES (June 24, 2021), https://www.bsg.ox.ac.uk/blog/eus-carbon-border-tax-good-approach.

[197] *See* Koekkoek, *supra* note 51.

[198] Measures which were rigid and imposed without good faith negotiations were termed as arbitrary and unjustifiable discrimination. *See US — Shrimp* (AB), *supra* note 17, at ¶¶ 164, 168-171.

[199] WTO jurisprudence about the chapeau is restricted to rigidity, transparency, and exceptions bearing no relationship with the policy objective of the measure. *See* Trachtman, *supra* note 36, at 299–301.

C. Importation through the Living Instrument Approach

For evolutionary circumstances that cannot be directly considered through certain generic references and can only be understood in context — through the object and purpose (*telos*) — the living instrument approach may be more suitable. This method is more than interpreting generic terms in an evolutionary context — it is about analysing the object and purpose of the treaty to determine if an evolved situation can be included within the scope of the treaty.[200] This approach is followed by international judges, "charged with the task of interpreting a treaty that establishes an organization designed to achieve a shared purpose [since they are] … emboldened to undertake a more dynamic interpretation of a treaty where [they do] not simply act as an arbitrator between the parties, but rather . . . the role of a guardian of a common institution".[201]

This approach is not catered to Article 31 of the VCLT. George Letsas argues that the ECtHR focuses more stringently on the objectives within the Preamble to 'further realize' human rights based on present-day standards.[202] This involves going beyond the text of the treaty and importing several international instruments outside of the European Convention of Human Rights (ECHR). The Court focuses on determining present-day standards of human rights through these international instruments — including non-binding instruments and treaties to which most of the Members are not parties. Letsas justifies this by stating that the Court is obligated to, "protect whatever human rights people *in fact* have, and not what human rights domestic authorities or public opinion *think* people have" (emphasis added).[203]

This ECtHR approach can be distinguished from the ordinary meaning approach by comparing cases from each forum. In *Rantsev* v. *Cyprus and Russia,* the Court was tasked with the responsibility to determine if human trafficking fell under the scope of Article 4 of the ECHR devoted to prohibition of slavery and forced labour.[204] The Court stated:

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[200] Pierre-Marie Dupuy, *supra* note 18.
[201] *Id.*
[202] George Letsas, *ECHR as a Living Instrument: Its Meaning and Legitimacy*, *in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 106 (Andreas Føllesdal et al. eds., 2013) [hereinafter Letsas' *ECHR as a Living Instrument*]; George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509 (2010) [hereinafter Letsas' *Strasbourg's Interpretive Ethic*].
[203] Letsas' *ECHR as a Living Instrument*, *supra* note 202.
[204] Rantsev v. Cyprus, *supra* note 17; *see also id.*

> There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude', or 'forced and compulsory labour'. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.[205]

The above approach is in stark contrast to the AB approach. The ECtHR focused on how trafficking threatens the dignity and fundamental freedoms of individuals. This was sufficient to understand it as a violation of an article based on safeguarding the dignity and fundamental freedoms of the individual. They did not deem it necessary to expand the scope of the terms 'slavery' or 'servitude'. In contrast, under *US — Shrimp*, the AB focused on expanding the term 'exhaustible natural resources' to include living resources. While the AB highlighted that the objective of the WTO treaty was for optimal utilisation of resources on the lines of sustainable development, they did not focus on how the objective itself allows conservation of living resources to preserve biodiversity, an important goal of sustainable development in CBD.

The main difference between the two approaches is identifying if a term could be expanded to include an evolved circumstance in comparison to determining whether the objective of that clause or treaty 'should' cover an evolved circumstance.[206]

To apply the living instrument approach to answer whether extraterritoriality is permissible under GATT Article XX(g), the interpreter shall focus on whether the article or treaty's objective of sustainable development covers the evolved situation where climate change is a common concern of humankind — with the concern transcending boundaries. Next, the focus shifts to whether, and how, MEAs and

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[205] Rantsev v. Cyprus, *supra* note 17; *see also* Marckx v. Belgium, *supra* note 17; Tyrer v. U.K., *supra* note 17.

[206] A similar pattern is witnessed in the codification of the Talinn Manual. *See* INTERNATIONAL GROUP OF EXPERTS BY THE INVITATION OF THE NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, TALINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt & Liis Vihul eds., 2017).

international instruments related to sustainable development,[207] determine how to treat extraterritorial actions connected to the common concern of humankind.

Firstly, the relevant MEAs and international instruments under Part II(B)(2) create a legal regime of common concern of humankind to respond to climate change, conservation of biodiversity, and protection of global atmosphere.[208] This regime includes the concept of sustainable development to respond to such concerns.[209] Thus, the WTO objective of sustainable development is intricately linked to common concern of humankind.

Secondly, while the MEAs and instruments do not specifically mention extraterritorial actions, they provide the basis for a State to act extraterritorially. The preamble of UNFCCC acknowledges that since climate change is a common concern of humankind, responses to fight against climate change are human rights obligations.[210] This implies that the State has a responsibility to act against environmental common concerns like climate change.[211] The objectives of the UNFCCC also include that States should anticipate, prevent, and minimise adverse effects from climate change, because it is a common concern of humankind.[212] Unilateral measures are also explicitly allowed as a response to a common concern of humankind by a State.[213] Thus, the UNFCCC showcases that a common concern of humankind provides the basis for measure imposing countries to respond to such concerns by acting unilaterally to conserve a natural resource outside their territory.

Additionally, other relevant principles attached to sustainable development within MEAs — such as intergenerational equity, common but differentiated responsibilities, and precautionary principle, can aim to draw limits for such extraterritorial measures so that the coercive and unilateral effect of these measures can be reduced for vulnerable countries.[214] This directly solves our concern about

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[207] VAN DAMME, *supra* note 183.
[208] Castillo-Winckels, *supra* note 119.
[209] *Id.*
[210] *Id.* (citing UNFCCC, *supra* note 24, at Preamble & ¶ 11).
[211] *Id.* at 142.
[212] UNFCCC, *supra* note 24, art. 3.3.
[213] *Id.* art. 3.5.
[214] *See* Castillo-Winckels, *supra* note 119. Castillo-Winckels links certain concepts intrinsically to sustainable development — common concern of humankind, common but differentiated responsibility, precautionary approach, and intergenerational equity. These concepts can provide guidance on how to limit the coerciveness of extraterritorial measures by applying common but differentiated responsibilities [CBDR] and precautionary approach to determine necessity while reducing the harshness for developing countries.

drawing legal boundaries around extraterritorial actions so that developing countries' concerns are also appropriately considered.

Thus, both the approaches may be used to expand the scope of GATT Article XX(g), but with different outcomes. The ordinary meaning approach focuses on specific terms and their corresponding meanings in other instruments, limited to the will of the parties,[215] which is perhaps why it is followed by the WTO Panel and AB. The living instrument approach directly allows import of substantive concepts related to both the broader objective of sustainable development and the narrower objective of conservation. This provides broad basis to understand the importance of concerns arising out of environment-related trade measures, not limited to extraterritoriality. This approach is, however, unlikely to be followed by the Panel and AB because it does not follow Article 31 of the VCLT strictly and is more activist in nature than what the WTO Membership intended.[216]

Interpreting Article XX(g) of the GATT using either approach, while including common concern of humankind, would lead to an addition of a few elements to the provisional justification test. The standard test of provisional justification under Article XX(g) is: a) whether the measures are, "related to conservation of natural resources"; and b) whether the measure is, "applied in conjunction with restrictions to domestic production".[217] The author argues that to include common concern of humankind into the picture, one must also check whether the need for conservation of the specific natural resource is significant and requires collective action.[218] Deferring to treaties and international instruments which identify such common concerns, and enlist the resources important to be conserved to fight the concern, would be helpful. For example, depletion of natural resources which would allow absorption of GHG emissions, like deforestation, can be considered as a part of the common concern of climate change, since more forests are an efficient tool to curb temperature rise from GHG emissions, as specifically observed under Article 5 of the Paris Agreement.[219]

IV. POTENTIAL RISKS

The purpose behind both the evolutionary interpretation approaches is to understand the changing realities and adjust the agreement to accommodate them

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[215] Pierre-Marie Dupuy, *supra* note 18.
[216] Klabbers, *supra* note 128, at 412.
[217] *US — Gasoline* (AB), *supra* note 26, at 20.
[218] Shelton, *supra* note 23.
[219] Paris Agreement, *supra* note 116, art. 5.

while fulfilling its objective. This helps avoid long-drawn negotiations,[220] while not going against the will of the parties. Evolutionary interpretation allows reading new realities into provisions which do not debar such changes, while being loyal to the intention of the parties[221] — by focusing on generic references or the object and purpose of the treaty or provision.

Evolutionary interpretation has, however, led to many Members questioning the legitimacy of the judges or the institution. At the WTO, several WTO Members were displeased by the AB's expansive reading of 'natural resources' in *US — Shrimp.* Many Members treated this interpretation to be modifying existing rights and obligations, in violation of Article 3.2 of the DSU.[222] Similarly, the credibility of the International Whaling Commission was shaken after the evolutionary interpretation of the Duty to Cooperate by the International Court of Justice,[223] prompting Japan and other countries to leave the Commission because of its severely altered nature. [224]

However, according to Eirik Bjorge, evolutionary interpretation used while ensuring that the nature of the terms allow for such evolution, such as the ordinary

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[220] To put this in context, it has taken the WTO Members more than twenty-one years to negotiate the Fisheries Subsidies Agreement, and as of 2022, they were only able to conclude a provisional agreement which expires in four years. With the Environmental Goods Agreement, the negotiations failed on a multilateral level, and it was decided to make the Agreement plurilateral instead of multilateral. There's no movement on that front too. *See In Focus: A Draft WTO Agreement to Curb Harmful Fisheries Subsidies,* INT'L INST. SUSTAINABLE DEV. (Apr. 7, 2022), https://www.iisd.org/articles/policy-analysis/draft-wto-agreement-harmful-fisheries-subsidies (for the fisheries subsidies agreement). On June 16, 2022, a provisional agreement was finalised. *See* WTO, Agreement on Fisheries Subsidies: Draft Ministerial Decision of 17 June 2022, WTO Doc. WT/MIN(22)/W/22. *See* William Alan Reinsch, *Environmental Goods Agreement: A New Frontier or an Old Stalemate?*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 28, 2021), https://www.csis.org/analysis/environmental-goods-agreement-new-frontier-or-old-stalemate (for the Environmental Goods Agreement).

[221] Eirik Bjorge, *Time Present and Time Past, in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW (G. Abi-Saab et al. eds., 2019) [hereinafter Bjorge].

[222] Mariana Clara De Andrade, *Evolutionary Interpretation and the Appellate Body's Existential Crisis*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW (G. Abi-Saab et al. eds., 2019).

[223] Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment of 31 March 2014, 2014 ICJ Reports 226, ¶ 56 (Mar. 31); Margaret Young & Sebastian Rioseco Sullivan, *Evolution Through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice,* 16 MELB. J. INT'L L. 311 (2015).

[224] Int'l Whaling Comm'n, *Statement on Government of Japan Withdrawal from the IWC,* (Jan. 14, 2019), https://iwc.int/resources/media-resources/news/statement-on-government-of-japan-withdrawal.

meaning approach, should not hurt the credibility of an organisation or result in modifying rights and obligations.[225] He views such interpretation as just a tool to determine the common intention of parties.[226] He referred to the ILC reports where it is stated that, "[s]ubsequent agreements and subsequent practice . . . may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning[,] which is capable of evolving over time."[227] In the commentary, the ILC added that the interpreter should aim to answer the question of, "whether the parties can be presumed to have intended . . . to give a term used a meaning that is capable of evolving over time."[228] Hence, evolutionary interpretation may only be legitimate if it can be justified that it was the common will of the party to allow for an evolved meaning of the term used. Peter Van den Bossche supports this, highlighting the AB's emphasis on generic terms in *US — Shrimp* as an example of valuing common intention.[229] This, however, only supports the ordinary meaning approach.

Applying evolutionary interpretation through the living instrument approach brings in more complications than the ordinary meaning approach. While the living instrument approach is more loyal to the objectives of the treaty and treaty provisions than the ordinary meaning approach, the former may be out of the scope of the VCLT.[230] The ECtHR has been more than willing to depend on treaties and instruments not ratified by several Members,[231] which goes against the present understanding of Article 31(3)(a) and (c) of the VCLT. This is not a concern for the ECtHR since they are allowed to contract out of the customary rules of interpretation in international law.[232] The living instrument approach receives its legitimacy from the Preamble,[233] which legitimises an objective oriented method, outside the contours of the VCLT. At the WTO, however, interpretations need to be in accordance with customary rules of international law, which has invariably been identified as Article 31 of the VCLT.[234] However, the VCLT does not define how much weight to provide to object and purpose of a treaty and does not establish what 'applicable between the relations of the parties' means

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[225] Bjorge, *supra* note 221.
[226] *Id.*
[227] Int'l L. Comm'n, Rep. on the Work of the Seventieth Session, U.N. Doc. A/73/10, at 64-70 (2018).
[228] *Id.* ¶ 9.
[229] Peter Van den Bossche, *Is There Evolution in the Evolutionary Interpretation of WTO Law?*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 222-227 (Georges Abi-Saab et al. eds., 2019).
[230] Letsas' *Strasbourg's Interpretive Ethic*, *supra* note 202.
[231] Letsas' *ECHR as a Living Instrument*, *supra* note 202, at 8, 9.
[232] *Id.* at 521-523.
[233] *Id.*
[234] *US — Gasoline* (AB), *supra* note 26, at 17; *see also* DSU, *supra* note 31, art. 3.2.

specifically. Thus, one can argue that the living instrument may also be justified under Article 31 of the VCLT. The WTO has been notoriously known for straying away from the *telos* though, thus complicating the application of this approach.[235] Inconsistent and often incorrect interpretative styles have, however, been identified by the US as one of the main reasons they have blocked appointments at the AB,[236] so this unwritten custom of the AB can potentially change once it is reformed and reconstituted.

Another significant concern would be putting the WTO in charge of determining whether a situation is a common concern. Since the WTO is not equipped with the expertise (and does not possess a mandate) to ascertain whether an environmental crisis is significant enough to require collective action, it should defer to MEAs and apply their findings and assertions in its reports.[237]

The unilateral nature of these extraterritorial measures is also a potential risk under the chapeau. A measure would have violated the chapeau if it is applied in a manner that is arbitrarily or unjustifiably discriminatory, where same conditions prevail.[238] It does not prohibit unilateralism as long as the measure is applied in good faith.[239] Certain indicators of good faith include flexibility,[240] transparency,[241] and genuine relationship of the discrimination with the objective of the measure,[242] good faith negotiations prior to imposition of the measure,[243] and no "alternative

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[235] Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, *in* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 99 (Malgosia Fitzmaurice et al. eds., 2010); Donald McRae, *Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 164 (Enzo Cannizzaro ed., 2011).

[236] U.S. Trade Representative, Rep. on the Appellate Body of the World Trade Organization (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[237] *See generally* PAUWELYN, *supra* note 126.

[238] GATT 1994, *supra* note 13, art. XX Chapeau; *see generally US — Shrimp* (AB), *supra* note 17; VAN DEN BOSSCHE & ZDOUC, *supra* note 34.

[239] *US — Shrimp (Art. 21.5)* (AB*), supra* note 50, at ¶¶ 129-132.

[240] *US — Shrimp* (AB), *supra* note 17, at ¶ 178.

[241] *US — Shrimp* (AB), *supra* note 17, at ¶ 181.

[242] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres,* ¶ 246, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007); *EC — Seal Products* (AB), *supra* note 22, at ¶ 5.336-5.339.

[243] *US — Shrimp (Art. 21.5)* (AB*), supra* note 50, at ¶¶ 129-132; *see also Decision on Trade and Environment,* WTO Preamble (Apr. 15, 1994), https://www.wto.org/ENGLISH/docs_e/legal_e/56-dtenv.pdf; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development,* U.N. Doc. A/Conf. 151/26 (vol. 1), annex 1 (Aug. 12, 1992).

course of action".[244] Coercive measures like CBAM are required to fulfil these indicators. Additionally, developing countries, such as India, have opposed CBAM and similar measures,[245] as these may be seen as an evasive measure for developed countries to escape from their climate finance and technical assistance commitments to developed countries.[246] Cooreman has suggested that unilateral and extraterritorial environment-related trade measures which include technical assistance to developing countries may be considered more legitimate.[247] Therefore, if the measures are applied considering all good faith indicators inside and outside the WTO jurisprudence, and include technical and financial assistance to countries, especially developing countries, it should not be considered to be a violation of the chapeau.

V. CONCLUSION

This paper builds on the existing narrative created by Bartels, Cooreman, and Dobson, amongst others, about using WTO consistent extraterritorial trade measures to fight environmental concerns. However, the author uses two kinds of evolutionary interpretation to provide a direct connection between the concept of common concern of humankind and conservation of exhaustible natural resources to sidestep the contentious application of Article 31(3)(c) of the VCLT which would need to be used to import the concept of common concern of humankind. While the concept has been imported through customary laws of jurisdiction in previous scholarship, it is not in fact directly related to any of the customary bases of jurisdiction, as also identified by Dobson and Ryngaert. Modification of such bases is not supported by state practice.[248] Thus, this paper deviates from the previous approaches to avoid the obstacles of an inconsistent and vague interpretation of Article 31(3)(c). It focuses on the ordinary meaning approach through Article 31(1) of the VCLT using generic reference based evolutionary interpretation and the living instrument doctrine used by the ECtHR which is an objective based evolutionary interpretation.

Evolutionary interpretation is an often-criticised means of re-interpreting old conventions. It is deployed when a substantial change occurs either within a term or surrounding it. Regarding the term 'conservation of exhaustible natural resources', many changes have occurred since the 1990s. The most significant

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[244] *US — Shrimp* (AB), *supra* note 17, at ¶ 171. *US — Gasoline* (AB), *supra* note 26, at 25.
[245] Chimni, *supra* note 32.
[246] U.N. Independent Expert Group on Climate Finance, Delivering on the $100 Billion Climate Finance Commitment and Transforming Climate Finance (Dec. 2020), https://www.un.org/sites/un2.un.org/files/100_billion_climate_finance_report.pdf.
[247] Cooreman, *supra* note 29, at 247.
[248] Dobson & Ryngaert, *supra* note 28, at 326.

change — the introduction and eventual acceptance by the international community of the concept of common concern of humankind — has provided us with a new basis to challenge the narrow interpretation of conservation of exhaustible natural resources to legalise limited extraterritoriality. Under the ordinary meaning approach, the term 'conservation' can be interpreted to include methods which respond to concerns transcending boundaries. Under the living instrument approach, the relevant MEAs and international instruments can be directly depended upon to establish the 'present standard' of determining the scope of measures under GATT Article XX(g).

Not all extraterritorial measures falling under Article XX(g) of GATT should be accepted as legal. Some measures pose severe coercive risks. However, extraterritorial measures imposed in good faith, with technical and financial assistance included, aimed at fighting common concerns of humankind in the form of conservation of some exhaustible natural resources would be an adequate response to the changing reality of the climate crisis. Reading the concept of common concern of humankind into the term 'conservation of exhaustible natural resources' makes space for this response.

These approaches provide a more specific answer to how global environmental concerns may be addressed through trade measures. It explicitly allows for measures limiting GHG emissions, while ensuring reduced carbon leakage amidst a world of weak environmental protection. Both the approaches also provide for an opportunity to recognise how conventions, even of a multilateral nature, may need to be understood differently years after inception because of changing realities — so that conventions do not become a hindrance in fighting such changes in context — such as issues like the climate change crisis.