

# Protecting Protectionism in the WTO: A Reinterpretation of the General Exceptions to Protect the IRA's Local Content Requirements

Abigail Pelton<sup>1</sup>

*The Inflation Reduction Act of 2022 (IRA), as part of the largest investment the United States has made to mitigate climate change to date, amended the United States Internal Revenue Code to reduce the cost of shifting toward renewable energy. Specifically, the IRA expands tax credits available to taxpayers who invest in or produce clean energy and provides a new consumer tax credit for electric vehicles. However, the IRA has come under fire from U.S. trading partners because some of these tax credits contain local content requirements (LCRs)— that is, the Act requires beneficiaries to source products or materials domestically in order to receive the full benefit. Several foreign governments have claimed that the IRA's use of LCRs violates World Trade Organization (WTO) agreements to which the U.S. is a party. If another member of the WTO lodges a formal complaint with the WTO and the U.S. receives an adverse ruling, the U.S. could be ordered to repeal the IRA or face sanctions, which would severely hamper U.S. and global efforts to meet emissions goals. Moreover, LCRs could be a very useful tool for countries other than the U.S. to use to facilitate the growth of prosperous new renewable energy industries, something essential to sustainably avoiding climate catastrophe. This Note reviews the WTO rules which the IRA may violate and finds that the IRA would not pass muster under prevailing interpretations of WTO agreements. However, evidence in the relevant WTO agreements support an alternative that would allow the IRA to survive. This Note proposes such an interpretation and argues that it would be prudent for the WTO to adopt it in light of the current climate crisis.*

1. J.D., Columbia Law School, 2024; B.S., Emerson College, 2020. I would like to thank Professor Michael Gerrard for his invaluable insight and the Columbia Journal of Environmental Law student editors for their outstanding feedback and meticulous editing.

I.	Introduction .....	102
II.	The WTO, LCRs in the RE Industry, and the IRA .....	104
A.	WTO Framework .....	104
1.	Goals & History of the WTO .....	104
2.	Dispute Resolution.....	106
B.	Local Content Requirements in Renewable Energy Policy ....	111
1.	The need for RE policy .....	111
2.	Why governments find LCRs attractive in RE policy.....	113
C.	The Inflation Reduction Act.....	114
1.	History and Goals of the IRA.....	114
2.	LCRs in the IRA.....	117
III.	Violations Based on Prior Interpretations of WTO Rules.....	119
A.	GATT .....	119
1.	“Likeness” .....	120
2.	“Law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use” .....	121
3.	Less favorable treatment .....	122
B.	TRIMS .....	123
C.	SCM .....	124
1.	“Financial Contribution” .....	124
2.	“A Benefit is Conferred” .....	125
3.	“Specific” .....	125
D.	General Exceptions .....	126
1.	Applicability of the General Exceptions Outside of GATT ..	128
2.	Article XX(a)-(j) Subject Matter Requirements .....	130
3.	Article XX Chapeau .....	133
IV.	Reinterpreting the General Exceptions.....	134
A.	Proposed Interpretation of the General Exceptions .....	135
1.	Simplifying the “Necessary” or “Essential” Qualifier .....	135
2.	Viewing Policy Considerations as Central to the Chapeau of GATT Article XX.....	137
3.	Extending GATT Article XX to SCM .....	139
B.	Arguments Against This Construction.....	140
1.	Increased Barriers to Trade.....	140
2.	The Importance of Predictability.....	142
V.	Conclusion.....	143

## I. INTRODUCTION

On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 (IRA or “the Act”) into law.<sup>2</sup> The IRA contributes an estimated \$369 billion toward climate change mitigation and energy security,<sup>3</sup> representing the largest investment the U.S. has made in addressing the climate crisis to date, and bringing the U.S. closer to meeting its greenhouse gas reductions targets.<sup>4</sup> These investments are far-reaching and include direct investments in energy research, critical mineral processing, and parts manufacturing; loans for electric vehicle manufacturers; grants for improving energy efficiency and transitioning to clean energy across sectors; and tax credits for clean energy production, clean energy investments, and electric vehicle purchases.<sup>5</sup> Several of the tax credits contained in the IRA have been the subject of criticism from foreign governments because the credits include Local Content Requirements (LCRs); that is, in order to receive all or part of the credit, products or materials must be sourced locally.<sup>6</sup> Some of the U.S.’s trading partners have argued that the Act’s use of LCRs violates World Trade Organization (WTO) agreements.<sup>7</sup>

LCRs are a useful tool in renewable energy policy because they allow players in emerging industries to grow before being exposed to the full competition of a global market<sup>8</sup> and they allow nations to

2. THE WHITEHOUSE, BUILDING A CLEANER ECONOMY 5 (Sept. 2023), <https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf> [<https://perma.cc/5QYY-H85D>].

3. SENATE DEMOCRATS, SUMMARY: THE INFLATION REDUCTION ACT OF 2022, [https://www.democrats.senate.gov/imo/media/doc/inflation\\_reduction\\_act\\_one\\_page\\_summary.pdf](https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf) [<https://perma.cc/FS56-PPAJ>] (last visited Oct. 20, 2023).

4. John Larsen et al., *A Turning Point for U.S. Climate Progress: Assessing the Climate and Clean Energy Provisions in the Inflation Reduction Act*, RHODIUM GROUP (Aug. 12, 2022), <https://rhg.com/research/climate-clean-energy-inflation-reduction-act/> [<https://perma.cc/YTF4-A49B>].

5. The Practical Guidance Finance Team, *Energy Security and Climate Change Initiatives in the Inflation Reduction Act*, LEXISNEXIS (Jan. 24, 2023), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/energy-security-and-climate-change-initiatives-in-the-inflation-reduction-act#:~:text=BIDEN%20SIGNED%20THE%20IRA%20INTO,investments%20in%20clean%20energy%20manufacturing> [<https://perma.cc/T29C-7LK3>]. This is not an exhaustive list of the ways in which the IRA invests in climate change mitigation.

6. *Local Content Requirements Impact the Global Economy*, ORG. FOR ECON. COOP. AND DEV., <https://www.oecd.org/trade/topics/local-content-requirements/> [on file with the Journal] (last visited Oct. 15, 2023).

7. Louise Wendt Jensen, *E.U. Accuses U.S. of Violating WTO Rules with Inflation Reduction Act*, ENERGYWATCH (Aug. 11, 2022) [https://energywatch.com/EnergyNews/Policy\\_\\_Trading/article14567471.ece](https://energywatch.com/EnergyNews/Policy__Trading/article14567471.ece) [<https://perma.cc/96JC-J6JJ>].

8. JAN-CHRISTOPH KUNTZE & TOM MOERENHOUT, LOCAL CONTENT REQUIREMENTS AND THE RENEWABLE ENERGY INDUSTRY—A GOOD MATCH? 4 (May 2013),

internalize the benefits of promulgating emissions-reducing policy more directly.<sup>9</sup> As a result, LCRs can also broaden appeal for partisan policies.<sup>10</sup> Nonetheless, LCRs are frequently challenged under the WTO because they create barriers to trade, and it is possible that one or more of the U.S.'s trading partners will formally complain to the WTO Dispute Settlement Body (DSB) about the IRA.<sup>11</sup>

A survey of prior cases that have been heard by the DSB reveals that, under previous interpretations of WTO agreements, the IRA likely violates at least three agreements due to its use of LCRs. This note proposes an alternative interpretation of certain WTO agreements that would allow the IRA to pass muster. This note further argues that it would be prudent for the Appellate Body (AB) to adopt this new interpretation if the IRA is formally challenged.

Part II of this Note describes the history and goals of the WTO as well as its mechanisms for dispute resolution; explains the appeal of LCRs in renewable energy (RE) policy; and outlines relevant portions of the IRA, with special attention to the LCRs therein. Part III describes the WTO agreements implicated by a challenge against the IRA and the jurisprudence that has evolved surrounding these agreements. Part III also demonstrates that, absent reinterpretation, the IRA and similar RE policy would be found to violate WTO agreements. Part IV proposes an alternative interpretation of the General Exceptions to the General Agreement in Trades and Tariffs that would allow the IRA to survive a challenge; describes potential counterarguments to this interpretation; and ultimately concludes that the WTO should use the IRA as an opportunity to reinterpret the General Exceptions as described in this note, considering the state of the climate crisis.

<https://www.greenpolicyplatform.org/sites/default/files/downloads/resource//local-content-requirements-renewable-energy-industry-ICTSD.pdf> [<https://perma.cc/5YFV-HFZR>].

9. See Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 1937, 1939 (2015).

10. See *infra* notes 93–95 and accompanying text for a discussion of the political climate in the U.S. that led to inclusion of LCRs in the IRA.

11. Louise Wendt Jensen, *supra* note 7. After the U.S. passed the IRA, the European Union and South Korea immediately expressed concern over the Act's potential WTO violations. The European Union eventually responded to the IRA by implementing the Green Deal Industrial Plan, which contains LCRs that are similar to those included in the IRA. As of August 2023, South Korea is still considering launching a complaint with the WTO. Kim Da-sol, *Korea to Review WTO Complaint on Biden's IRA*, THE KOREA HERALD (Aug. 22, 2022), <https://www.koreaherald.com/view.php?ud=20220822000789> [<https://perma.cc/HZM4-N5RY>].

## II. THE WTO, LCRs IN THE RE INDUSTRY, AND THE IRA

Before assessing whether the IRA violates the WTO, it is important to understand what is at stake and why the U.S. employed LCRs in the Act. Part II(A) describes the history and goals of the WTO, outlines the process for resolving disputes in the WTO, and explains the consequences of violating the WTO. Part II(B) defines LCRs and demonstrates why they are frequently employed in RE policy. Part II(C) describes the IRA with an eye to the political climate in which the Act was passed and identifies the LCRs in the Act that have drawn opposition from international trading partners.

### A. WTO Framework

This section first discusses the goals and history of the WTO, then explains the dispute resolution process for when one WTO member nation believes another to be in violation of one or more agreements.

#### 1. Goals & History of the WTO

The WTO is an intergovernmental organization which exists “to open trade for the benefit of all.”<sup>12</sup> The predecessor to the WTO was the General Agreement on Tariffs and Trade of 1947 (GATT 1947), a multilateral trade agreement aimed at eliminating trade discrimination between members, reducing tariffs, and encouraging open markets following World War II.<sup>13</sup> However, GATT 1947 only covered trade in goods, leading many member nations to enter bilateral agreements covering trade topics such as services and intellectual property, which undermined GATT 1947.<sup>14</sup> During the Uruguay Round (1986–1994), contracting nations undertook to completely reform their agreements and create the World Trade Organization.<sup>15</sup> A total of 123 nations took part in the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement) at the Uruguay Round.<sup>16</sup> This umbrella agreement was passed along with three annexes

12. *What is the WTO?*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) [<https://perma.cc/72A7-62GB>] (last visited Oct. 15, 2023).

13. *GATT 1947 and the Grueling Task of Signing*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/gatt\\_e/task\\_of\\_signing\\_e.htm](https://www.wto.org/english/tratop_e/gatt_e/task_of_signing_e.htm) [<https://perma.cc/WS3L-5JF3>] (last visited Oct. 15, 2023).

14. *Id.*

15. *The Uruguay Round*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) [<https://perma.cc/N43H-X8LZ>] (last visited Oct. 15, 2023).

16. *Id.* See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement].

containing multilateral trade agreements and one annex containing plurilateral trade agreements.<sup>17</sup>

The WTO's stated principles are: improving people's lives, negotiating trade rules, overseeing WTO agreements, maintaining open trade, and settling disputes.<sup>18</sup> At the heart of the WTO are its agreements, which, like nearly all WTO decisions, are approved by a consensus of member nations (Members).<sup>19</sup> The IRA's usage of LCRs implicates three of the WTO's existing agreements: the General Agreement on Tariffs and Trade 1994 (GATT),<sup>20</sup> the Agreement on Subsidies and Countervailing Measures (SCM),<sup>21</sup> and the Agreement on Trade-Related Investment Measures (TRIMs).<sup>22</sup> These agreements are discussed in-depth in Part III, *infra*, but they largely function to prevent Members from enacting measures that create barriers to trade.

Throughout the WTO agreements, there is evidence that sustainable development and environmental protection are important goals to the organization. For example, in the preamble to the Marrakesh Agreement, Members committed to "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so[.]"<sup>23</sup> Other WTO findings also report that climate change has the potential to disrupt supply chains and raise trade costs across the globe, making climate change

17. See Marrakesh Agreement, *supra* note 16.

18. *Who We Are*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) [<https://perma.cc/W6PT-F4G5>] (last visited Oct. 15, 2023).

19. *Whose WTO is it Anyway?*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm) [<https://perma.cc/Y2UH-T4AV>] (last visited Oct. 15, 2023).

20. 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, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

21. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement] [Not reproduced in I.L.M.].

22. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement] [Not reproduced in I.L.M.]. Other agreements, such as the General Agreement on Trade in Services (GATS), could also be implicated by LCRs, though complaints against the IRA are more likely to arise under the three aforementioned agreements. This note will therefore focus only on GATT, SCM, and TRIMs. Furthermore, analysis of the IRA under GATS and other WTO agreements would be largely repetitive, as the same principles are found throughout most WTO agreements. See The General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

23. Marrakesh Agreement, *supra* note 16.

mitigation in service of the WTO goal to reduce barriers to trade.<sup>24</sup> In spite of repeated mentions of environmental goals, the WTO is clear that measures passed by Member nations to protect the environment still must comply with all requirements of the WTO agreements “to avoid the misuse of such measures for protectionist ends[.]”<sup>25</sup>

## 2. Dispute Resolution

If a Member nation believes that another Member is in violation of an agreement, the complaining Member must follow dispute settlement procedures outlined in the Dispute Settlement Understanding (DSU),<sup>26</sup> as modified by the particular agreement(s) alleged to be violated.<sup>27</sup> Per the DSU, Members must engage in consultation to attempt to settle their dispute before any other remedy is made available.<sup>28</sup> If, after 60 days, the Members have failed to settle their dispute, the complaining Member may request a panel be convened.<sup>29</sup> Panels are composed of three or five panelists, drawn from a pool of “well-qualified” individuals.<sup>30</sup> The role of the panel is to “make an objective

24. *Trade and Climate Change*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/envir\\_e/climate\\_intro\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm) [<https://perma.cc/K8QK-HFC7>] (last visited Oct. 15, 2023).

25. *Trade and Environment*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envir_e.htm) [<https://perma.cc/JG2A-LCQT>] (last visited Oct. 15, 2023).

26. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU] (“The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding”).

27. GATT 1994 and TRIMs largely rely on the default dispute resolution terms of the DSU. SCM “contains extensive special or additional dispute settlement rules and procedures providing, *inter alia*, for expedited procedures, particularly in the case of prohibited subsidy allegations.” *Agreement on Subsidies and Countervailing Measures*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm) [<https://perma.cc/3TSE-PFLB>] (last visited Oct. 15, 2023). A Member may request consultations with any other Member which it believes has granted a subsidy prohibited by SCM. SCM Agreement, *supra* note 21, art. 4.1. The Members then must engage in consultation to “clarify the facts of the situation and to arrive at a mutually agreed solution.” *Id.* art. 4.3. If the Members fail to agree on a solution within 30 days of the consultation request, “any Member party to such consultations may refer the matter to the [DSB] for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.” *Id.* art. 4.4.

28. DSU, *supra* note 26. The complaining party first requests consultation, which the party alleged to be in violation must respond to within 10 days. *Id.* art. 4.3. The Members must then begin good faith consultations within 30 days of the receipt of the request for consultation. *Id.*

29. *Id.* art. 4.7. The 60-day period for consultations begins on the date of receipt of the request for consultation. *Id.* If both parties agree that consultations have failed before the 60-day consultation period ends, the complaining party may request the panel be established sooner. *Id.*

30. *Id.* art. 8.

assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”<sup>31</sup>

Panel examination resembles an adversarial trial. Prior to the first substantive meeting of the panel, the parties submit their arguments in writing.<sup>32</sup> The parties then present their cases orally at the first substantive meeting, beginning with the complaining Member.<sup>33</sup> A second substantive meeting is later held, where parties present their rebuttal arguments.<sup>34</sup> The panel may also ask parties questions at any time<sup>35</sup> or “seek information and technical advice from any individual or body which it deems appropriate.”<sup>36</sup>

After examination, the panel’s interim report is sent to the parties for comment.<sup>37</sup> The panel reviews and responds to any comments from parties, and the report is finalized and circulated to the parties.<sup>38</sup> The entire panel examination process takes up to six months from the date of the panel’s establishment until its findings are circulated to the parties.<sup>39</sup> Throughout this process, the panel “should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”<sup>40</sup> If parties are unable to do so, the panel submits its findings to the DSB, which is composed of a representative from each Member.<sup>41</sup> The findings include the panel’s determination of whether the challenged measures are consistent with WTO rules and—if the panel finds that measures are inconsistent—a recommendation that the Member bring the measures into conformity.<sup>42</sup> A report also generally includes specific recommendations as to how the Member should achieve conformity.<sup>43</sup>

31. *Id.* art. 11.

32. *Id.* app 3.4.

33. *Id.* app. 3.5.

34. Arguments are again submitted in writing ahead of time. Rebuttals begin with the party complained against. *Id.* app. 3.7.

35. *Id.* app. 3.8

36. *Id.* art. 13.1.

37. *Id.* art. 15.2.

38. *Id.* art. 12.9, app. 3.12(k).

39. *Id.* art. 12.8.

40. *Id.* art. 11.

41. *Id.* art. 12.7–12.8.

42. *Id.* art. 19.

43. *Id.* art. 19. Remedies under SCM deviate slightly: if a panel finds that SCM is violated, it must recommend immediate withdrawal of the subsidy in question. SCM Agreement, *supra* note 21, art. 4.7. This is in contrast to the generally-preferred course of recommending means of bringing the measure into compliance without withdrawing it. DSU, *supra* note 26 art. 19.1.

If no party objects to a panel's findings of inconsistency with WTO agreements, the DSB will adopt the panel's recommendation (which is generally either to bring the measure into compliance or withdraw the measure altogether within sixty days).<sup>44</sup> A party which disagrees with the panel's report has two options: submit objections to the DSB or appeal the report to the AB.<sup>45</sup> If a party appeals the report, the DSB will not consider or adopt the panel report until the appeals process is resolved.<sup>46</sup> The AB draws up its own procedures and its proceedings are confidential, but the AB must address each of the issues the Members raise.<sup>47</sup> The AB "may uphold, modify or reverse the legal findings and conclusions of the panel," and then will send a Report to the DSB.<sup>48</sup> The DSB must adopt the AB Report, unless they decide by consensus not to.<sup>49</sup> The DSB then makes recommendations that would bring the challenged measure into compliance with WTO rules (generally repealing all or part of the measure).<sup>50</sup>

Following panel or AB proceedings, any Member found to be in violation of WTO agreements must follow the recommendations from the panel report or Appeals report, as adopted by the DSB. If a Member refuses to do so within a reasonable period of time, the Member in violation must provide compensation to the challenging Member.<sup>51</sup> If the parties fail to agree on compensation, the DSB will permit the complaining party or parties to employ temporary retaliatory measures.<sup>52</sup>

It is important to note that there is no rule of *stare decisis* in WTO dispute resolution, meaning that panels and the AB have no obligation to follow prior interpretations of the rules currently before them.<sup>53</sup>

44. *Id.* art. 16.

45. DSU, *supra* note 26 art. 16.2, 16.4. An appeal is the preferred route for Members who disagree with the panel Report because the DSB can only depart from the Report by consensus vote. *Id.*

46. *Id.* art. 16.4.

47. *Id.* art. 17.

48. *Id.*

49. *Id.* art. 17.14.

50. *A Unique Contribution*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) [<https://perma.cc/FT3K-FHYJ>] (last visited Oct. 15, 2023).

51. *Id.* The compensation is agreed upon by the parties to the dispute (e.g., a reduction in tariffs for the complaining party/parties).

52. *Id.* Retaliatory measures may include blocking imports or raising import duties. Generally, the retaliatory measure will be similar to the offending measure, or at least affecting the same sector or WTO agreement. These retaliatory measures are designed to pressure the Member in violation to come into compliance.

53. *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c7s2p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm) [<https://perma.cc/4DH5-SZ29>] (last visited Oct. 15, 2023). While prior

That said, panels and the AB do tend to take prior findings into account because they “create legitimate expectations among WTO Members.”<sup>54</sup> The AB has varied in the emphasis it places on prior rulings, sometimes using them only insofar as the reasoning contained within is persuasive,<sup>55</sup> and other times deferring broadly to prior rulings in the interest of predictability.<sup>56</sup>

The United States is currently dissatisfied with the WTO dispute resolution mechanisms, due in large part to the adjudicatory bodies’ increased reliance on their own precedent.<sup>57</sup> The U.S. has expressed this dissatisfaction by refusing to appoint new AB members, triggering an Appellate Body “Crisis” and undermining the authority of the WTO.<sup>58</sup> Under WTO rules, appeals must be heard by a panel of three judges, drawn from a standing Appellate Body that is composed of seven members appointed by the DSB by consensus.<sup>59</sup> Standing AB members serve four-year terms. Under President Trump, the U.S. refused to appoint any new members of the AB, in protest of the WTO’s “overreach.”<sup>60</sup> Since AB members are appointed by consensus, the U.S.’s refusal prevents appointment of new AB members, which

interpretations of WTO agreements are not binding in future disputes, AB interpretations are binding on future panels *in the same dispute* between the same parties. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 14 (adopted Nov. 1, 1996) [hereinafter *Japan—Taxes on Alcoholic Beverages*].

54. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Art. 21.5 of the DSU by Malaysia*, ¶ 108, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001).

55. *Japan—Taxes on Alcoholic Beverages*, *supra* note 53.

56. Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008). In this report, the AB stated that, absent “cogent reasons” to do so, WTO adjudicatory bodies should not depart from prior judicial interpretations, in order to ensure “security and predictability.” *Id.* The “absent cogent reasons” language was viewed by many nations—including the U.S.—as judicial overreach. For further reading on precedent in WTO adjudications, see James Bacchus & Simon Lester, *The Rule of Precedent and the Role of the Appellate Body*, 54 J. WORLD TRADE 183 (2020).

57. Giorgio Sacerdoti, *The Authority of “Precedent” in International Adjudication: the Contentious Case of the WTO Appellate Body’s Practice*, 19 L. AND PRAC. OF INT’L CTS. AND TRIBUNALS 497, 498 (2020). The U.S. asserts that the over-reliance on AB precedent effectively binds parties to rules that they did not agree to. Moreover, this over-reliance prevents remedy of what the U.S. views as mistaken interpretations of WTO agreements. *Id.* According to U.S. representatives, WTO panels and ABs should rely on the text of the agreements in question and the arguments of the parties, rather than the non-ratified interpretations promulgated by earlier panels and ABs. ROBERT MCDUGALL, CRISIS IN THE WTO: RESTORING THE WTO DISPUTE SETTLEMENT FUNCTION 8 (Oct. 2018), <https://www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf> [<https://perma.cc/J53B-YDRC>].

58. McDougall, *supra* note 57.

59. DSU, *supra* note 26, art. 17. The DSB is composed of representatives from each Member, so DSB consensus entails consensus of Member nations.

60. McDougall, *supra* note 57.

caused the standing AB to dwindle as AB members' terms ended.<sup>61</sup> In 2019, two of the last three AB members' terms ended, meaning there were no longer enough members to hear appeals.<sup>62</sup> President Biden has continued to block new AB members' appointment.<sup>63</sup> Since appealing a panel finding prevents the DSB from adopting the report or ordering a remedy, any Member that receives an adverse panel decision can essentially appeal the adverse finding into a void, and aggrieved Members may not obtain relief for WTO violations.

Even in light of the Appellate Body Crisis, the question of whether a measure violates the WTO is important for a number of reasons. First, losing Members do not always appeal panel findings, so panel reports can still be adopted by the DSB;<sup>64</sup> second, there is the possibility that the WTO will resolve the Appellate Body Crisis in the near future through cooperation with the U.S. or by implementing procedural workarounds so that the U.S.'s consent is not necessary;<sup>65</sup> and third, many WTO Members have formed the Multi-Party Interim Appeal Arbitration Arrangement, where appeals between participating members can be heard, so WTO agreements still have their full effect for those nations.<sup>66</sup> Furthermore, the interpretation of the General Exceptions that this note suggests in Part IV could help address "judicial overreach" concerns expressed by the U.S.

61. *Id.* at 5.

62. *Id.* at 1.

63. A. M. Menshikov, *Position of Joe Biden's Administration on the World Trade Organization*, 92(6) HERALD OF THE RUSSIAN ACAD. OF SCI. 529, 531 (2022).

64. *See, e.g.*, Status Report, *European Union—Safeguard Measures on Certain Steel Products*, WTO Doc. WT/DS595/14 (Jan. 17, 2023).

65. Tetyana Payosova et al., *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, 18–5 PETERSON INST. FOR INT'L ECON. POL. BRIEFS 9-10 (Mar. 2018), <https://www.piie.com/sites/default/files/documents/pb18-5.pdf> [<https://perma.cc/666C-J3CF>]. The Appellate Crisis would also be resolved if the WTO conceded to the U.S.'s demands or if the U.S. consented to appointment of AB members (though this seems unlikely given that the U.S. has refused to appoint AB members for the past five years).

66. There are currently 52 nations participating in the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) including major U.S. trade partners such as the European Union, Canada, China, and Mexico. The MPIA largely follows DSU rules for appellate review and will remain in effect as long as the Appellate Body Crisis continues. *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, WORLD TRADE ORG., [https://wto plurilaterals.info/plural\\_initiative/the-mpia/](https://wto plurilaterals.info/plural_initiative/the-mpia/) [<https://perma.cc/JZF2-B397>] (last visited Oct. 15, 2023); *see* DSU, *supra* note 26. Since the U.S. is not a participant in the MPIA, the IRA will not be challenged in that forum, but the European Union's Green Deal Industrial Plan contains similar LCRs to the IRA and may be challenged in the MPIA.

## B. Local Content Requirements in Renewable Energy Policy

Having set the stage with the WTO framework under which the IRA will be analyzed, this section explains what LCRs are and why they are frequently employed in RE policy. This section will begin by describing the need for RE and why a national policy is necessary to stimulate its development, then explain the appeal of LCRs as a tool in RE policy.

### 1. The need for RE policy

The effects of climate change are already being felt globally.<sup>67</sup> To curb the worst impacts of climate change, virtually all nations—the U.S. included—entered the Paris Agreement in 2015.<sup>68</sup> The Paris Agreement is a treaty with the goal of limiting global average temperature rise to “well below” 2°C above pre-industrial levels by 2100 and “pursuing efforts to limit the temperature to 1.5°C.”<sup>69</sup> In order to reach the 1.5°C figure, global greenhouse gas emissions must be reduced by 43% by the year 2030.<sup>70</sup> Countries participating in the Paris Agreement are expected to submit Nationally Determined Contributions (NDCs), which describe the country’s plan for reducing greenhouse gasses.<sup>71</sup> Under President Biden, the U.S.’s NDC set an “economy-wide target of reducing its net greenhouse gas emissions by 50-52 percent below 2005 levels in 2030.”<sup>72</sup> As the world’s second-largest producer and consumer of energy,<sup>73</sup> the U.S.’s pledge is essential to achieving the goals of the Paris Agreement. To meet this goal, the U.S. vowed to “decarbonize the energy sector, including by cutting

67. *The Effects of Climate Change*, NASA.GOV, <https://climate.nasa.gov/effects/> [<https://perma.cc/KL2N-4Y93>] (last visited Oct. 15, 2023).

68. *The Paris Agreement*, U.N. FRAMEWORK CONV. ON CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement> [<https://perma.cc/3MNK-W2HW>] (last visited Oct. 15, 2023). The U.S. briefly withdrew from the Paris Agreement under President Trump, but rejoined in 2021 soon after President Biden took office. Press Statement, Antony J. Blinken, Secretary of State, *The United States Officially Rejoins the Paris Agreement* (Feb. 19, 2021), <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/#:~:text=On%20January%2020%2C%20on%20his,becomes%20a%20Party%20again%20today> [<https://perma.cc/U8BC-R5JY>].

69. *Id.* Even global warming of 1.5 degrees poses risks for humans, particularly those in developing nations and island nations. MYLES ALLEN, ET. AL., IPCC, 2018: SUMMARY FOR POLICYMAKERS (Masson-Delmotte, V., et al. eds., 2018) 7, <https://www.ipcc.ch/sr15/chapter/spm/> [<https://perma.cc/J7FW-UU5E>].

70. U.N. FRAMEWORK CONV. ON CLIMATE CHANGE, *supra* note 68.

71. *Id.*

72. UNITED STATES OF AMERICA, NATIONALLY DETERMINED CONTRIBUTION 1, <https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf> [<https://perma.cc/WLF3-E95Y>] (last visited Oct. 15, 2023).

73. *Id.* at 12.

energy waste; shifting to carbon pollution-free electricity; electrifying and driving efficiency in vehicles, buildings, and part of industry; and scaling up to energy sources and carriers[.]”<sup>74</sup> Currently, approximately 78% of global greenhouse gas emissions come from fossil fuels.<sup>75</sup> Emissions in the U.S. can be broken down by sector as follows: the transportation sector contributes 28% of emissions, the electric power sector contributes 25%, the industry sector contributes 23%, commercial and residential sectors contribute 13%, and agriculture contributes 10%.<sup>76</sup> The transportation sector’s high contribution is largely attributable to the fact that 90% of transportation energy usage is met by petroleum.<sup>77</sup>

A comparative case study between wind energy development in Europe and the U.S. demonstrates that, predictably, a consistent and long-term RE policy leads to steadier development.<sup>78</sup> Various U.S. states have enacted RE policies to encourage RE development, but federal-level RE policies have been insufficient to meaningfully decrease U.S. greenhouse gas emissions.<sup>79</sup> There are two notable roadblocks to RE policy in the U.S. which LCRs may mitigate. First, the cost of RE policy can outweigh the benefits to the jurisdiction enacting the policy, particularly in the short-term.<sup>80</sup> Second, partisan politics,

74. *Id.* at 3.

75. *Global Greenhouse Gas Emissions Data*, EPA.GOV, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data#:~:text=Since%201970%2C%20CO2%20emissions,been%20the%20second%2Dlargest%20contributors> [<https://perma.cc/9FU6-BRTF>] (last visited Oct. 15, 2023).

76. *Sources of Greenhouse Gas Emissions*, EPA.GOV, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [<https://perma.cc/9ERD-VFTU>] (last visited Oct. 15, 2023) (describing emissions from the year 2021).

77. Light-duty vehicles (e.g., SUVs, pickup trucks, and cars) produce the largest share of emissions. UNITED STATES OF AMERICA, *supra* note 72 at 4.

78. Randall Swisher & Kevin Porter, *Renewable Policy Lessons from the USA: The Need for Consistent and Stable Policies*, in *RENEWABLE ENERGY POLICY AND POLITICS* 185, 196–197 (Karl Mallon ed., 2006).

79. *U.S. Emissions*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/u-s-emissions/#:~:text=Trends%20in%20U.S.%20Greenhouse%20Gas%20Emissions%2C%201990–2020&text=Total%20emissions%20decreased%20by%207.3,least%206%20percent%20in%202021> [<https://perma.cc/75VL-D4EG>] (last visited Oct. 15, 2023).

80. Since climate change is a collective action problem, the jurisdiction enacting measures to reduce emissions will not gain any special benefit from its emission reductions. Meyer, *supra* note 9.

fragmentation of authority,<sup>81</sup> and politicization of climate change slow progress.<sup>82</sup>

## 2. Why governments find LCRs attractive in RE policy

An LCR is a policy tool in which a government requires businesses to source products or materials from a particular geographic area to receive a benefit.<sup>83</sup> One of the primary reasons for LCRs in RE policy is to spur innovation. Currently, many potential players in the RE industry are dissuaded from investing in the field because they may not be able to compete with their well-established, non-RE counterparts in the international free market.<sup>84</sup> Incentives that include LCRs for manufacturers and generators in the RE industry provide some protection against international competition with more-developed peers while domestic industry participants scale up their operations.<sup>85</sup> Since incentives with LCRs will allow more industry participants to survive infancy and eventually enter the global market, it is theorized that worldwide competition in this area will be increased, which will spur innovation that would eventually lower the global cost of renewable energy technology.<sup>86</sup>

LCRs also allow nations to internalize the benefits of their emissions-reducing policies. Climate change presents a classic collective-action problem: each country will benefit greatly if they all work together to reduce greenhouse gas emissions, but a jurisdiction that enacts RE policy will receive no special benefit from its own policies.<sup>87</sup> Governments are understandably hesitant to take on a particularized and immediate cost (i.e., the domestic cost of enacting the policy) in exchange for a non-immediate benefit that is dispersed globally.<sup>88</sup> LCRs as a RE tool create an immediate benefit for the jurisdictions

81. See Sean Farhand & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, 60 AM. J. OF POL. SCI. 401 (Apr. 2016). Authority is divided between state and federal decision-makers, as well as splintered between three equal branches of federal government. Compared to more hierarchical government structures common in Europe, the U.S. system leads to policymakers wielding comparatively weaker power. *Id.* at 402.

82. Aaron M. McCright & Riley E. Dunlap, *The Politicization of Climate Change and Polarization in the American Public's Views of Global Warming, 2001-2010*, 52 SOCIO. Q. 155 (2011).

83. *Local Content Requirements*, ORG. FOR ECON. COOP. AND DEV., <https://www.oecd.org/trade/topics/local-content-requirements/> [on file with the Journal] (last visited Mar. 18, 2023).

84. KUNTZE & MOERENHOUT, *supra* note 8, at 4.

85. *Id.* at 4–5.

86. *Id.* at 5. This would require, of course, that LCRs are eventually phased out to allow for international competition.

87. Meyer, *supra* note 9.

88. *Id.*

enacting the policy, allowing them to more directly internalize the benefits of their emissions-reducing measures.

A related benefit of LCRs is that they preserve domestic jobs.<sup>89</sup> One of the greatest costs of RE policy is job loss in areas with a large number of jobs tied to the fossil fuel industry. LCRs aid in creating jobs in regions that would otherwise face significant job loss as a result of the decreased reliance on fossil fuels. Without LCRs, nations that have been faster to develop their EV manufacturing infrastructure will gain an advantage in EV manufacturing, while nations that have delayed doing so will have a much harder time recovering those lost jobs. A 2021 study projected that, without any policy to keep EV jobs in America, approximately 75,000 American auto assembly and auto parts jobs would be lost if the EV share of the auto market increased to 50% by 2030.<sup>90</sup> By contrast, if the U.S.-produced share of EV powertrain components concurrently rose to match the share of U.S.-produced share of internal combustion engine vehicle powertrain components, only around 35,000 American auto jobs would be lost.<sup>91</sup> If the share of domestically produced vehicles sold in the U.S. also increased by 10%, the U.S. would see a net increase of 152,000 jobs.<sup>92</sup> If switching to RE means loss of domestic jobs, nations will be much more resistant to transitioning.

### C. The Inflation Reduction Act

#### 1. History and Goals of the IRA

Partisanship in Washington, D.C. has prevented Congress from passing meaningful legislation on climate change for decades, with Republicans repeatedly blocking attempts to combat the climate

89. It may be argued that creation of domestic jobs should not be an acceptable policy reason for discriminating against products imported from other WTO Members, but RE policy is a special case given the import of mitigating the climate crisis. If increased RE will mean loss of domestic jobs, it will be very difficult to garner support for the transition to RE.

90. Jim Barret & Josh Bivens, *The Stakes for Workers in How Policymakers Manage the Coming Shift to All-Electric Vehicles*, ECONOMIC POLICY INSTITUTE (Sept. 22, 2021), <https://www.epi.org/publication/ev-policy-workers/> [<https://perma.cc/CRE6-RXU4>] (discussing light-duty vehicles). This figure assumes that the remaining 50% of cars are ICE vehicles (i.e., no share of the market is attributed to hybrid vehicles). *Id.* It also assumes the total number of cars made stays the same. *Id.*

91. *Id.*

92. *Id.*

crisis.<sup>93</sup> In 2022, Democrats had a slim majority in both the House of Representatives and the Senate,<sup>94</sup> but as the midterms approached, their chance to act on climate change was drawing to an end, as a “red wave” was predicted to flip both houses.<sup>95</sup> The Democrats’ majority was not wide enough to pass normal legislation without Republican support, so the only option for major climate action was through budget reconciliation.<sup>96</sup> However, Congress can only pass measures

93. See, e.g., Daniel J. Weiss, *Anatomy of a Senate Climate Bill Death*, CENTER FOR AM. PROGRESS (Oct. 12, 2010), <https://www.americanprogress.org/article/anatomy-of-a-senate-climate-bill-death/> [<https://perma.cc/LH8L-SD4G>] (discussing the failure of the Waxman-Markey American Clean Energy and Security Act, where Republicans and Centrist Democrats in the Senate blocked a greenhouse gas cap-and-trade program that had passed in the House of Representatives). See generally Patrick J. Egan & Megan Mullin, *US Partisan Polarization on Climate Change: Can Stalemate Give Way to Opportunity?*, POL. SCI. & POL. 1 (Sept. 7, 2023), <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/us-partisan-polarization-on-climate-change-can-stalemate-give-way-to-opportunity/2666C4C08C3A5456B3001240B882C48D> [<https://perma.cc/AWQ5-SPC9>]. In recent attempts to pass climate change policy immediately preceding the IRA, Senator Joe Manchin III (D. W.Va.), whose vote was necessary to secure a majority vote in the Senate, joined Republicans in blocking legislation. Alan Fram, *Manchin, key Dem, says Build Back Better bill is “dead,”* ASSOC. PRESS (Feb 1, 2022), <https://apnews.com/article/joe-biden-business-environment-and-nature-environment-joe-manchin-c2e743dbb3978a9e780779fa4fec09b7> [<https://perma.cc/2Q8A-EV8L>] (discussing the Build Back Better Bill, an unsuccessful predecessor to the IRA). Though Senator Manchin is a Democrat, his opposition to action on climate change is closely connected to his large Republican constituency in West Virginia. See Greg Giroux & Chris Strohm, *Joe Manchin (D-WV)*, BLOOMBERG GOV’T (2015) 1-2, <https://www.asn-online.org/policy/webdocs/WV-Joe-Manchin.pdf> [<https://perma.cc/FLB7-4FFB>].

94. 117<sup>th</sup> *United States Congress*, [https://ballotpedia.org/117th\\_United\\_States\\_Congress#cite\\_note-ind-1](https://ballotpedia.org/117th_United_States_Congress#cite_note-ind-1) [<https://perma.cc/N34C-TJ86>] (last visited Oct. 20, 2023). Democrats held a 220-to-212-person majority in the House and a 50-person majority in the Senate (including independent Senators who caucus with Democrats), with Vice President Kamala Harris providing the tie-breaking vote. *Id.*

95. *Climate Policy in 2023 and Beyond: U.S. Midterm Election Results, What They Mean, and Where We Go From Here*, CLEAN AIR TASK FORCE (Jan. 23, 2023), <https://www.catf.us/2023/01/climate-policy-2023-beyond-us-midterm-election-results> [<https://perma.cc/WR3U-JEA8>]. This was the last of several attempts by Democrats to pass climate policy through budget reconciliation, as Senator Manchin refused to vote for earlier bills that included climate provisions. Ximena Bustillo & Laura Benshoff, *Biden Urges Democrats to Pass Slim Health Care Bill After Manchin Nixes Climate Action* (updated Jul. 15, 2022), <https://www.npr.org/2022/07/15/1111675233/manchin-rejects-climate-and-tax-provisions-in-democrats-spending-package> [<https://perma.cc/RM43-8TGG>]. With only a 50-person majority, Manchin was effectively blocking these earlier attempts. *Id.*

96. Budget reconciliation is a legislative process that allows Congress to make changes to spending, revenue, and the federal budget. Under normal legislative processes, senators may use the filibuster to delay a vote on a bill and the filibuster may only be ended by a 60-vote majority. By contrast, in budget reconciliation, debate can be closed by a simple majority vote, so approval is only needed from 51 senators to pass controversial measures through reconciliation. HOUSE COMM’N ON THE BUDGET, *BUDGET RECONCILIATION: THE BASICS*, (Aug. 11, 2021), <https://democrats-budget.house.gov/resources/fact-sheets/budget-reconciliation-basics> [<https://perma.cc/V4J9-PNLD>].

through reconciliation that deal with budget, spending, and the federal debt limit;<sup>97</sup> thus, subsidies were the primary tool available.

Democrats passed the IRA on August 16, 2022 without any Republican support in the House or Senate,<sup>98</sup> investing \$369 billion in energy security and climate change.<sup>99</sup> Prior to the passage of the IRA, a business-as-usual estimate would project the U.S. to reduce GHG emissions by 30% of 2005 levels by 2030.<sup>100</sup> The clean energy investments in the IRA put the U.S. on track to reduce emissions to 40% of 2005 levels by 2030.<sup>101</sup>

This anticipated emission reduction is accomplished through a variety of tax credits, most notably an expanded Investment Tax Credit for certain investments in renewable energy,<sup>102</sup> an expanded Production Tax Credit for renewable energy generation,<sup>103</sup> an Advanced Energy Project Credit for investments in renewable energy manufacturing,<sup>104</sup> several credits for homes and buildings that are energy efficient<sup>105</sup> or generate solar energy,<sup>106</sup> and a consumer tax credit for certain EVs.<sup>107</sup> Although the IRA alone will not bring the U.S. to its target of a 50–52% reduction by 2030, it is the most aggressive action Congress has taken thus far to respond to the climate crisis.<sup>108</sup>

97. CONG. RSCH. SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (updated Sept. 28, 2022), <https://sgp.fas.org/crs/misc/RL30862.pdf> [<https://perma.cc/666X-NXHQ>].

98. Kelsey Tamborrino & Josh Siegel, *Big Winners from Biden's Climate Law: Republicans Who Voted Against It* (Jan. 23, 2023), <https://www.politico.com/news/2023/01/23/red-states-are-winning-big-from-dems-climate-law-00078420> [<https://perma.cc/3YSN-CZQQ>].

99. SENATE DEMOCRATS, *supra* note 3. The IRA also serves a number of additional goals, including lowering the federal deficit, lowering the costs of prescription drugs and healthcare, creating jobs, and lowering the cost of energy. Press Release, White House Briefing Room, *Fact Sheet: The Inflation Reduction Act Supports Workers and Families* (Aug. 19, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/19/fact-sheet-the-inflation-reduction-act-supports-workers-and-families/> [<https://perma.cc/9CRQ-S8NW>].

100. Larsen et al., *supra* note 4.

101. *Id.*

102. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 § 13102 (2022) (codified at 26 U.S.C. § 48).

103. *Id.* § 13101 (codified at 26 U.S.C. § 45).

104. *Id.* § 13501 (codified at 26 U.S.C. § 48C).

105. *See id.* §§ 13301 (codified at 26 U.S.C. § 45) & 13303 (codified at 26 U.S.C. § 179D); *see also* Dirk Wallace & Peter Lawrence, *The Inflation Reduction Act: An Overview of Clean Energy Provisions and Their Impact on Affordable Housing*, NOVOGRADAC (Jan. 13, 2023), <https://www.novoco.com/notes-from-novogradac/inflation-reduction-act-overview-clean-energy-provisions-and-their-impact-affordable-housing> [<https://perma.cc/ES6W-A7KN>].

106. *See, e.g.*, Inflation Reduction Act § 13302 (Residential Clean Energy Credit) (codified at 26 U.S.C. § 25D).

107. *Id.* § 13401 (codified at 26 U.S.C. § 30D).

108. Larsen et al., *supra* note 4.

## 2. LCRs in the IRA

A number of the IRA's new tax credits include LCRs. For example, enhancements are offered on the Production Tax Credit (PTC) and Investment Tax Credit (ITC) if minimum amounts of raw materials are produced in the United States,<sup>109</sup> and the Clean Vehicle Credit is only for Electric Vehicles (EVs) that meet domestic assembly<sup>110</sup> and battery sourcing requirements.<sup>111</sup> The PTC and ITC were already part of the Internal Revenue Code, but the IRA expanded them to provide more support for RE facilities. In its new form, the PTC offers up to 2.6 cents per kilowatt hour of renewable energy produced by qualifying facilities.<sup>112</sup> If a RE facility uses only steel or iron that was produced in the U.S. and at least 40% of the remaining material was also produced in the U.S., the PTC and ITC credits will be increased by 10% (increasing the ITC from 30% to 40% of the cost of eligible RE projects).<sup>113</sup>

The Clean Vehicle Tax Credit offers up to \$7,500 in rebates for the purchase of qualifying electric vehicles.<sup>114</sup> As a threshold to qualify for any of the credit, the EV's final assembly must take place in North America.<sup>115</sup> Then, to be eligible for one-half of the credit (\$3,750), the battery components of the vehicle must be manufactured or assembled in North America.<sup>116</sup> To be eligible for the other half (\$3,750), critical minerals used in the vehicle must be extracted, processed, or recycled in North America or a country with which the U.S. has a free trade agreement.<sup>117</sup>

109. Thomas Gray et al., *New IRA Tax Incentives for US Manufacturing in Renewable Energy Sector*, TROUTMAN PEPPER (Oct. 25, 2022) <https://www.troutman.com/insights/new-ira-tax-incentives-for-us-manufacturing-in-renewable-energy-sector.html> [<https://perma.cc/TP98-NYXU>].

110. *Id.*

111. *Id.*

112. *Inflation Reduction Act Tax Changes, Part 2—Energy Credits and Incentives*, BALLARD SPAHR (Sept. 27, 2022), <https://www.ballardspahr.com/insights/alerts-and-articles/2022/09/inflation-reduction-act-tax-changes-part-2-energy-credits-and-incentives> [<https://perma.cc/758F-PB3T>].

113. *Id.*

114. Sean Bray et al., *How the Inflation Reduction Act Affects the Future of U.S.-EU Tax and Trade Cooperation*, TAX FOUND. (Nov. 9, 2022), <https://taxfoundation.org/inflation-reduction-act-eu-tax-trade/> [<https://perma.cc/J3TN-DGLB>]. However, there are disagreements over whether this tax credit will actually reduce the cost of EVs. Tori Smith, *Proposed Tax Credits Would Make Electric Vehicles More Expensive*, AM. ACTION F. (Aug. 4, 2022), <https://www.americanactionforum.org/insight/proposed-tax-credits-would-make-electric-vehicles-more-expensive/> [<https://perma.cc/8B6Q-MY78>].

115. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 § 13401(b).

116. *Id.* § 13401(e)(2)(B).

117. *Id.* § 13401(e)(2)(A).

Of all these LCRs, the Clean Vehicle Credit has received the most attention for potentially violating WTO agreements. The European Union, Japan, and South Korea have publicly voiced concerns about the Clean Vehicle Tax Credit.<sup>118</sup> The European Union passed the Green Deal Industrial Plan in direct retaliation against the IRA,<sup>119</sup> and South Korea may still be considering launching a complaint with the WTO.<sup>120</sup> This is likely due to the fact that the Clean Energy Tax Credit is more likely than other LCRs in the IRA to distort trade because the tax credit is worth a significant percentage of the value of an EV, and its LCR is very stringent, with 100% of the credit contingent upon final assembly in North America.<sup>121</sup> The PTC and ITC are less likely to distort trade, since the LCR enhancement is a small percentage of each credit, which themselves are only a portion of the cost of the renewable energy projects.<sup>122</sup>

118. Louise Wendt Jensen, *supra* note 7.

119. Press Release, Eur. Parliament, *Green Deal Industrial Plan: Securing the EU's Clean Tech Leadership* (Feb. 16, 2023), <https://www.europarl.europa.eu/news/en/press-room/20230210IPR74806/green-deal-industrial-plan-securing-the-eu-s-clean-tech-leadership> [<https://perma.cc/TR6M-U4RY>]. The Green Deal Industrial Plan is a package of several acts that seek to speed the development of net-zero technology in the European Union. Many of the measures included in the Green Deal Industrial Plan include LCRs. It is clear that the IRA has incited a greater disregard for WTO compatibility by comparing the Green Deal Industrial Plan with the EU's Carbon Border Adjustment Mechanism (CBAM). *Carbon Border Adjustment Mechanism*, EUROPE COMM'N, [https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism\\_en](https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en) [<https://perma.cc/4RLH-H3CF>] (last visited Sept. 22, 2023). CBAM is a measure set to go into effect in October 2023 and will essentially adjust the price of certain goods to reflect their carbon-intensity. *Id.* When this measure was first proposed in 2021, the EU carefully designed CBAM not to discriminate between WTO members. *Id.* In fact, the EU requested comments on CBAM's compatibility from WTO Deputy Director General Jean-Marie Paugam in 2021. Statement, Jean-Marie Paugam, Deputy Director-General of the WTO, *WTO Rules No Barrier to Ambitious Environmental Policies* (Sept. 16, 2021), [https://www.wto.org/english/news\\_e/news21\\_e/ddgjp\\_16sep21\\_e.htm](https://www.wto.org/english/news_e/news21_e/ddgjp_16sep21_e.htm) [<https://perma.cc/LX5C-N499>]. By comparison, the Green Deal Industrial Plan is a "Europe First" plan that would be treated similarly to the IRA under WTO rules.

120. Heekyong Yang et al., *South Korea to Review Filing WTO Complain Over U.S. Inflation Reduction Act*, REUTERS (Aug. 22, 2022), <https://www.reuters.com/markets/skorea-review-filing-wto-complaint-over-us-inflation-reduction-act-industry-2022-08-22/> [on file with the Journal]. However, South Korea seems pacified for the time being because the U.S.'s implementing regulations have so far prevented the Act negatively impacting South Korea's EV economy. Chad P. Brown, *How the United States Solved South Korea's Problems with Electric Vehicle Subsidies Under the Inflation Reduction Act 1* (Peterson Inst. for Int'l Econ. Working Paper No. 23-6, July 2023) For example, the Treasury left open a loophole so that leased vehicles assembled outside of North America qualify for the exemption. *Id.* at 13. The Treasury also announced pathways for other countries to "become 'free trade agreement' partners for the sake of gaining access to Section 30D tax credits." *Id.* Nevertheless, nations such as South Korea could still file a WTO complaint if these concessions ever prove insufficient to keep up U.S. demand for imported EVs.

121. Trevor Houser et al., *Relay Race, Not Arms Race: Clean Energy Manufacturing Implications of the IRA for the US and EU*, RHODIUM GROUP (Feb. 28, 2023), <https://rhg.com/research/clean-energy-manufacturing-ira-us-eu/> [<https://perma.cc/4J3K-4ZNS>].

122. *Id.*

In the sections that follow, this Note will (1) demonstrate that the IRA's LCRs probably do violate WTO rules as they have been interpreted historically, and (2) argue that the IRA presents an opportunity for the WTO to reinterpret its rules—especially the General Exceptions—in the context of RE policy to allow for limited protectionism.

### III. VIOLATIONS BASED ON PRIOR INTERPRETATIONS OF WTO RULES

Objections to the IRA under the WTO are most likely to arise under GATT, SCM, and TRIMs. A survey of prior cases demonstrates that the IRA likely violates these agreements under the jurisprudence that has formed over the past 29 years of WTO dispute resolution. This section describes the relevant provisions of GATT, SCM, and TRIMs in turn; discusses relevant disputes that WTO adjudicatory bodies have heard dealing with those agreements; and applies prior interpretations of the agreements to the IRA. This section demonstrates that, absent a reinterpretation like that one proposed in Part IV, the IRA would likely violate the WTO.

#### A. GATT

The GATT is the primary WTO agreement dealing with trade in goods.<sup>123</sup> Article III of GATT establishes the National Treatment Rule, which is a central principal of WTO agreements.<sup>124</sup> In essence, the National Treatment Rule says that Members may not use tariffs or other measures to treat imported products less favorably than “like” domestic products.<sup>125</sup>

One recent renewable energy case provides a survey of AB decisions regarding the elements necessary to prove a violation of the

123. *GATT and the Goods Council*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/gatt\\_e/gatt\\_e.htm](https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm) [<https://perma.cc/2RXL-6RYN>] (last visited Oct. 20, 2023).

124. GATT 1994, *supra* note 20 art. III. There is also a potential violation of the Most-Favoured Nation Principle, which says that no member may treat any member nation less favorably than the nation it treats most favorably. *Id.* art. I. The fact that the IRA includes products produced by its free-trade partners as fulfilling the IRA's LCRs may implicate the Most-Favoured Nation Principle. However, the Most-Favoured Nation Principle will not be discussed at length in this Note because the National Treatment Principle is more clearly applicable, and at any rate the same general rules and exceptions apply to both the National Treatment Principle and the Most-Favoured Nation Principle. *See generally id.*

125. *Id.* art. III. Section 4 states, “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

National Treatment Principle.<sup>126</sup> *U.S.—Renewable Energy* arose when India challenged measures enacted by various U.S. states that included incentives to encourage renewable energy generation under GATT Article III.<sup>127</sup> The challenged programs each required in-state manufacturing or assembly in order to qualify for all or part of the incentives.<sup>128</sup> India argued that the incentives' contingency upon use of domestic parts or local labor violated the National Treatment Principle.<sup>129</sup> The U.S. did not raise any exemptions in defense of its states' policies, arguing only that India "has failed to meet its burden to show that the measures at issue are inconsistent with [the National Treatment Principle]."<sup>130</sup> The panel's report stated that there are three elements necessary to establish a violation: first, "that the imported and domestic products at issue are like products"; second, "that the measure at issue is a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and third, "that the imported products are accorded treatment less favorable than that accorded to like domestic products."<sup>131</sup> These three elements are discussed in turn below.

### 1. "Likeness"

The panel in *U.S.—Renewable Energy* noted that there has been inconsistency in how the AB defines the first element of the National Treatment test ("likeness"). There is a line of AB cases that views "likeness" as "a determination about the nature and extent of a competitive relationship among products" and require a holistic analysis of the nature of the products, consumer behavior toward them, etc.<sup>132</sup> Other cases have allowed complainants to establish "likeness" "by

126. Panel Report, *United States—Certain Measures Relating to the Renewable Energy Sector*, WTO Doc. WT/DS510/R (adopted June 27, 2019) [hereinafter *U.S.—Renewable Energy*].

127. *Id.* ¶ 7.84.

128. The challenged measures were promulgated by the states of Washington, California, Montana, Connecticut, Michigan, Delaware, and Minnesota. *Id.* ¶ 2.5. The Washington, California, Connecticut, Delaware, and Michigan programs offered financial incentives for renewable energy projects, with additional benefits available for use of equipment manufactured or assembled in-state. *Id.* The Montana programs offered tax incentives for biofuels produced within Montana, using agricultural products originating in Montana. *Id.* ¶ 2.20. The Minnesota programs provided incentives and rebates for photovoltaic modules that are certified as "Made in Minnesota." *Id.* ¶ 2.55.

129. *Id.* ¶ 2.2. India additionally argued that these measures violate TRIMs and SCM. *Id.*

130. *Id.* ¶ 3.2.

131. *Id.* ¶ 7.85 (internal quotations omitted).

132. *Id.* ¶ 7.89. See also Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 102, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2011) [hereinafter *EC—Asbestos*].

demonstrating that the measure at issue makes a distinction based exclusively on the origin of the product.”<sup>133</sup> A complaining party would be able to show that the IRA’s EV tax credit would fulfill both of these “likeness” tests because the IRA distinguishes exclusively on the origin of the battery components and the location of assembly,<sup>134</sup> and there is a competitive relationship between domestic and foreign EVs.

2. “Law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use”

The panel in *U.S.—Renewable Energy* separated the second element into (1) an inquiry into whether the measure is a law, regulation, or requirement, and (2) an inquiry into whether the measure affects the “internal sale, offering for sale, purchase, transportation, distribution, or use” of the products.<sup>135</sup> The panel noted that ABs have interpreted “laws, regulations, and requirements” broadly to include not only mandatory orders, but also “conditions that an enterprise accepts in order to obtain an advantage.”<sup>136</sup> The U.S. argued that India failed to demonstrate that the second part of this element (“affecting the internal sale, offering for sale, purchase, transportation, distribution, or use”) was met.<sup>137</sup> However, the AB relied on *Canada—Autos* to reject the U.S.’s argument.<sup>138</sup> The AB had held in that case that any measure that “confers an advantage upon the use of domestic products while denying that advantage if imported products are used” alters the competitive relationship between the products and thus does “affect the internal sale, offering for sale, purchase, transportation, distribution, or use,” even if such effect is minimal.<sup>139</sup> The panel therefore concluded that this inquiry “need not examine whether or the extent to which the measure has, under current circumstances, influenced purchasing decisions on the market.”<sup>140</sup> Under this interpretation, the

133. *U.S.—Renewable Energy*, *supra* note 126, ¶ 7.89. See also Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 6.36, WTO Doc. WT/DS453/AB/R (adopted May 9, 2016).

134. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 § 13401.

135. *U.S.—Renewable Energy*, *supra* note 126, ¶ 7.147 (citing Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/AB/R (adopted June 19, 2000)).

136. *Id.* ¶ 7.151.

137. *Id.* ¶ 7.156.

138. *Id.* ¶ 7.158.

139. *Id.* ¶ 7.160.

140. *Id.* ¶ 7.161.

IRA is also vulnerable at the second element of the National Treatment Rule violation because it conditions a benefit (receipt of tax credits) on making an EV purchase that complies with certain requirements.

### 3. Less favorable treatment

Finally, the panel addressed the third element: less favorable treatment. Prior AB rulings have determined that “treatment no less favorable requires effective equality of opportunities for imported products to compete with like domestic products,” so the question at this stage is “whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported product.”<sup>141</sup> In *U.S.—Renewable Energy*, India argued that the fact that the measures incentivize the use of domestic inputs necessarily makes its treatment of imported products less favorable.<sup>142</sup> The U.S. argued—and the panel agreed—that “it is difficult to see how a measure could accord less favorable treatment to imported than to domestic products without it affecting the sale, purchase, transport, distribution or use of such products,”<sup>143</sup> which makes the second element<sup>144</sup> somewhat redundant. Nevertheless, the panel concluded that these two elements are different because the third element introduces the “to the detriment of imported products” piece.<sup>145</sup> A final note that the panel made on the “less favorable treatment” element is that the AB does not generally require that the claimant demonstrate that there are *actual* detrimental trade impacts; rather, they only must show that the competitive trade relationship is affected.<sup>146</sup> This element would therefore also be found to be satisfied by the IRA’s final assembly requirement: incentivizing the purchase of domestically-manufactured

141. *Id.* ¶ 7.243 (citing Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 137, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) (emphasis in original)). See also Appellate Body Report, *Thailand—Fiscal Measures on Cigarettes from the Philippines*, ¶ 73, WTO Doc. WT/DS371/AB/R (adopted Mar. 21, 2017) (“[I]t seems to be sufficient for a panel to determine on the basis of the available elements of fact that the measure will *probably* negatively affect the conditions of competition.”).

142. *U.S.—Renewable Energy*, *supra* note 126, ¶ 7.241.

143. *Id.* ¶ 7.242.

144. The second element is “[l]aw, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use,” discussed earlier. See *supra* Part III(A)(2).

145. *U.S.—Renewable Energy*, *supra* note 126, ¶ 7.242.

146. *Id.* ¶ 7.245 (citing Panel Report, *United States—Tax Treatment for “Foreign Sales Corporations”—Recourse to Article 21.5 of the DSU by the European Communities*, ¶ 215, WTO Doc. WT/DS353/RW (adopted Jan. 29, 2002); Appellate Body Report, *Japan—Measures Affecting the Automobile Industry*, ¶¶ 16–17, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/W (adopted Nov. 1, 1996)).

EVs over foreign-manufactured EVs affects the competitive relationship between foreign and domestic producers to the detriment of foreign producers.

## B. TRIMS

The TRIMs Agreement mandates in relevant part that no Member may apply a trade-related investment measure that is inconsistent with the National Treatment obligation in GATT Article III.<sup>147</sup> TRIMs does not define a trade-related investment measure, but it does provide an illustrative list of measures which would violate the agreement.<sup>148</sup> This illustrative list states, *inter alia*, that measures that require “the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production” in order to “obtain an advantage” would be inconsistent with the national treatment obligation and therefore violate TRIMs.<sup>149</sup>

As demonstrated in the AB report for *Canada—Renewable Energy*, the inquiry into whether a measure violates TRIMs is a straightforward question of whether the measure is one of the types described in the illustrative list.<sup>150</sup> In *Canada—Renewable Energy*, the AB addressed two consolidated cases, both pertaining to a feed-in tariff (FiT) program established by Ontario for electricity generators using renewable resources.<sup>151</sup> Eligibility for contracts under the FiT program required meeting a minimum domestic content level.<sup>152</sup> Complaints against this program were made by the EU and Japan under TRIMs Article 2.1.<sup>153</sup> The AB affirmed the panel’s finding that the FiT program did require “the ‘purchase or use’ of products from a domestic source, within the meaning of Paragraph 1(a) of the Illustrative List,” and compliance with this requirement was necessary in order to “obtain an advantage.”<sup>154</sup> Since the measure fit within one of the

147. TRIMs Agreement, *supra* note 22, art. 2.1.

148. *Id.* Annex.

149. *Id.* Annex 1(a).

150. Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Sector and Measures Relating to the Feed-in Tariff Program*, WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R (adopted May 24, 2013) [hereinafter *Canada—Renewable Energy*].

151. *Id.*

152. *Id.* ¶ 1.4.

153. *Id.* ¶ 1.6.

154. *Id.* ¶ 1.12. See TRIMs Agreement, *supra* note 21, art. 2.2 (stating that measures described in the Illustrative List are inconsistent with GATT 1994, *supra* note 20, art. III:4).

examples in the Illustrative List, the panel and AB found that it violated the National Treatment Obligation and therefore also violated TRIMs Art. 2.1.<sup>155</sup> The IRA likewise requires that entities purchase products of domestic origin in order to obtain an advantage in the form of a tax rebate, and would therefore be found by a panel to be in violation.<sup>156</sup>

### C. SCM

SCM “provides rules for the use of government subsidies and for the application of remedies to address subsidized trade that has harmful commercial effects.”<sup>157</sup> The first step in analyzing whether a challenged measure violates SCM is to determine whether the measure is a subsidy in the first place. The SCM states that “a subsidy shall be deemed to exist if: there is a financial contribution by a government or any public body within the territory of a Member . . . or there is any form of income or price support in the sense of Article XVI of GATT 1994; and a benefit is thereby conferred.”<sup>158</sup> This can be broken into two pieces: 1) whether there is a “financial contribution” and 2) whether “a benefit is conferred.” Once it is established that a measure is a subsidy, the next question is whether the subsidy is “specific.” If so, the measure violates the WTO.<sup>159</sup>

#### 1. “Financial Contribution”

The SCM’s sections dealing with subsidies do not expound upon what types of measures would qualify as a “financial contribution,”<sup>160</sup> but Part V of SCM, which deals with countervailing measures, provides a list of types measures that would leave a recipient “better off.”<sup>161</sup> The AB has routinely turned to this list in order to interpret “financial contributions.”<sup>162</sup> Included on the list is “government revenue that is otherwise due is foregone or not collected (e.g. fiscal

155. *Canada—Renewable Energy*, *supra* note 150, ¶ 1.15.

156. *Gray*, *supra* note 109.

157. *Trade Guide: WTO Subsidies Agreement*, INT’L TRADE ADMIN., <https://www.trade.gov/trade-guide-wto-subsidies> [<https://perma.cc/L4MV-VX5V>] (last visited Sept. 22, 2023).

158. SCM Agreement, *supra* note 21, art. 1.1.

159. Some specific subsidies are “prohibited,” meaning a Member will be ordered to repeal or amend the offending measure. Other specific subsidies are “actionable,” meaning a Member will not be ordered to repeal the measure, but they will be subject to countervailing measures. Subsidies that include LCRs fall into the “prohibited” category. *Id.* art. 3.1(b).

160. *Id.*

161. *Id.* art. 14.

162. *Canada—Renewable Energy*, *supra* note 150, ¶ 5.163.

incentives such as tax credits).<sup>163</sup> Following the AB's approach of using SCM Part V list to interpret "financial contribution," the IRA's EV tax credits would clearly count as "government revenue that is otherwise due" that is being "foregone or not collected." These credits therefore fall within SCM's definition of "financial contribution."

## 2. "A Benefit is Conferred"

The next question is whether a measure confers a benefit. According to the AB in *Canada—Renewable Energy*, a measure confers a benefit if it puts the recipient in a better position than it had been in the marketplace.<sup>164</sup> If no data is available to show a marketplace "baseline," the panel or AB may create a model baseline to compare with the outcome of the financial contribution.<sup>165</sup> Whether the IRA actually confers a benefit will not be clear for several months or longer, when there is data available regarding the actual cost of EVs to consumers after the rebates are given. Whether there is a benefit conferred for the purposes of SCM will also depend on how narrow of a "baseline" marketplace is used. However, the ABs seem to err on the side of finding that a measure confers a benefit,<sup>166</sup> so it is safest to proceed assuming that a benefit would be found.

## 3. "Specific"

If it is established that a measure is a subsidy, then it is necessary to explore whether it is prohibited by the agreement. A subsidy is prohibited under SCM if it is "specific." A subsidy is automatically considered specific if it is "contingent . . . upon export performance" or "contingent . . . upon the use of domestic over imported goods."<sup>167</sup> LCRs have historically been found to fall within the latter category.<sup>168</sup> If a subsidy doesn't fall within either of these categories, it is considered specific if access is limited to certain enterprises.<sup>169</sup> A measure is not specific if the authority granting the subsidy "establishes objective criteria or conditions governing the eligibility for, and the amount of, a

163. SCM Agreement, *supra* note 21, art 1.1(a)(1)(ii).

164. *Canada—Renewable Energy*, *supra* note 150, ¶ 5.163.

165. *See id.*

166. *See, e.g., Canada—Renewable Energy*, *supra* note 150.

167. SCM Agreement, *supra* note 21, art. 3.

168. *Id.* art. 2.2.

169. *Id.* art. 2.1(a)–(b). There are additional factors that can also be considered where there are reasons to believe that a subsidy is specific despite the measure not having the characteristics described in Article 2.1(a)–(b) of SCM. *See id.* art. 2.1(c), 2.2.

subsidy.”<sup>170</sup> In the case of the IRA, the benefit is contingent upon the use of domestic over imported goods, so it would likely be found to be specific and therefore prohibited.

#### D. General Exceptions

Having established that the IRA preliminarily violates GATT, TRIMs, and SCM, this section discusses the General Exceptions to GATT, which is the most promising defense available to the U.S. for a RE policy that contains LCRs.<sup>171</sup> The General Exceptions authorize certain measures that would otherwise violate the WTO, recognizing that there are domestic policy considerations that must sometimes supersede open trade objectives. There are ten General Exceptions, though only three are likely to apply to renewable energy-promoting

170. *Id.* art. 2.1(b).

171. There are also two exemptions found in Article III of GATT that Member nations have attempted to use to defend RE measures containing LCRs. First is the “government procurement” exemption, which applies to goods “purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.” GATT 1994, *supra* note 20, art. III:8(a). This exemption arises in the context of RE policy because some of the most prevalent RE-promoting measures involve renewable generation requirements (such as feed-in tariffs, renewable portfolio standards, and tradeable green certificates) for electricity. See Xianyu Yu et. al, *Whether Feed-In Tariff Can Be Effectively Replaced or Not? An Integrated Analysis of Renewable Portfolio Standards and Green Certificate Trading*, 245 ENERGY 1, 1–2, (2022). The “government procurement” exemption is arguably applicable to measures regulating electricity procurement because electricity is usually purchased by a government or quasi-governmental entity before being distributed. The IRA does not primarily regulate electricity procurement or other government or quasi-government purchases (public utilities in the U.S.), so the “government procurement” exemption does not apply to the LCRs contained therein. See *Energy Procurement: Everything You Need to Know*, WATCHWIRE (Feb. 8, 2021), <https://watchwire.ai/energy-procurement/#:~:text=Energy%20procurement%20is%20the%20strategic,indexed%2C%20and%20block%20and%20index> [https://perma.cc/F68T-VU32]. The second Article III exemption is the “domestic subsidies” exemption for “subsidies [applied] exclusively to domestic producers.” GATT 1994, *supra* note 20, art. III:8(b). The domestic subsidies exemption states that “[t]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers . . . applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.” *Id.* The domestic subsidies exemption therefore applies to subsidies for domestic producers, so long as such subsidies are permitted under SCM. The exemption provides no definition of a subsidy, so the AB has deferred to the definition of subsidy provided in SCM. *Id.* See Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted July 2, 1998). Therefore, if a measure is found to be a subsidy under SCM and does not violate SCM, it will not violate GATT. If the measure is not found to be a subsidy under SCM, then the “domestic subsidies” exemption is not applicable. For the purposes of this Note, an analysis of the “domestic subsidies” exemption would be entirely redundant of SCM analysis in Part III(C), so it will not be discussed at length again here.

policy.<sup>172</sup> The applicable exceptions are: Article XX(b), measures “necessary to protect human, animal or plant life or health”; Article XX(g), measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”; and Article XX(j), measures “essential to the acquisition or distribution of products in general or local short supply.”<sup>173</sup> The chapeau (introductory text) to Article XX specifies that measures are only eligible for the General Exceptions if they “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>174</sup> A successful Article XX defense must satisfy both the subject matter of the relevant exception (including the “essential to,” “necessary to,” or “relating to” qualifier threshold) and the chapeau. Under existing WTO interpretations, it is very difficult to mount a successful Art. XX exception defense. Within the 48 WTO disputes in which General Exceptions were invoked, the challenged policy was found not to violate WTO terms only twice.<sup>175</sup> As demonstrated below, previous interpretations of the General Exceptions by WTO adjudicatory bodies thus far would not absolve the U.S. of its National Treatment Obligation with regards to the IRA. However, the text of the General Exemptions and other WTO documents support an alternative interpretation of the General Exceptions that would allow the IRA to survive a challenge under SCM, TRIMs, and GATT.

172. The other seven exceptions are unlikely to apply because they are not relevant to environmental issues or energy. *See, e.g.*, GATT 1994, *supra* note 20, art XX(e) (measures “relating to the products of prison labour”).

173. GATT 1994, *supra* note 20, art. XX.

174. *Id.*

175. DANIEL RANGEL, WTO GENERAL EXCEPTIONS: TRADE LAW’S FAULTY IVORY TOWER 4 (Feb. 2022), [https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper\\_-1.pdf](https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper_-1.pdf) [<https://perma.cc/AU2U-Z8LP>]. This statistic includes disputes in which GATT General Exceptions were invoked and disputes in which the GATS General Exceptions were invoked. Eleven of these cases failed at the subject matter/scope threshold, seventeen failed at the “necessary”/“related to” qualifier threshold, and twelve failed at the chapeau threshold. *Id.* at 6. In eleven cases, the panel did not address the exception on judicial economy grounds; in five cases the subject matter requirement was not satisfied; in eighteen cases, the relevant essential, necessary, etc. requirement was not met; and in nine cases the chapeau threshold was violated. *Id.* In one of the two cases where the challenged policy was ruled not to violate WTO terms, the AB found that the challenged measure was non-violative without reaching the General Exceptions defense, because they determined that the “likeness” test was failed. *Id.* at 14.

### 1. Applicability of the General Exceptions Outside of GATT

There was uncertainty for many years as to whether the General Exceptions were applicable to agreements other than GATT.<sup>176</sup> The AB first addressed this question in *China—Audiovisuals*, in which the U.S. alleged that measures enacted by China violated of Paragraph 5.1 of China's Accession Protocol, *inter alia*.<sup>177</sup> China defended its measure under the General Exceptions. The AB turned to the text of the Accession Protocol to resolve the matter and found that since Paragraph 5.1 referenced GATT ("without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement"), the exceptions to GATT would apply to the Accession Protocol.<sup>178</sup> A few years later, in *China—Raw Materials*,<sup>179</sup> the AB was asked to consider whether the General Exceptions applied to a different section of China's Accession Protocol. The AB worked under the presumption, based on *China—Audiovisuals*, that the General Exceptions would not apply outside of GATT unless there was evidence in the text that the exceptions were intended to apply.<sup>180</sup> The AB concluded that China could not rely on the General Exceptions as a defense under Paragraph 11.3 of China's Accession Protocol because they did not explicitly mention GATT Article XX.<sup>181</sup>

One important distinction between the WTO agreements such as China's Accession Protocol and agreements such as SCM and TRIMs is that the latter were drafted alongside GATT and are annexed together to the Marrakesh Agreement.<sup>182</sup> The agreements annexed to the Marrakesh Agreement were drafted together at the Uruguay Round to be

176. See generally Danielle Spiegel Feld & Stephanie Switzer, *Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After China—Raw Materials*, 38 YALE J. INT'L L. ONLINE (2012) (analyzing *China—Raw Materials*, *infra* note 179, and the WTO jurisprudence leading to it).

177. 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 Dec. 21, 2009). An Accession Protocol is a document required of new entrants to the WTO, stating that the new entrant accedes to the WTO agreement and outlining the terms of entry.

178. *Id.* ¶ 220–21.

179. Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R (adopted Jan. 30, 2012) [hereinafter *China—Raw Materials*].

180. *Id.* ¶ 303.

181. *Id.* ¶ 304.

182. Marrakesh Agreement, *supra* note 16. The Marrakesh Agreement is annexed with the agreements on goods, services, and intellectual property, dispute settlements, and more. These agreements were all drawn at the Uruguay Round. *Id.*

read as a cohesive whole.<sup>183</sup> Members' Protocols of accession, on the other hand, were drafted years or even decades after the Uruguay Round. Moreover, protocols of accession are very different types of documents: While protocols of accession are created by a subset of Member nations (a "working party") to set out the obligations and commitments of specific nations as terms of joining the WTO,<sup>184</sup> the agreements annexed in the Marrakesh Agreement are the primary guiding documents of the WTO, agreed upon by consensus and binding on all Members. Therefore, a panel may apply a less exacting standard in determining whether the General Exceptions apply to TRIMs and SCM. A further point is that the National Treatment Obligation in TRIMs is derived directly from GATT.<sup>185</sup> Therefore, even under a standard as strict as the one set out by the AB in *China—Audiovisuals*, a panel would still probably find that the General Exceptions apply to TRIMs. However, since SCM does not refer to GATT, a panel that applies the test iterated in *China—Audiovisuals* may determine that the General Exception cannot be used to defend against an SCM challenge. Some scholars suggest that the uncertainty around the question of whether the General Exceptions apply to non-GATT Uruguay Round agreements may have a chilling effect when nations consider measures that would require invoking the General Exceptions for a non-GATT agreement.<sup>186</sup>

Looking at non-GATT agreements relevant to the IRA, a panel following the AB's precedent from the disputes involving China's Accession Protocol would probably find that General Exceptions are applicable to TRIMs' National Treatment obligation because that obligation originates in GATT, but a panel may determine that it does not apply

183. See Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WTO Doc. WT/DS98/AB/R (adopted Jan. 12, 2000) ("Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreement and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole").

184. *WTO Membership and Accession*, GEO. L. LIBRARY, <https://guides.ll.georgetown.edu/c.php?g=363556&p=4108236#:~:text=The%20protocol%20of%20accession%20is,bound%20by%20its%20multilateral%20agreements> [https://perma.cc/K845-Z6EU] (last visited Oct. 20, 2023).

185. The language that establishes TRIMs National Treatment Obligation states, "Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994." TRIMs Agreement, *supra* note 22, art. 2.1.

186. Luca Rubini, *The Subsidization of Renewable Energy in the WTO: Issues and Perspectives* 35, NCCR Trade Reg. Working Paper No. 2011/321 (June 2011). However, the chilling effect is less likely to occur while the Appellate Body Crisis is ongoing, as the WTO's enforcement powers are undermined.

to SCM because the relevant SCM sections make no reference to GATT generally or to Article XX.

## 2. Article XX(a)-(j) Subject Matter Requirements

When the AB analyzes a measure under Article XX, it will separate the relevant (a)–(j) paragraph into two or more elements. To satisfy Article XX(b), the measure must be (1) “necessary” to (2) “protect human, animal or plant life or health.”<sup>187</sup> To satisfy Article XX(g), the measure must be (1) “relating” to (2) “the conservation of exhaustible natural resources” (3) “if such measures are made effective in conjunction with restrictions on domestic production or consumption.”<sup>188</sup> To satisfy Article XX(j), the measure must be (1) “essential” to (2) “the acquisition or distribution of products in general or local short supply.”<sup>189</sup>

The AB has found that “necessary” and “essential” require more or less the same inquiry (though “essential to” is vaguely more stringent).<sup>190</sup> The AB purports that this inquiry involves a balancing test between the effectiveness of the measure to address the policy concern against the trade-restrictiveness of the measure,<sup>191</sup> taking into account “the relative importance of the societal interest” that the measure seeks to protect.<sup>192</sup> If that analysis “yields a preliminary conclusion that the measure is necessary,” the AB will compare the measure against reasonable alternatives to confirm that the measure is necessary.<sup>193</sup> However, in practice the entire “necessary” or “essential” analysis inevitably boils down to the question of whether the measure enacted is the least trade-restrictive of the reasonably

187. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea—Beef*].

188. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 19, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996).

189. Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/AB/R (adopted Oct. 14, 2016) [hereinafter *India—Solar*].

190. *Id.*

191. See, e.g., *Korea—Beef*, *supra* note 187, ¶ 164. See also Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 182, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil—Tyres*] (analyzing “necessary to”).

192. *India—Solar*, *supra* note 189, ¶ 5.59 (quoting Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.126, WTO Doc. WT/DS 461/AB/R (adopted May 18, 2005) [hereinafter *Colombia—Textiles*]) (internal quotations omitted); *Brazil—Tyres*, *supra* note 191, ¶ 182 (“necessary” analysis).

193. *Brazil—Tyres*, *supra* note 191, ¶ 178.

available alternatives.<sup>194</sup> When considering an alternative, the AB allows the defending Member to show that it is not “reasonably available” by demonstrating that the suggested alternative would involve “prohibited costs or substantial technical difficulties,”<sup>195</sup> but domestic political barriers such as partisanship and fragmentation of authority (i.e., federalism) are not taken into account. Also not considered is the cost of “returning to the drawing board,” for example, the loss of momentum if a measure is struck down, or the delaying action will cause the problem seeking to be remedied to get worse. The “relating to” threshold has been found to be much lower than the “necessary” or “essential” threshold; it merely requires a substantial relationship with the relevant policy goal.<sup>196</sup>

Panels and the AB read the second part of the subject matter requirement with varying levels of broadness. In *India—Solar*, the AB found that India’s power-purchase agreement failed to satisfy the subject matter requirements with respect to Art. XX(j), which mandates that such agreements be “essential to the acquisition or distribution of products in general or local short supply.”<sup>197</sup> The AB interpreted “general or local short supply” strictly to mean that there must be a disruption in supply of the product in question, considering both imports and domestic production.<sup>198</sup> However, the subject matter element has often been interpreted more broadly than in *India—Solar*. One case where a Member came close to mounting a successful Article XX defense is *United States—Shrimp*.<sup>199</sup> There, Article XX(g) (“relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic

194. *Korea—Beef*, *supra* note 187, ¶ 166 (“In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available.’”); *see also India—Solar*, *supra* note 189, ¶ 5.59.

195. Appellate Body Report, *U.S.—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

196. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 135-137, WTO Doc. WT/DS58/AB/R (adopted Nov. 21, 2001) [hereinafter *U.S.—Shrimp*].

197. *India—Solar*, *supra* note 189, ¶ 5.45. The PPA was a 25-year agreement with solar power developers that set minimum domestic content requirements for solar cell modules. *Id.* ¶ 1.3.

198. *Id.* ¶ 5.75.

199. *U.S.—Shrimp*, *supra* note 196. The challenged measure prohibited importation of shrimp except where (a) the shrimp trawler used Turtle Excluder Devices (TEDs), (b) the harvesting country’s government has a program similar to the TEDs program that has been certified by the U.S., or (c) the U.S. certifies that the shrimp were not fished from an environment where the fishing poses a risk of sea turtle capture. *Id.* ¶ 3-5.

production or consumption”)<sup>200</sup> was invoked by the United States in defense of a measure promulgated to protect an endangered species of sea turtle.<sup>201</sup> Noting that the understanding of terms such as “natural resource” can evolve over time and may have different meanings for different Member nations, the AB stated that the subject matter of the General Exceptions should be interpreted in accordance with the understanding of the Member which promulgated the measure, as understood at the time.<sup>202</sup> The AB thus concluded that, within our modern scientific understanding of sea turtle populations and ecosystems generally, sea turtles could be considered “exhaustible natural resources.”<sup>203</sup>

Looking at the subject matter requirement as a whole, a WTO adjudicatory body closely following AB precedent would be unlikely to find that the IRA is “necessary to protect human, animal or plant life or health.” The IRA, as a statute that encourages renewable energy development and reduces the U.S.’s greenhouse gas emissions, would almost certainly be found to protect “human, animal, or plant life or health.” However, the Act on its own will not have a significant impact on mitigating climate change,<sup>204</sup> so its trade restrictions may not survive a balancing test against the policy considerations, which would be required to meet the “necessary to” element of Article XX(b). Moreover, complaining nations would certainly be able to identify less trade-restrictive means of reducing greenhouse gas emissions,

200. GATT 1994, *supra* note 18 art. XX(g).

201. *U.S.—Shrimp*, *supra* note 196, ¶ 8.

202. In *U.S.—Shrimp*, the AB noted that the term “natural resource” has evolved over the fifty years since GATT was written, and that the exception should be read “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” *Id.* ¶ 129. Likewise, in *European Communities—Seal Products*, the AB’s inquiry into whether a measure was “necessary to protect public morals” focused on the public morals of the Member promulgating the measure, without regard to the public morals of other nations. *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2013) (referring throughout to the moral concerns of the *EU public*).

203. *U.S.—Shrimp*, *supra* note 196, ¶ 131.

204. Since the United States is one of the biggest greenhouse gas emitters, the IRA is a much-needed step toward reducing global emissions, and early projections regarding its impacts are promising. John Bistline et al., *Emissions and Energy Impacts of the Inflation Reduction Act*, 380 SCIENCE 1324, 1325 (June 29, 2023) (showing that without the IRA, economy-wide emissions were projected, on average, to decrease by only 28% by 2030 compared with 2005, but with the IRA, the average projected decrease in emissions is 37%). However, collective action is needed from nations around the world; on the scale of action needed to combat the climate crisis, individual measures such as the IRA are drops in the bucket. For a comparative look at individual nations’ potential contributions to climate change mitigation, see Steven R. Brechin, *Climate Change Mitigation and the Collective Action Problem: Exploring Country Differences in Greenhouse Gas Contributions*, 31 SOCIO. F. 846 (2016).

particularly if the adjudicatory body does not consider political barriers when assessing “reasonable alternatives.”

When it comes to whether the measure is “essential to the acquisition or distribution of products in general or local short supply,” the U.S. could invoke global battery supply chain shortages.<sup>205</sup> The U.S. could argue that these shortages necessitate expanding U.S. infrastructure for battery assemblage, mining, and mineral processing in order to ensure that the U.S. maintains an adequate supply of batteries. Applying the balancing test, a WTO panel would probably find that effect of the IRA on access to these resources justifies the trade restrictiveness of the Act. Again, however, survival of the IRA against WTO challenges would depend on whether other nations are able to propose less trade-restrictive means of serving the same ends.

Regarding Article XX(g) (“relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”), fossil fuels are certainly an exhaustible natural resource,<sup>206</sup> and the IRA seeks in part to reduce reliance on fossil fuels. However, the U.S. has not otherwise restricted domestic production or consumption of fossil fuels, opting instead to prioritize alternatives, so the IRA would once again fail.

### 3. Article XX Chapeau

Even if a panel found that the IRA fell within one of the paragraphs of Article XX, it would likely fail the chapeau under existing AB interpretation. The chapeau states that the General Exceptions do not protect measures that are “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>207</sup> In *U.S.—Shrimp*, the AB rejected the notion that discrimination is justifiable on the grounds that “differing treatment between countries relates to the policy goal of the applicable Article

205. Phil LeBeau, *EV Battery Costs Could Spike 22% by 2026 as Raw Material Shortages Drag On*, CNBC (May 18, 2022), <https://www.cnbc.com/2022/05/18/ev-battery-costs-set-to-spike-as-raw-material-shortages-drag-on.html> [<https://perma.cc/D63Q-U3EF>].

206. Moshood Sadiq, *What Differentiates Exhaustible from Inexhaustible Resources?* Energy Clime, <https://energyclimate.com/10-differences-between-exhaustible-and-inexhaustible-resources> [<https://perma.cc/6DXX-QPUT>] (last visited Nov. 23, 2023). The ability of the atmosphere to absorb greenhouse gases without increasing global temperature could also be viewed as a natural resource.

207. GATT 1994, *supra* note 20 art. XX.

XX exception.”<sup>208</sup> Rather, the AB opined that policy considerations cease after determining that the measure falls within the scope of a General Exception’s subject matter.<sup>209</sup> The AB also noted that the chapeau “addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.”<sup>210</sup>

At the chapeau level, an adjudicatory body addresses whether the measure—regardless of any Article XX policy considerations—is applied “as a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or “a disguised restriction on international trade.”<sup>211</sup> The AB has not sufficiently elaborated on when discrimination is or is not “arbitrary or unjustifiable.” In *U.S.—Shrimp*, the AB found that the measure failed at the chapeau because the measure was applied such that other WTO Members were forced to adopt a regulatory program that is “essentially the same” as the U.S. program for an import to receive equal treatment.<sup>212</sup> Given that the IRA discriminates against imported EVs and battery components, and that the Article XX(a)–(j) policy considerations are not accepted as justification for discrimination under the chapeau, a panel following prior AB interpretations would likely find that the IRA fails at the chapeau.

#### IV. REINTERPRETING THE GENERAL EXCEPTIONS

The AB’s prior interpretations of the WTO rules create a predicament. Rapid decarbonization is vital for the wellbeing of all nations, measures to support decarbonization would uphold the values of the WTO, and LCRs such as the IRA are a popular and arguably necessary tool for achieving that end. However, the prior WTO determinations discussed in Part III of this Note show that a WTO adjudicatory body would likely consider the IRA violative of the relevant agreements. This section proposes an interpretation of GATT that would allow for easier survival of measures such as the IRA that forward important policy goals but contain restrictions on international trade. This section then explains potential drawbacks to the new interpretation and

208. *U.S.—Shrimp*, *supra* note 196, ¶ 149.

209. *Id.*

210. *Id.* ¶ 115 (quoting Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996)). The AB determined that the panel below had erred because it focused on the design of the measure rather than its application. *Id.*

211. GATT 1994, *supra* note 20, art. XX.

212. *U.S.—Shrimp*, *supra* note 196, ¶ 164.

finally explains why the WTO adjudicatory bodies should nonetheless use the IRA as an opportunity to establish a more expansive interpretation of the General Exceptions.

#### A. Proposed Interpretation of the General Exceptions

There are two major flaws in the AB's interpretation of the General Exceptions that have resulted in it being virtually impossible for a Member to use these exceptions to justify a restriction on trade.

First, the existing interpretation places too much emphasis on the trade restrictiveness of the challenged measure and not enough emphasis on the policy concerns being addressed. Under existing interpretation, when an exception uses the "necessary" or "essential" standard, the adjudicatory body considers the trade restrictiveness of a measure three times in its analyses. First, during the initial balancing test, the AB weighs the measure's effectiveness against its trade restrictiveness. Then, if the measure passes the initial balancing test, the AB considers trade restrictiveness again because it will only permit a measure that is the least trade restrictive of reasonable alternatives. Finally, the AB considers trade restrictiveness a third time when it applies the chapeau. The policy concern that the Member seeks to address is only considered in the initial balancing test.

Second, the WTO is too restrictive in its application of the General Exceptions to agreements other than GATT. The AB looks for specific indicia that drafters of WTO agreements outside of GATT intended for the General Exceptions to apply. This narrow application of the General Exceptions means that even where there is an important policy interest involved that would absolve a Member of obligations under GATT, the measure could still be struck down under other agreements that were intended to be read as a cohesive whole along with GATT.

To remedy these flaws, this Note proposes that the WTO panels and the Appellate Body re-ground the "necessary" or "essential" test, reform the chapeau interpretation, and expand the General Exceptions to more agreements. Such changes in the WTO interpretation would redress many of the U.S.'s concerns that triggered the Appellate Body Crisis as well as encourage more nations to promulgate aggressive RE policy. Each of these solutions are described below.

##### 1. Simplifying the "Necessary" or "Essential" Qualifier

Part III(D)(2) of this Note explained that when determining whether a measure is "necessary" or "essential" to the policy

consideration, the AB balances the effect of the challenged measure on the problem seeking to be remedied against its trade restrictiveness and requires that there is no reasonable alternative to achieving the policy goals that is less trade restrictive than the promulgated measure. During the initial balancing test, the AB also takes into account the seriousness of the issue being remedied, but it is not clear from prior rulings exactly how that is done. This Note proposes that the “necessary” or “essential” inquiry should be a single balancing test between the effectiveness of the measure to remedy the problem being addressed, the trade-restrictiveness of the measure, and the gravity of the problem seeking to be solved. That is, where the situation being addressed is very dire, less effective (i.e., more incremental) and/or more trade-restrictive measures may pass muster, so as not to hinder government efforts to respond to the most serious threats.

This test is not so different from what the AB *purports* to do in the first part of its “necessary”/“essential” analysis.<sup>213</sup> Making it an explicit three-part balancing test removes some of the vagueness around how to “take into account” the seriousness of the problem being addressed. The biggest difference between this interpretation and the prevailing interpretation is that, under the interpretation forwarded by this Note, the results of the balancing test will not be undermined by the existence of a less restrictive alternative. The text of Article XX does not require that the measure is the least restrictive of alternatives, and implementing this requirement bizarrely gives nations the power to block measures by fellow Members if they can come up with new, less restrictive solutions to the problem being addressed.

One obvious problem is that the alternatives proposed by other nations may not be practicable for political reasons. As noted earlier, that type of practicability has historically not been accounted for by the AB. Another issue is that the prevailing interpretation essentially requires Members to think of every conceivable course of action to address the problem in order to implement the least trade-restrictive, which is a large burden when Members are trying to address serious problems quickly.

Applying the new interpretation to disputes involving RE policy in light of the climate emergency, panels and the AB should generously

213. See *supra* Part III(D)(2) (“The AB purports that this inquiry involves a balancing test between the effectiveness of the measure to address the policy concern against the trade-restrictiveness of the measure, taking into account the relative importance of the societal interest that the measure seeks to protect” (internal quotations omitted)).

view measures which serve a goal of decarbonization or otherwise mitigating climate change as “necessary to protect human, animal or plant life or health.”<sup>214</sup> Without expedient, radical action, climate change will result in significant loss of human, animal, and plant life and serious detriment to health. Since climate change is a cumulative-impact issue, nations around the globe must use all tools in their arsenal to combat its negative effects. Mandating withdrawal of measures where there is a less trade-restrictive alternative is counterproductive. This reasoning should carry over to other Article XX (a)–(j) paragraphs as well. For example, the more pressing a product shortage is, the more likely a measure should be found to be “essential to the acquisition or distribution of products in general or local short supply.”<sup>215</sup>

Under this interpretation, given that climate change is an existential threat to human, animal, and plant life,<sup>216</sup> the IRA would be very likely to be considered “necessary” to protect those groups. Although the final assembly requirement for the EV credit is quite trade-restrictive and the IRA on its own will not end climate change, those considerations pale in comparison to the severity of the climate crisis. This interpretation would also make it easier for the IRA to clear the threshold of “essential to the acquisition or distribution of products in general or local short supply” because there would no longer be a requirement that the IRA be the least restrictive of available alternatives.

## 2. Viewing Policy Considerations as Central to the Chapeau of GATT Article XX

An alternative interpretation of the chapeau could also make it easier for RE measures such as the IRA to successfully mount a General Exceptions defense. Rather than viewing the Article XX(a)–(j) policy considerations as irrelevant to the chapeau, the WTO panels should instead view these policy considerations as *central* to the chapeau. This interpretation of the Article XX chapeau would require that a panel analyze any discrimination resulting from the manner in which a measure is applied within the context of the policy consideration.

The Article XX chapeau states that the General Exceptions will not save measures that are “applied in a manner which would constitute

214. GATT 1994, *supra* note 20, art. XX(b).

215. GATT 1994, *supra* note 20, art. XX(j).

216. *Id.*

a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>217</sup> In cases such as *United States—Shrimp*, the AB has held that the Article XX(a)–(j) policy considerations are not relevant to the chapeau, but rather that the policy considerations are only relevant insofar as is necessary to determine whether the measure falls within the subject matter scope of a General Exception.<sup>218</sup> After that inquiry is complete, the AB determines whether the measure—regardless of the policy concerns it is addressing—is “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.”<sup>219</sup> However, in doing so the AB has largely disregarded the “arbitrary or unjustifiable” language, finding that any measure that is applied in a manner that discriminates between countries fails to satisfy the chapeau. This results in it being nearly impossible for measures which violate the National Treatment Principle to qualify for a General Exception because any measure that discriminates against imported products will almost certainly also discriminate between countries as applied.

However, the drafters of GATT clearly intended for GATT violations to sometimes be excused for policy reasons. This is the purpose of the General Exceptions in the first place. Only “arbitrary or unjustifiable discrimination,” or “a disguised restriction on international trade” should fail the chapeau, according to the chapeau’s own terms.<sup>220</sup> Including the modifiers “arbitrary” and “unjustifiable” suggests that the drafters of GATT foresaw *some* acceptable justification for discrimination and sought to require such discrimination to be reasonably connected to said justifications. Placing the chapeau within the context of the General Exceptions, it seems that the appropriate justifications ought to be the policies outlined in Article XX(a)–(j).

The better reading of the chapeau would require any discrimination that results from the manner in which the measure is applied be justifiable based on the Article XX(a)–(j) policy concerns (i.e., not “unjustifiable”), reasonably related to the policy goals (i.e., not “arbitrary”), and not a “disguised restriction on international trade.” The first requirement is similar to the necessary/essential analysis discussed in Part IV(A)(1) of this Note, but the focus under the chapeau would be on the *application* of the measures rather than its design. The second

217. GATT 1994, *supra* note 20, art. XX.

218. *U.S.—Shrimp*, *supra* note 196.

219. GATT 1994, *supra* note 20, art. XX.

220. *Id.*

requirement is fairly self-explanatory, simply requiring that any inconsistency in the ways in which the measure is applied serve the purpose of forwarding the policy goals that the measure seeks to serve. The third requirement involves examining the legislative history of the measure and the decision-making process that the Member uses to implement the measure, so as to determine whether the Article XX(a)–(j) policy considerations are the true motivation behind the discrimination.

Looking at the IRA, there are two reasons that the Act's restrictions on trade are justifiable and reasonably related to the goal of protecting human, plant, and animal life. First, the restrictions on trade were necessary in order to pass any federal action on climate change in the U.S.<sup>221</sup> Second, the restrictions will allow the production of newer green technologies to grow before being exposed to an international market, which will ultimately make them cheaper and more available globally.<sup>222</sup> The Article XX chapeau specifically requires looking into the application of a measure rather than just the measure itself. It will be some time before it becomes clear whether the IRA is applied so as to unjustifiably or arbitrarily discriminate between Member nations, but based on the Act itself, it ought to be able to be applied in such a way as to avoid violating the chapeau.

### 3. Extending GATT Article XX to SCM

Finally, the General Exceptions should be interpreted to apply to all multilateral trade agreements annexed in the Marrakesh Agreement,<sup>223</sup> such as GATT, TRIMs, and SCM.<sup>224</sup> This interpretation is appropriate because the various agreements of the WTO are intended to be read as whole, as indicated by Article II of the WTO Agreement, which states, "The agreements and associated legal instruments included in Annexes 1, 2, and 3 . . . are integral parts of this Agreement."<sup>225</sup> Yet the AB has indicated that it will only apply the General Exceptions to other agreements where the provisions in question specifically refer to GATT or the General Exceptions. The AB has not yet made explicit whether the General Exceptions would apply to other

221. *See supra* Part II(B)(2) & Part II(C)(1).

222. *Id.*

223. Marrakesh Agreement, *supra* note 16, art. XI.1. The Marrakesh Agreement is annexed with the agreements on goods, services, and intellectual property, dispute settlements, and more. These agreements were all drawn at the Uruguay Round.

224. *WTO Legal Texts*, WORLD TRADE ORG., [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm) [<https://perma.cc/9U5A-7FWV>] (last visited Oct. 20, 2023).

225. Marrakesh Agreement, *supra* note 16, art. II:2.

agreements annexed in the Marrakesh Agreement, but answering this question explicitly and in the positive would foster predictability and reassurance for nations attempting to address the types of problems contemplated by the General Exceptions.

The purpose of the General Exceptions is to allow measures to pass muster, despite restricting trade, where policy concerns are more important than barrier-free trade.<sup>226</sup> It would undermine that purpose if measures that are justified under the General Exceptions as serving important policy objectives were considered impermissible under other agreements.<sup>227</sup> Moreover, the AB has frequently relied on WTO agreements to aid in the interpretation of other agreements. For example, the AB relies on the definition of subsidy from SCM when interpreting whether a measure is a subsidy for the purpose of GATT.<sup>228</sup>

Under this interpretation, if the IRA were found to violate SCM, GATT Article XX exceptions would be available to the U.S. to defend SCM violations, just like they are available to defend alleged GATT and TRIMs violations. This would be an important point for RE generally, since subsidies are effective instruments in the development of renewable energy technology and infrastructure; Articles XX(b), XX(g), and XX(j) could justify renewable energy subsidies that would otherwise violate SCM.

## B. Arguments Against This Construction

There are two major downsides to reinterpreting the General Exceptions as this Note proposes. First, the WTO's primary purpose is to reduce barriers to trade, and lowering the bar to qualify for the General Exceptions would be counter to that purpose. Second, the interpretation suggested by this Note departs from AB precedent, so it would undermine the WTO goal of predictability for adjudicatory bodies to adopt this or a similar interpretation. This section will elaborate on and respond to each of these arguments in turn.

### 1. Increased Barriers to Trade

The WTO is first and foremost a mechanism for promoting free trade between nations. Broadening the reach of the General Exceptions would undoubtedly lead to more barriers to trade, since

226. RANGEL, *supra* note 175, at 9.

227. Rubini, *supra* note 186, at 35.

228. Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 5.181, WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted July 23, 1998).

Members would have less concern about adverse rulings in the WTO when promulgating measures to address pressing issues such as climate change. Moreover, when one nation adopts RE policy with LCRs, other nations are likely to respond with similar measures. Even knowing that the WTO would likely rule against the IRA, the European Union has retaliated against the U.S. by announcing a Green Deal Industrial Plan, which is geared at scaling up new renewable energy projects in Europe.<sup>229</sup> French president Emmanuel Macron has also called for a “Buy European” policy to respond to the IRA’s Clean Vehicle Credit more directly.<sup>230</sup> These policies are being labeled as the beginning of a potential subsidy war.<sup>231</sup>

It is important to recall at this point that these policies are being promulgated in the context of the Appellate Body Crisis, where the WTO as a dispute resolution forum is in a weak position.<sup>232</sup> If the U.S. receives an adverse ruling from a WTO panel, it could just appeal it into the “void” and continue to refuse to appoint standing AB members.<sup>233</sup> The Appellate Body Crisis was triggered in the first place by what the U.S. viewed as judicial overreach on the part of the DSB.<sup>234</sup> Expanding the General Exceptions as this Note proposes could go a long way toward appeasing some of the U.S.’s concerns, perhaps convincing the U.S. to end the Appellate Body crisis. The WTO would then be able to control the damage, so to speak, by striking measures when the trade restrictiveness does in fact outweigh the policy interest of the General Exceptions. WTO adjudicatory bodies can also assess whether the application LCRs is arbitrary, unjustified, or a disguised restriction on trade in violation of the chapeau to the General Exceptions.

Moreover, we must ask ourselves whether a tit-for-tat approach in protectionist RE policy is such a bad thing. A global increase in domestic growth-promoting RE policy could ultimately result in more green innovation and, eventually, lower costs of RE technologies worldwide.<sup>235</sup> This type of rapid progress is essential in the fight

229. See *supra* note 119.

230. Clea Caulcutt, *Emmanuel Macron Calls for ‘Buy European Act’ to Protect Regional Car-makers*, POLITICO (Oct. 26, 2022), <https://www.politico.eu/article/emmanuel-macron-buy-european-act-cars-united-states-china/> [<https://perma.cc/X8EZ-BT5K?type=image>].

231. Andrés Velasco, *A Subsidy War Without Winners*, PROJECT SYNDICATE (Jan. 27, 2023), <https://www.project-syndicate.org/commentary/only-losers-in-the-us-europe-green-subsidy-war-by-andres-velasco-2023-01> [<https://perma.cc/7N2K-5DZR>].

232. See WORLD TRADE ORG., *supra* note 50.

233. *Id.*

234. See *supra* notes 57–62 and accompanying text.

235. KUNTZE & MORENHOUT, *supra* note 8, at 10.

against the climate crisis. While there are valid reasons to proceed with caution in the face of a so-called RE subsidy war,<sup>236</sup> WTO adjudicatory bodies could continue to protect free trade even if the General Exceptions are more accessible.<sup>237</sup>

## 2. The Importance of Predictability

Another concern some may raise to a new construction of the General Exceptions comes down to the fact that it is a departure from precedent, which would undermine the WTO goal of predictability. Though WTO precedent is not binding, panels treat prior AB rulings as very persuasive, in large part so that Members can rely on prior interpretations.<sup>238</sup> There is also the concern that if panels interpret agreements vastly differently from one dispute to another, their application of the rules could become arbitrary. Despite the lack of stare decisis in the WTO, panels have frequently treated AB precedent as though it is binding.<sup>239</sup>

However, the interpretation proposed by this Note is not vastly different from the AB's past interpretations. The AB purports to apply a balancing test when applying the general exceptions, yet in practice, the trade-restrictiveness of the measure is emphasized so much as to almost completely overshadow the policy concerns that the General Exceptions exist to address.<sup>240</sup> Simplifying the "necessary" or "essential qualifier" is really a matter of following the inquiry the AB has purported to employ. The AB has never spoken to the question of whether the General Exceptions apply to SCM, so answering in the affirmative does not depart from AB precedent, *per se*. It is only at the

236. For example, when world powers put domestic production first, the real losers could end up being the developing nations that cannot match pace. See Rachel Thrasher, *Green Subsidies: What About the Global South?*, SOC. EUR. (Feb. 10, 2023), <https://www.socialeurope.eu/green-subsidies-what-about-the-global-south> [<https://perma.cc/XAZ7-UTST>]. Even so, the WTO has mechanisms for protecting developing nations, and those should be employed if the "subsidy war" continues to escalate.

237. For example, by making GATT Article XX(a)-(j) policy considerations central to the chapeau, as discussed above, a panel could conduct a thorough analysis of the measure, its legislative history, and its application to determine whether discrimination is truly motivated by the approved policy considerations. See Part IV(A)(2), *supra*. Where the panel determines that the policy considerations are being invoked as a "disguised restriction on international trade," the panel can reject the General Exceptions defense.

238. Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (adopted 20 May 2008).

239. Bacchus & Lester, *supra* note 56, at 189–91.

240. See Donald H. Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 WORLD TRADE REV. 347, 355–56 (2007).

chapeau to Article XX that the interpretation proposed by this Note expressly diverts from the AB's precedent.

Importantly, the contracting members to the WTO chose not to make prior AB decisions controlling.<sup>241</sup> The drafters could have established *stare decisis* as a rule but opted not to, likely in recognition that making prior decisions binding would place too much power in the hands of the adjudicatory bodies rather than in the text of the agreements. In fact, the habit of panels and the AB to treat prior rulings as binding is precisely the type of "judicial overreach" that led the U.S. to block appointment of standing AB members and set off the Appellate Body Crisis.<sup>242</sup>

## V. CONCLUSION

This Note has demonstrated that a WTO panel would likely find that the IRA's use of LCRs violates GATT, TRIMs, and SCM under prior AB interpretations. Yet measures such as the IRA are essential for developing and scaling up RE technology quickly to combat the climate crisis, and LCRs are an affective policy tool for those ends. This Note proposes a new construction of GATT General Exceptions which would permit policies such as the IRA to pass muster. Specifically, this Note suggests that: (1) the balancing test in the "necessary" and "essential" inquiries should be simplified to create equilibrium between trade restrictiveness and non-trade policy objectives; (2) policy considerations should continue to be considered when analyzing whether a measure passes the chapeau to the General Exceptions; and (3) the General Exceptions should be interpreted to apply to SCM and other agreements that are annexed to the Marrakesh Agreement.

Though RE policy that includes LCRs presents a barrier to trade, the climate crisis is an emergency that justifies some trade restriction, and the time is ripe for the WTO to open the door to this type of policy. The interpretation proposed in this Note is ultimately in the interest of the WTO and the planet.

241. Bacchus & Lester, *supra* note 56, at 189. International tribunals' prior rulings are not binding so that nations are not bound by the outcome of disputes that they were not involved in. *Id.* at 184.

242. *Id.* at 185.