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PUBLIC HEALTH REGULATIONS AND THEIR JUSTIFICATION WITHIN THE GATT AND WTO FRAMEWORK

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Public Health Regulations and Their Justification Within the GATT and WTO Framework

Kamu Sağlığı Düzenlemeleri ve Bunların GATT ve DTÖ Çerçevesinde Meşruiyeti

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ABBREVIATIONS

AMS	Aggregate Measurement of Support
CITES	Convention on the International Trade in Endangered Species of Wild Flora and Fauna
COP	Conference of the Parties
COVID-19	Coronavirus disease of 2019
Doha Declaration	Declaration on the TRIPS Agreement and Public Health
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
HIV	Human Immunodeficiency Virus
HS	Harmonized System
ICESCR	International Covenant on Economic, Social and Cultural Rights
IP	Intellectual Property
ITO	International Trade Organization
MEAs	Multilateral Environmental Agreements
MERCOSUR	Mercado Común del Sur

Member	WTO Member
MFN	Most-Favored-Nation
NPR-PPMs	Non-product related processes and production methods
R&D	Research and Development
SCM Agreement	Subsidies and Countervailing Measures
SDGs	Sustainable Development Goals
SPS	Sanitary and Phytosanitary
SPS Agreement	The WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
US	United States of America
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization
WTO Agreement	The Agreement Establishing the World Trade Organization

ABSTRACT

This thesis aims to establish and thoroughly analyze the justification clauses of the GATT 1994 and certain other covered agreements of the WTO, which are relevant to the protection of public health. This thesis consisted of four main chapters. The first chapter presents the definition of public health, international agreements pertinent to public health and environmental health, a brief historical background of the WTO and its disciplines, and the relationship between international trade and the protection of public health. The second chapter explores the fundamental provisions of the GATT, namely the MFN treatment provision under Article I of the GATT 1994, the national treatment provision under Article III of the GATT 1994, and the quantitative restrictions provision under Article XI of the GATT 1994, and their specific relationship with exception clauses and certain public health issues. The third chapter analyzes six different WTO agreements and their relationship with the protection of public health and the justification clauses of the GATT 1994. The final chapter thoroughly analyzes the general exception clause under Article XX of the GATT 1994 and the national security exception clause under Article XXI of the GATT 1994 with a specific focus on protecting public health. The final chapter also assesses specific legal change proposals with regards to Article XX.

ÖZET

Bu tezin amacı, GATT 1994 Anlaşması ve DTÖ kapsamındaki bazı anlaşmaların kamu sağlığı ile alakalı olan meşrulaştırma hükümlerini tespit etmek ve detaylı bir şekilde ortaya koymaktır. Bu tez dört bölümden oluşmaktadır. Birinci bölüm kamu sağlığının tanımını, kamu sağlığına ilişkin uluslararası anlaşmaları, kısa olarak DTÖ'nün tarihsel arka planını ve disiplinlerini ve uluslararası ticaret ile kamu sağlığının korunması arasındaki ilişkiyi ortaya koymaktadır. İkinci bölüm GATT 1994 Anlaşmasının temel hükümlerini, yani Madde I altında en çok kayrılan ülke prensibini, Madde III altında ulusal muamele prensibini ve Madde XI altında miktar sınırlamaları hükmünü ve bunların istisna hükümleri ile bazı kamu sağlığı önlemleriyle olan spesifik ilişkilerini incelemektedir. Üçüncü bölüm altı farklı DTÖ anlaşmasını ve onların kamu sağlığının korunması ve GATT Anlaşması'nın istisna hükümleri ile ilişkisini incelemektedir. Son bölüm GATT 1994 Anlaşması'nın XX. Maddesi altındaki genel istisna hükmünü ve XXI. Maddesindeki güvenlik istisnası hükmünü, kamu sağlığının korunması odağında derinlemesine incelemektedir. Son bölüm ayrıca GATT 1994 Anlaşması Madde XX bağlamında bazı hukuki değişiklik önerilerini de değerlendirmektedir.

INTRODUCTION

Public health issues and the pursuit of solutions to these problems have always been important matters for societies to endure and governments to tackle. While many public health problems such as infectious diseases and malnutrition present themselves throughout human history, a great new threat that reveals its adverse impacts ever-increasingly, namely the climate change, becomes a constant reminder of public health problems and shows us the importance of tackling such issues. However, any measure taken towards addressing these problems can willingly or unwillingly restrict free trade. However, measures that are taken by the Members to tackle such public health problems often have economic consequences. Therefore, the legitimacy of such measures under international trade law becomes more important by the day.

The multilateral trading system was first regulating through the General Agreement on Tariffs and Trade[1] ("GATT 1994"), which has got the main objectives of the reduction of tariffs and other barriers to the elimination of discrimination in international trade. Therefore in principle, violating GATT 1994 provisions such as the Most-Favored-Nation ("MFN") principle, national treatment obligation, or prohibition of quantitative restrictions leads to a *prima facie* violation of the GATT, even if a member of the World Trade Organization ("WTO") pursues a legitimate intent such as the protection of public health or environment. That being said, as a means to recognize Members' right to protect certain legitimate societal values or interests and as a tool to justify their otherwise GATT-inconsistent measures, WTO members ("Member" or "Members") are also provided with a general exception clause, in Article XX of the GATT 1994. Moreover, Article XXI of the GATT 1994, that is the security exception clause, enables the Members to enjoy a considerable margin of discretion towards the protection of their vital security interests.

While subparagraph (b) of Article XX of the GATT 1994 explicitly refers to the protection of human life and health, its subparagraph (g) applies to measures

[1] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190 [hereinafter GATT 1994].

concerning the conservation of the environment. Accordingly, there is no substantial discussion on whether measures taken to protect public health and environmental health would fall within the scope of Article XX of the GATT 1994. Yet, as laid out in detail in the fourth chapter of this thesis, the analysis of the eligibility of a public health measure for justification under Article XX of the GATT 1994 is a complex one. Although Article XX of the GATT 1994 has become the central point of various disputes and WTO adjudicating bodies clarified its elements on many occasions, it remains to be a challenging issue for a Member to foresee precisely whether its measure would fulfill or not the requirements of this Article. Moreover, in order to understand the scope and limits of the general exception clause of the GATT 1994, many other issues such as the potential extraterritorial applicability of Article XX and whether it can be applied to WTO agreements other than the GATT 1994, particularly to the Agreement on Subsidies and Countervailing Measures[2] ("SCM Agreement") within the context of this thesis, must be studied. Furthermore, the question of how and to which extent other relevant international agreements and particularly multilateral environmental agreements ("MEAs") should be taken into account under Article XX of the GATT 1994 is another matter that requires reflection on. Consequently, while the historical background of the GATT and other relevant WTO agreements such as the Agreement on the Application of Sanitary and Phytosanitary Measures[3] ("SPS Agreement") and the Agreement on Technical Barriers to Trade[4] ("TBT Agreement") provides useful guidance for the existing ambiguities attributable to Article XX of the GATT 1994, emerging urgent threats such as the climate change gave rise to new discussions about potential legal changes to be made regarding this Article. Moreover, Article XXI of the GATT 1994, the security exception, which is

[2] 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].
[3] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 493 [hereinfater SPS Agreement].
[4] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [Hereinafter TBT Agreement].

a powerful tool that Members, in the past, almost always abstained from invoking due to its possible systemic implications, has started to be widely discussed in recent years and even got invoked by the Members on a couple of occasions. Accordingly, in the near future, this exception clause can potentially be employed to legitimize a range of measures, including certain public health measures.

This study attempts to analyze the justification of public health measures under the GATT exception clauses in four chapters. The first chapter of this thesis defines the concept of public health, presents the relevant international agreements for its protection, and sheds light on the importance of Article XX of the GATT 1994 to avoid a conflict between the GATT 1994 and international public health and international environmental health agreements. Chapter One also briefly touches on the historical background of the GATT and the establishment of the WTO. Chapter Two of this thesis reveals the fundamental provisions of the GATT 1994, namely the MFN principle, national treatment obligation, and the elimination of quantitative restrictions under the GATT 1994. It displays the linkages that exist between these provisions and public health protection and specifically focuses on certain recent public health problems such as the COVID-19 pandemic and climate change. Chapter 3 analyzes five different covered agreements of the Agreement Establishing the World Trade Organization[5] ("WTO Agreement"), focusing on their relationship with public health measures and exception clauses. Chapter Four thoroughly examines the exception clauses under the GATT 1994, namely Article XX and Article XXI, which are most relevant to the justification of public health measures. In particular, subparagraphs (b) and (g) of the GATT 1994, which are the most pertinent subparagraphs for justifying public health measures as well as the introductory clause of this Article, are studied in depth. Moreover, possible legal alternatives to modify or amend the existing WTO legal texts, in particular Article XX of the GATT 1994, are explored. Finally, Article XX of the GATT 1994, the security exception clause, and its emerging importance in the application towards

[5] Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [Hereinafter WTO Agreement].

justifying specific public health measures are also tackled in Chapter Four of this thesis.

CHAPTER ONE

A HISTORICAL REVIEW OF THE GATT AND THE RELATIONSHIP BETWEEN TRADE AND PUBLIC HEALTH

1.1. OVERVIEW

The importance of the protection of public health is a unanimously adopted concept among the international community. Yet, when it comes to defining the elements and the limits of the public health concept, no single universally adopted opinion exists. Moreover, in parallel with the increasingly adverse impacts of climate change, the protection of the environment is increasingly conjugated with the protection of public health. Therefore, to understand the current interpretation of the public health concept and its interrelation with trade, a thorough analysis of the international agreements and the interpretative approach of the relevant international bodies are made in the first chapter of the thesis.

Along with the aforementioned analysis on the concept of public health and the scope and limits of its protection, a brief historical summary of the international trade is made, with the focus on GATT 1994 and its predecessors, since the historical background may shed light on the current text of GATT 1994 and its interpretation.

1.2. THE DEFINITION AND THE SCOPE OF PUBLIC HEALTH

Public health concerns play a significant role in the current international trading system. Therefore, GATT 1994 and the WTO Covered Agreements regulate the rights of the Members to protect their citizens from health risks, to such extent that the legal assessments regarding public health concerns have been at the center of some landmark WTO disputes. Ranging from banning the carcinogenic goods[6] to the tobacco plain packaging requirements[7], WTO adjudicating bodies have

[6] Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Apr. 25, 2001) [hereinafter EC—Asbestos Appellate Body Report].

[7] Appellate Body Reports, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R; WT/DS441/AB/R (adopted June 29, 2020).

analyzed a great number of cases related to the protection of public health. However, neither the WTO agreements nor the WTO adjudicating bodies have defined the term "public health" to this date. As a matter of fact, the term "public health" rarely appears in WTO agreements[8]. Instead, the WTO agreements generally use the term "human, animal or plant life or health", which can be considered as a broad term also including the concept of public health. But what are the definition and the scope of public health? While there are numerous definitions regarding the term public health, in a joint study made by the WTO and World Health Organization ("WHO") Secretariat, public health is defined as "*All measures (whether public or private) to prevent disease, promote health and prolong the life of the population as a whole*"[9]. Following this definition, actions of the Members to regulate genetically modified organisms or prevent zoonotic diseases that may affect the health or lives of humans can also be considered under the term public health.

The protection of the environment is also related to the protection of public health in varying degrees. For instance, while the conservation of the sea turtles may not be directly related to the protection of public health, the protection of clean air or climate change mitigation is substantially related to public health protection.

Although the global climate crisis did not exist at the date of adoption of the General Agreement on Tariffs and Trade in 1947 ("GATT 1947")[10] or was not considered to be as a major concern by all Members when the WTO was founded, it now is perceived as the greatest threat to the public health of the 21st century[11]. Accordingly, measures taken to protect the environment fall within the scope of this study to the extent that they also affect public health. For environmental measures

[8] *See* Article 8 of the TRIPS Agreement (providing an exception specifically for public health measures).
[9] WTO AGREEMENTS & PUBLIC HEALTH: A JOINT STUDY BY THE WHO AND THE WTO SECRETARIAT (2002), http://site.ebrary.com/id/10040303 (last visited May 31, 2021) [Hereinafter WTO&WHO Joint Study].
[10] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].
[11] Anthony Costello et al., *Managing the health effects of climate change: Lancet and University College London Institute for Global Health Commission* 373 THE LANCET 1693, 1698 (2009).

that also affect the protection of public health, the term "environmental health"[12] will also be used hereafter.

1.3. INTERNATIONAL AGREEMENTS ON PUBLIC HEALTH AND ENVIRONMENTAL HEALTH

In order to fully comprehend the approach of the WTO towards public health regulations, international agreements on public health and their relationship between WTO agreements must be understood. After briefly addressing the several important international agreements on public health and environmental health, the position of the WTO and its adjudicating bodies towards multilateral public health and environmental health agreements will be analyzed.

1.3.1. International Agreements on Public Health

The history of international public health regulations dates back to the 19th century[13]. Later on, with the adoption of the Constitution of the WHO as a special agency of the United Nations ("UN") in the year 1946, global cooperation concerning public health has been strengthened and the basic principles of public health have been established. The Constitution of the WHO recognized the right to health as a fundamental human right in its preamble[14]. The Universal Declaration of Human Rights proclaimed by the UN General Assembly in 1948 reaffirmed the approach to the right to health as a human right[15].

The International Covenant on Economic, Social, and Cultural Rights ("ICESCR") adopted by the UN General Assembly in 1967 has been considered another essential

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[12] World Health Organization Regional Office for Europe [WHOROE], *Environment and Health the European Charter and Commentary*, at 18, 35 (Dec. 7-8, 1989) (defining environmental health as "*those aspects of human health and disease that are determined by factors in the environment*").
[13] See World Health Organization, *Global Health Stories: Origin and Development of Health Cooperation*, https://www.who.int/global_health_histories/background/en/ (Last visited June 2, 2021)
[14] Frank P. Grad, *The Preamble of the Constitution of the World Health Organization*, *80* BULL. WORLD HEALTH ORG. 981, 983 (2002).
[15] Universal Declaration of Human Rights art 25.1, Dec. 10, 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III). (Dec. 10, 1948) ("*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control").*

international treaty concerning public health[16]. Article 12 of the ICESCR recognized that everyone has the right to enjoy the highest attainable standard of health, and it also included mental health within the scope of the right to health.

Various international agreements focusing on specific matters about public health also exist. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which aims to protect biological diversity from the possible risks arising from genetically modified organisms, can be an example of such international agreements[17]. WHO Framework Convention on Tobacco Control is another international public health agreement with a specific subject matter to protect public health from the tobacco epidemic[18].

1.3.2. International Agreements on Environmental Health

In recent years, environmental problems and especially climate change, have started to affect public health increasingly. From draught[19] to famine[20], climate change has begun to cause catastrophic results on public health. As a response, governments' efforts to solve this global problem gradually increased.

The UN Conference on the Human Environment (also known as "1972 Stockholm Conference"), which led to the creation of the UN Environment Programme, was the first UN conference to focus on human interactions with the environment. The 1972 Stockholm Conference highlighted the problem related to the climate change for the first time and warned the governments regarding the likelihood and magnitude of the adverse effects of climate change[21]. Following the 1972

[16] International Covenant on Economic, Social and Cultural Rights. Dec, 16 1966, 993 U.N.T.S. 3.
[17] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208.
[18] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208.
[19] *See Drought*, WORLD HEALTH ORG., https://www.who.int/health-topics/drought#tab=tab_1 (Last visited May 30, 2021).
[20] *See UN Warns Climate Change Is Driving Global Hunger*, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/news/un-warns-climate-change-is-driving-global-hunger (Last visited May 10, 2021).
[21] Peter Jackson, From Stockholm to Kyoto: A Brief History of Climate Change, THE MAGAZINE OF THE UNITED NATIONS 44 (June 2007), https://unchronicle.un.org/article/stockholm-kyoto-brief-history-climate-change (Last visited May 3, 2021).

Stockholm Conference, several international agreements were made to reduce air pollution and ozone-depleting substances, such as the Montreal Protocol[22].

The UN Framework Convention on Climate Change ("UNFCCC") is considered another milestone concerning climate change mitigation. While the non-binding obligations of the UNFCCC on limiting greenhouse gas emissions for individual countries might not be seen as a huge matter at first glance, the annual conference of the parties ("COP") provided the basis for the Kyoto Protocol and the Paris Agreement[23].

In 1997, COP 3 was held in Kyoto, Japan, and the Kyoto Protocol was adopted. The Kyoto Protocol entered into force in 2005 and established binding obligations for the industrialized countries to reduce greenhouse gas emissions[24]. The Kyoto Protocol had a five-year commitment period between 2008 to 2012. After years of negotiations, the parties agreed to establish a second commitment period between 2013 to 2020. However, parties could not reach an agreement to further extend their commitments under the Kyoto Protocol.

Although the negotiations regarding the extension of the Kyoto Protocol had failed, such negotiations led to the creation of the Paris Agreement, a separate agreement under the UNFCCC. With its 191 parties, the Paris Agreement is one of the most comprehensive multilateral environmental agreements in history[25]. Under the structure of the Paris Agreement, member states make Nationally Determined Contributions to pursue efforts to limit the temperature increase to 1.5 Celcius degrees above pre-industrial levels[26].

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[22] Montreal Protocol on Substances that Deplete the Ozone Layer art. 5, Sept. 16, 1987, S. TREATY Doc. No. 100-10 (1987), 1522 U.N.T.S. 29, 34 [hereinafter Montreal Protocol]

[23] Kyoto Protocol to the United Nations Framework Convention On Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol]; *See Climate: Get the Big Picture,* UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/resource/bigpicture/ (Last visited May 30, 2021).

[24] *See What is the Kyoto Protocol?*, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/kyoto_protocol (Last visited May 2, 2021).

[25] Conference of the Parties, Adoption of the Paris Agreement art. 6, Dec. 12, 2015, UN Doc. FCCC/CP/2015/E.9/Rev/1 [hereinafter Paris Agreement]; (The number of parties represent the data on May 15, 2021.)

[26] *Id.*, at 2.1.

1.3.3. A Tool to Avoid Conflict Between Trade and International Public and Environmental Health Agreements – Article XX of the GATT 1994

While various international agreements regarding public health and environmental health protection exist, some of them also include provisions affecting international trade. Montreal Protocol, which bans the import of controlled substances from any state that is not a party to the Protocol, can be an example of such international agreements. Accordingly, in certain circumstances, several provisions of the international public health or environmental health agreements may conflict with the provisions of the GATT, such as MFN obligation under Article I or quantitative restrictions under Article XI. Accordingly, for mutual application of trade and international public and environmental agreements, Article XX of the GATT 1994 plays an important role.

First of all, it should be pointed out that there is a presumption against conflict regarding the interpretation of international treaties in international law. Such presumption should be considered by the WTO adjudicating bodies since Article 3.2 of the Dispute Settlement Understanding[27] ("DSU") states that the provisions of the covered agreements should be clarified under the customary rules of interpretation of public international law. In this vein and referring to Article 3.2 of the DSU, Appellate Body in the *US - Gasoline* opined that the GATT 1994 could not be read in clinical isolation from public international law[28]. Accordingly, provisions of the GATT 1994 should be interpreted in a manner that the GATT 1994 and public health agreements and MEAs would not conflict with each other to the extent possible.

Article XX of the GATT 1994 plays an essential role in interpreting the GATT 1994 and public health or environmental health agreements in a harmonious manner. Subparagraphs (b) and (g) of Article XX of the GATT 1994 allow Members to

[27] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
[28] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R, (adopted May 20, 1996) [hereinafter US—Gasoline Appellate Body Report].

deviate from their GATT 1994 obligations to protect public health or the environment, along with other conditions stipulated in Chapter Four of this study. Therefore, most of the obligations provided in the international public health or environmental health agreements are not to be found in breach of the GATT 1994 since such measures would be justified under Article XX of the GATT 1994. Moreover, for the interpretation of Article XX of the GATT 1994, the Appellate Body in the *US – Shrimp* took into account the Convention on the International Trade in Endangered Species of Wild Flora and Fauna ("CITES") for the legitimacy of the measure at issue despite all Members of the WTO who were not parties to the CITES[29]. Considering this approach of the Appellate Body, it is arguable that the current legal regime of the WTO is appropriate to deal with possible conflicts between the GATT 1994 and international agreements related to both public health and international environmental health[30]. On the other hand, since no climate change-related case has been brought before the WTO adjudicating bodies until this date, possible legal modifications in the WTO legal system in general and Article XX of the GATT 1994, in particular, have also been a topic of debate in recent years[31]. Nevertheless, Article XX of the GATT 1994 is seen as essential to resolve the possible conflicts between the GATT 1994 and the other international agreements.

Moreover, to prevent a possible conflict, Members of the WTO agreed to negotiate in special sessions of the Trade and Environment Committee about the rules of the WTO and the multilateral environmental agreements ("MEAs")[32]. Thus, to sustain the harmony between the WTO agreements and the MEAs, the WTO Secretariat and the Secretariats of the MEAs have started working together[33]. In this vein, the

[29] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES]; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, (adopted Oct. 12, 1998) [hereinafter US—Shrimp Appellate Body Report].
[30] *See* BRADLY CONDON, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW 206 (2006) (discussing conflicts between WTO Agreements and MEAs).
[31] *See infra* Chapter 4.3.
[32] *See The Doha mandate on multilateral environmental agreements (MEAs)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm (Last visited May 30, 2021).
[33] WTO Director-General, *Coherence In Global Economic Policy-Making*, WTO Doc. WT/TF/COH/S/13 (Feb. 18, 2008).

Secretariats of the several MEAs have been granted the observer status to the WTO Trade and Environment Committee to provide further collaboration.

1.4. HISTORY OF THE GATT AND THE WTO

In order to better understand the structure of the GATT 1994 and its exception clauses, along with the relationship that exists between the GATT 1994 and the Covered Agreements, the history of the GATT 1994 must be comprehended. Accordingly, from the pre-negotiation era of the GATT 1947 to the establishment of the WTO, a brief historical summary of international trade will be explained in this subchapter.

1.4.1. History of International Trade Prior to the GATT 1994 Negotiations

The bedrock of modern trade cooperation has been established around the second half of the nineteenth century following the industrial revolution. During that period, bilateral trade agreements with the MFN principle such as the Cobden-Chevalier Treaty emerged to have access to each other's markets[34]. However, in terms of political and economic conditions, various countries were devastated during the period between World War I and World War II. In such circumstances, many of those countries have chosen to protect their economy from the financial crisis by raising trade barriers. Consequently, the tariffs went significantly up[35]. However, imposing protectionist measures caused even more economic problems and contributed to the near collapse of international trade[36].

Following World War II, Cordell Hull, the Secretary of State of the United States of America ("US"), argued the revival of international trade was essential for the maintenance of world peace[37]. Hull's vision shaped the US foreign trade policy to be aimed to decrease the trade barriers globally. Therefore, the US had become the

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[34] ANDREW G. BROWN, RELUCTANT PARTNERS: A HISTORY OF MULTILATERAL TRADE COOPERATION: 1850-2000, 57 (2003).

[35] DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, THE GENESIS OF THE GATT 5 (2008).

[36] Douglas A. Irwin, *The GATT's Contribution to Economic Recovery in Post-War Western Europe* (1994), NBER PAPERS, https://www.nber.org/papers/w4944 (last visited May 31, 2021) (providing average tariff levels in certain countries within the years of 1913 and 1952).

[37] *See* Irwin, *supra* note at 35 & n.5.

promoter of the new commercial relations. Although the US and the United Kingdom ("UK") had a significant disagreement regarding the remaining colonial trade networks of the UK, they have made a joint statement at a presidential level regarding common policies and intentions of both countries, which is called the Atlantic Charter[38]. The Atlantic Charter became one of the milestones of the GATT system since both the US and the UK expressed their intentions to lower the trade barriers and pursue global economic cooperation.

In 1944, Bretton Woods Conference had been held with the participation of 44 countries. Along with the foundation of the International Monetary Fund and the International Bank for Reconstruction and Development, the Final Act of the Bretton Woods Conference also recommended the participating governments to reach an agreement in order to reduce obstacles to international trade[39]. Based on this recommendation, the US issued a proposal in December 1945 to establish the International Trade Organization ("ITO"). The aim of ITO was to liberalize and supervise international trade[40].

1.4.2. The GATT and the ITO Negotiations

The complex relationship between the ITO Charter and the GATT must be evaluated to genuinely understand the history of the GATT 1994 and its general exception clause. During negotiations leading to the ITO Charter, the US also submitted a proposal calling for a "Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions"[41]. Accordingly, while a larger group of countries were negotiating on a more broad and ambitious ITO Charter, a smaller group started to negotiate mainly on tariff concessions with the said proposal of the US. However, since most of the GATT was taken verbatim from the draft of the ITO Charter, the negotiation process of the ITO Charter as a whole is deemed relevant

[38] *See generally Id.*
[39] *See* United Nations, *Proceedings and Documents of the United Nations Monetary and Financial Conference,* Bretton Woods, (July 1-22, 1944) [hereinafter Bretton Woods Conference]
[40] DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 224 (Illustrated edition ed. 1994).
[41] Preparatory Committee of the International Conference on Trade and Employment, *Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions - Submitted by the United States Delegation*, GATT Doc. E/PC/T/27 (Nov. 23, 1946).

to the GATT[42]. Accordingly, even if the ITO Charter itself never came into force due to the refusal of ratification of the US Congress, preparatory meetings of the ITO Charter are important for understanding the negotiating history of the GATT 1947[43].

1.4.3. Signing and Provisional Application of the GATT

The final act of the GATT has been signed and adopted by twenty-three countries on 30 October 1947[44]. However, this date does not represent the date of entry into force of the GATT. Since the GATT was thought of as an interim regulation to have quick results until the approval of the ITO Charter and to be absorbed by the ITO Charter at the end, GATT has only been provisionally accepted by the contracting parties[45]. "The Protocol of Provisional Application" is made effective on 15 November 1947 , and GATT 1947 finally came into force as of 1 January 1948[46]. Since the ITO Charter never became effective, GATT 1947 stayed provisionally in force until its provisions became part of the GATT 1994[47].

1.4.4. From the GATT to the WTO

Following the refusal of the ITO Charter by the US Congress, the GATT remained as the only multilateral tool to govern international trade until the establishment of the WTO in 1995. From 1947 to 1995, eight rounds of negotiations took place between the GATT Contracting Parties. Although most of these rounds have only one main subject, the reduction of tariffs, some of them dwelled on other matters as well. For instance, the Kennedy Round resulted in establishing the GATT Antidumping Code of 1967, also known as the Anti-Dumping Agreement.

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[42] JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 22 (2000).
[43] Note that on the contrary to the ITO Charter, no official record of the negotiation history of the WTO agreements exists.
[44] S*ee Fiftieth Anniversary Of The Multilateral Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm (Last visited May 31, 2021)
[45] Roy Santana, *GATT 1947: How Stalin and the Marshall Plan helped to conclude the negotiations*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gatt_e/stalin_marshall_conclude_negotiations_e.htm (Last visited May 31, 2021)
[46] *GATT 1947 and GATT 1994: what's the difference ?,* WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/legalexplgatt1947_e.htm (Last visited May 30, 2021).
[47] *Id.*

Following the Kennedy Round, the Tokyo Round has been held between 1973 and 1979. The Tokyo Round was the parties'first attempt to solve the issue related to non-tariff barriers. As a result of the Tokyo Round, several plurilateral agreements came into force, including the Tokyo Round Subsidies Code, International Bovine Agreement, International Dairy Agreement, and arguably the most important one for the public health concerns, the Agreement on Technical Barriers to Trade ("1979 TBT Agreement")[48].

The 1979 TBT Agreement was the ancestor of the TBT Agreement, which entered into force on 1 January 1995. However, it also formed the basis of the SPS Agreement. It also covered technical regulations about food safety and animal and plant health measures such as pesticide residue limits, inspection, and labeling requirements. Moreover, the 1979 TBT Agreement aimed to promote the harmonization of technical regulations or standards. Perhaps more importantly, the 1979 TBT Agreement also had an exception clause to protect human, animal, and plant life or health.

Following the Tokyo Round, the Uruguay Round was the next and the most comprehensive round of the GATT negotiations. The Uruguay Round was held between 1986 and 1994, and 123 contracting parties participated in the negotiations. As a result of the Uruguay Round, the WTO Agreement was signed. However, the formation of the WTO was not the only important outcome of the Uruguay Round. With the annexes of the WTO Agreement, various separate agreements entered into force, including the SPS Agreement, the TBT Agreement, the General Agreement on Trade in Services ("GATS"), the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and the SCM Agreement[49].

Moreover, the provisional application of the GATT 1947 has come to an end. Annex 1A of the WTO Agreement established the GATT 1994 by incorporating

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[48] *See* Tokyo Round Agreements, Understandings, Decisions and Declarations, WORLDTRADELAW.NET, https://www.worldtradelaw.net/static.php?type=public&page=tokyoround (Last visited May 30, 2021) (listing the agreements came out from the Tokyo Round).

[49] *See Legal texts: the WTO Agreements*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/ursum_e.htm (Last visited May 30, 2021) (consisting the full list and the summary of the WTO Agreements).

the provisions of the GATT 1947 along with certain amendments. Thus, significant changes had also been made in the dispute settlement system with Article 16 of the DSU. By way of example, the right of individual parties to block the establishment of a panel or adoption of a report was repealed. Besides, the introduction of a standing Appellate Body into the dispute settlement system enabled appellate review of the panel reports.

CHAPTER TWO

BASIC PRINCIPLES OF THE GATT 1994: MFN, NATIONAL TREATMENT, AND QUANTITATIVE RESTRICTIONS

2.1. OVERVIEW

While this study aims at analyzing the exception clauses provided in the GATT 1994 to justify public health measures, for a measure to be justified under GATT 1994, a violation of the GATT 1994 must be found in the first place. Therefore, understanding the core principles of the GATT 1994 and their relevance with the public health measures is important for the analysis of the exception clauses of the GATT 1994. Accordingly, this chapter focuses on the MFN treatment obligation under Article I, the national treatment obligation under Article III, and the general elimination of quantitative restrictions under Article XI of the GATT 1994. Moreover, the discussions under these provisions regarding public health concerns, including the debate on the issue of like products, will be analyzed in this chapter as well.

2.2. ARTICLE I OF THE GATT 1994 – MFN TREATMENT PRINCIPLE

Along with the national treatment obligation, the MFN treatment principle is one of the two main forms of the non-discrimination principle of the WTO system. Under the MFN principle, Members are not allowed to make any discrimination between their WTO Member trading partners. In other words, if a Member provides an advantage to another Member such as reducing tariffs or lifting a technical requirement on a product, it must immediately and unconditionally provide the same conditions to the other Members as well. MFN principle is not only regulated

in the GATT, but it is also regulated in Article II of the GATS and Article 4 of the TRIPS Agreement.

Article I:1 of the GATT 1994 set forth a four-tier test for a measure to be consistent with the MFN principle. Accordingly, a measure (i) must be covered by Article I:1 of the GATT 1994, (ii) must grant an advantage, (iii) products at issue must be like products, and (iv) the advantage at issue must be provided immediately and unconditionally to the all concerned like products[50].

Due to the limited jurisprudence on the discussion of "likeness" under Article I:1 of the GATT 1994, the issue of "likeness" will be discussed in Chapter 2.3.2 of this study, where the elements of Article III of the GATT 1994 are analyzed. While the interpretation of the term "like products" might differ in different provisions of the GATT 1994[51], it is arguable that the case law regarding likeness in Article III is similar to Article I:1 of the GATT 1994. Similarly, after finding that the products at issue are alike within the meaning of Article III:2 of the GATT 1994, the Panel in *Indonesia – Autos* argued that no further analysis under Article I of the GATT 1994 was needed and that the products at issue are considered as alike under Article I:1of the GATT 1994 as well[52].

2.2.1. Elements of the MFN Treatment Principle

Starting with the first element of the MFN treatment principle, it should be stated that the coverage of Article I:1 of the GATT 1994 is extensive. The MFN principle includes any advantage, favor, privilege, or immunity granted by any Member for any goods originating in or destined for any other country in various forms such as import or export duties, internal taxes, or laws and regulations affecting sale, purchase, distribution, or use of any goods. Moreover, all matters referred to in

[50]Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of the Seal Products*, ¶ 5.85, WTO Doc. WT/DS135/AB/R, (adopted May 22, 2014) [hereinafter EC—Seals Appellate Body Report].
[51]S*ee infra* note 68.
[52] Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 14.141, WTO Doc.WT/DS64/R (July 23, 1998).

Article III:2 and III:4 of the GATT 1994 fall under the scope of Article I:1 of the GATT as well.

The second element of the MFN principle is related to the issue of whether the measure at issue provides any "advantage, favor, privilege or immunity" to any other country or not. The term "advantage" is interpreted by the WTO adjudicating bodies like those that provide "more favorable opportunities" and thus is interpreted broadly[53]. Regarding this element of the MFN principle, it is also clarified that a Member cannot balance its less advantageous treatment applied to a product in certain situations with the argument that it provides more advantageous treatment to the same product in certain other situations[54].

The final element of the MFN principle is whether the advantage granted by a Member is provided immediately and unconditionally to all like products from all Members[55]. On the term "immediately", no significant debate has been made under Article I:1 of the GATT 1994. Nonetheless, no time should lapse between providing an advantage to a product and providing that advantage equally to all like products irrespective of their origin[56].

The term "unconditionally", on the other hand, caused certain debates in jurisprudence. In *EC – Seal Products*, the Appellate Body clarified that the prohibition on Article I:1 of the GATT 1994 is only applicable to those conditions that have a detrimental impact on the competitive opportunities for imported like products. Therefore, not all conditions are prohibited under Article I:1 of the GATT 1994[57]. In the same case, EC also argued the rationale of the measure must be taken into account in the Article 1:1 of the GATT 1994 test. Referring to the *US – Clove Cigarettes* jurisprudence, EC argued that the GATT and the TBT Agreement should be interpreted harmoniously and, therefore, the legitimate regulatory distinction

[53] Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.239, WTO Doc. WT/DS27/R/MEX, (adopted May 22, 1997).
[54] GATT Panel Report, *United States—Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, ¶6.10, DS18/R – 39S/128, (adopted June 19, 1992).
[55] *See infra* Chapter 2.3.2 (analyzing the likeness test, the third element of the MFN principle).
[56] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 319 (4th edition ed. 2017).
[57] EC – Seals Appellate Body Report, ¶ 5.88.

test[58] established in Article 1.1 of the TBT Agreement should be applicable to the Article I:1 of the GATT 1994 as well[59]. However, making a textual interpretation, the Appellate Body refuted such an approach and stated that there is no reason to analyze legitimate regulatory distinctions under Article I:1 of the GATT 1994. Because, unlike the TBT Agreement, respondent parties are able to justify their otherwise GATT-inconsistent measures, the approach adopted by the Appellate Body as not to apply legitimate regulatory distinction test under Article I:1 of the GATT 1994 seems plausible.

2.2.2. Preferential Tariff Treatment under the Enabling Clause and its relation with the Protection of Public Health

Other than the exception clauses applicable to all GATT 1994 provisions, such as the general exceptions clause under Article XX of the GATT 1994 or the security exceptions clause under Article XXI of the GATT 1994, there is another exception that applies to the violations of Article I:1 of the GATT. The 1979 GATT Decision on Differential and More Favourable Treatment, commonly known as the "Enabling Clause", provides an opportunity for the Members to deviate from their MFN obligations to accord special and differential treatment to developing countries[60]. In other words, Members are free not to fulfill their obligations under Article I:1 of the GATT 1994 provided that they grant more favorable treatment to developing countries, including preferential tariff treatments. Many developed countries offer their preferential tariff treatment within their Generalised System of Preferences ("GSP") schemes.

While there is no debate on the legality of granting special and differential treatment to all developing countries, it has become a matter of dispute whether developed Members are able to provide additional tariff treatments to certain developing countries on the basis of their non-economical policies and conducts. More

[58] *See infra* Chapter 3.2.2.
[59] EC – Seals Appellate Body Report, ¶ 5.89.
[60] Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 90 & n.192, WTO Doc. WT/DS246/AB/R, (adopted 20 Apr, 2004) [hereinafter EC—Tariff Preferences Appelate Body Report] (detailing the legal value of the enabling clause).

specifically, it is debated whether developed Members can discriminate between developing countries based on their societal policies such as their environmental, human rights, or public health-related policies to provide additional tariff treatments.

In *EC – Tariff Treatment*, India challenged EC's additional tariff preferences before the WTO adjudicating bodies. Under its former GSP schemes, EC provided additional tariff treatment only to developing countries who comply with the policy standards of the EC on environmental or labor standards. Moreover, EC also provided additional tariff preferences to twelve countries to tackle drug production and trafficking[61]. It is noteworthy that neither the Panel nor the Appellate Body addressed providing additional tariff preferences for the protection of the environment and the labor rights since India limited its initial Panel request only to the consistency of the additional tariff treatment on drug protection and trafficking. However, the reasoning of the Panel and the Appellate Body reports also shed light on the additional tariff preferences to protect societal values, such as the protection of public health.

The Panel in *EC – Tariff Preferences* stated that the negotiating parties intended to provide equal tariff preferences to all developing countries and therefore found that the EC's special treatment to the twelve countries on drug production and trafficking is in violation of the Enabling Clause[62]. Following this reasoning, it is understood that the Panel is in the view that making any difference among developing countries would be a violation of the Enabling Clause, even if such difference stems from a legitimate societal objective such as incentivizing environmental or public health policies.

Albeit reaching the same conclusion, the Appellate Body in *EC – Tariff Preferences* reversed the Panel's interpretation on differential tariff treatment, stating that applying differential treatment to developing countries does not necessitate an

[61] *Id*. ¶ 181.
[62] Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.144, WTO Doc. WT/DS246/R, (adopted 20 Apr, 2004) [hereinafter EC—Tariff Preferences Panel Report].

automatic violation of the Enabling Clause and that developed Members shall only apply the identical treatment to the similarly situated GSP beneficiaries, referring to the principle of non-discrimination[63]. Put it differently, the applicability of the additional preferential treatment is accepted by the Appellate Body on the condition that all similarly situated developing countries shall be benefited from such additional preferential treatment. Accordingly, it is plausible that a well-structured GSP scheme that includes additional preferential tariff treatment can be found in compliance with the Enabling Clause. In conclusion, it is arguable that for the protection of public health and the environment, there is an additional option to violate Article I:1 of the GATT 1994 and to benefit from the Enabling Clause exception, although it is only a limited option provided to developed Members to support developing countries.

2.3. ARTICLE III OF THE GATT 1994 – NATIONAL TREATMENT OBLIGATION

The national treatment obligation constitutes other aspect of the non-discrimination principle in the WTO system together with the MFN principle. While Article I of the GATT 1994 prohibits any discrimination between the Members, Article III of the GATT 1994 prohibits a Member from favouring domestic products over imported goods. In other words, Members cannot treat to the like imported products less favourably compared to domestic products. It should be noted that Article III of the GATT 1994 is only applicable to the internal measures and it does not apply to the border measures such as tariffs. On the other hand, Article II of the GATT 1994 which in principle regulates border measures can be applicable to the measure at issue.

Although Article III comprises ten paragraphs, only the paragraphs Article III:1, Article III:2, and Article III:4 of the GATT 1994, most referred paragraphs of Article III, along with the derogation clause stipulated under Article III:8(a) of the GATT 1994 will be briefly mentioned in the following subchapter. Moreover, the concept of like products which is not only an element of Article III:2 and III:4 but

[63] EC—Tariff Preferences Appellate Body Report, ¶ 173.

also Article I:1 and XI of the GATT 1994 and its importance in relation to public health concerns will also be addressed in Chapter 2.3.2 as well as the rest of this study.

2.3.1. Articles III:1, III:2, and III:4 of the GATT 1994

Article III:1 of the GATT 1994 stipulates that internal measures taken by the Members should not be applied to imported or domestic products so as to afford protection to the domestic production. Accordingly, Article III:1 of the GATT 1994 reflects the non-discrimination principle and informs the rest of Article III[64].

Similarly, Article III:2 of the GATT which comprises two sentences aims at regulate internal taxes so that they do not apply so as to afford protection to domestic production. While the first sentence of Article III:2 regulates the internal taxation of like products, the second sentence regulates internal taxation of the directly competitive or substitutable products. Since the issue of public health is not directly relevant to the internal taxation of products, no further analysis will be made with regards to Article III:2 of the GATT 1994 other than a debated issue under the likeness analysis[65].

Article III:4 of the GATT 1994 aims at preventing Members from granting less favourable treatment to imported products compared to like domestic products. As set out by the Appellate Body in *Korea – Various Measures on Beef*, three elements must be fulfilled for a measure to violate Article III:4 of the GATT 1994: (i) imported and domestic products at issue must be like products, (ii) the measure at issue must be a law, regulation or requirement affecting their domestic sale, offering for sale, purchase, transportation, distribution or use, and (iii) imported products must be accorded treatment less favorable compared to the like domestic products[66].

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[64] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 111, WTO Doc. WT/DS8/AB/R/, (Adopted Nov 1, 1996) [Hereinafter Japan—Alcoholic Beverages II Appellate Body Report].
[65] *See infra* Chapter 2.3.2.
[66] Appellate Body Report, *Korea—Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 133 (Jan. 10, 2001) [Hereinafter Korea—Beef Appellate Body Report].

While all elements of the Article III:4 of the GATT 1994 must be analyzed for the determination of a violation, identification of like products is particularly important in relation to public health measures as well as the interrelation between Article III:4 and Article XX of the GATT 1994. Therefore, the element of likeness will be analyzed separately in the following subchapter.

2.3.2. Likeness Test

Various provisions of the GATT 1994, as well as the covered agreements, stipulate that non-discrimination obligations in the form of MFN principle or national treatment obligations can only be applicable to the Members where the products at issue are "like products". Therefore, the interpretation of the term "like products" has been one of the key points of the various public health and environmental health discussions within the WTO jurisprudence. The term "like products" can be found in several provisions of the GATT 1994 as explained above as well as various provisions of covered agreements such as Article 2.1 of the TBT Agreement and Article II of the GATS. After establishing the likeness test as introduced by the Appellate Body in its seminal report in *EC – Asbestos* the likeness test as applied to public health measures will be analyzed in the following subchapter.

2.3.2.1. Interpretation of the Term "Like Products" by the Appellate Body

While the term "like products" is deemed as the key element in various disputes, no definition of this term exists neither in the GATT 1994 nor in other covered agreements. Therefore, the WTO adjudicating bodies had to interpret this term in the disputes brought before them. Other than the absence of any existing definition, making a uniform definition of "like products" is even more difficult if not impossible since applying the same "like product" analysis in different provisions where the term "like products" exist may create illogical results and nullify the given meaning to certain provisions[67]. For instance, in order to effectively interpret the Article III:2 of the GATT 1994, the term "like products" should be interpreted

[67]*See* Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.22, WTO Doc. WT/DS8/R/, (Adopted Nov. 1, 1996) [Hereinafter Japan—Alcoholic Beverages II Panel Report] (analyzing this issue in further detail).

narrowly to also give effect to the term "directly competitive or substitutable" stipulated in the Note ad Article III paragraph 2 of the GATT 1994. Therefore, the Appellate Body in *Japan – Alcoholic Beverages II* compared the term "likeness" to an accordion and stated that this concept stretches and squeezes in different places as different provisions of the WTO Agreement are applied[68]. In other words, products that are found to be alike under a provision of the WTO Agreement do not necessarily found to be alike under another provision of the WTO Agreement.

Appellate Body stated that the likeness test aims at providing an equal competitive relationship between and among the products[69]. For making such determination, the Appellate Body traditionally used four criteria which are derived from the 1970 Report of the Working Party on Border Tax Adjustments[70], and on a case-by-case basis, it analyzed the (i) products' psychical characteristics; (ii) products' end uses; (iii) consumer tastes and habits; and (iv) products' tariff classification[71]. Other than this traditional approach, WTO adjudicating bodies made a hypothetical assumption that the products at issue are alike when there is origin-based discrimination, or there is an impossibility of making a like product analysis such as an import ban on imports[72].

Under the likeness analysis, there has been a debate about whether the intent of the Members should be taken into account while determining likeness. In *Japan – Alcoholic Beverages II*, Japan argued that under Article III:2 of the GATT 1994, the intention of the Member imposing the measure and the actual effect of the measure should be taken into account for such determination. However, the Panel opined that such an approach (also called the *aim-and-effects* test) is not applicable since applying such a test under Article III:2 would render Article XX of the GATT

[68] Japan—Alcoholic Beverages II Appellate Body Report, at 21.
[69] EC—Asbestos Appellate Body Report, ¶ 99.
[70] Report by the Working Party, *Border Tax Adjustment*s, L/3464 (Nov. 20, 1970), at ¶18, available at https://www.wto.org/gatt_docs/English/SULPDF/90840088.pdf. (Note that the final criteria used by the Appellate Body for the likeness analysis, i.e. the tariff classification of the products was not included in the 1970 Working Party Report).
[71] EC—Asbestos Appellate Body Report, ¶ 92.
[72] Panel Report, United States—Certain Measures Affecting Imports of Poultry from China, ¶ 7.424-7.427, WTO Doc. WT/DS392/R, (Adopted Oct.25, 2010) [hereinafter US—Poultry Panel Report].

1994 redundant and useless[73]. Giving the example of health protection, the Panel argued that the requirements of Article XX of the GATT 1994, such as the necessity test would be circumvented if the purpose of the measure is taken into account under Article III of the GATT 1994. Accordingly, the Panel applied a market-based approach for the likeness analysis and mainly focused on the market competitiveness of the products at issue[74]. However, some scholars criticized the lack of consideration attributed to Members' legitimate policies and argued that such an approach would excessively restrict the regulatory autonomy of the Members[75].

2.3.3. Consideration of Public Health Concerns in Likeness Analysis: EC–Asbestos Dispute

The debate of considering or not considering the intent of the Members to determine likeness has become one of the central elements in the *EC – Asbestos* dispute. The Appellate Body Report in *EC – Asbestos* led to one of, if not the fundamental jurisprudence on the position of the WTO adjudicating bodies towards the relationship between trade and public health. The measure at issue was the imposed ban on the products that contain chrysotile asbestos, which is known to be a carcinogenic substance. While France, the responding party, argued that it had put an import ban to protect its public health, the complainant party, Canada, on the other hand, claimed that instead of putting a ban, France could have taken less trade-restrictive measures such as measures that stipulate special installation and maintenance requirements that would decrease the carcinogenic effects of the products that contain chrysotile asbestos.

2.3.3.1. Arguments of the Parties and the Panel Report in EC – Asbestos Dispute

Regarding the issue of likeness, Canada argued that the chrysotile asbestos-containing products are alike with the certain domestic substitutes that do not

[73] Japan—Alcoholic Beverages II Panel Report, ¶ 6.17.
[74] *Id*. ¶ 6.22.
[75] *See* DAVID SIFONIOS, ENVIRONMENTAL PROCESS AND PRODUCTION METHODS 117-119 (1st ed. 2018) (Providing various arguments of the proponents of the regulatory purpose approach).

contain asbestos since the end-uses of the products are identical, and many of the psychical characteristics are similar. Thus, Canada argued that it is not appropriate to consider the consumer tastes and habits criterion since the imposed ban forced the limited buyers of the products at issue to convert to buying domestic substitutes instead of buying chrysotile asbestos[76]. The EC, on the other hand, claimed that the products at issue are not like by underlining the health hazards of the chrysotile asbestos products and their different chemical structure[77]. The EC also argued that the HS codes of the products at issue were different, and only the criterion of end-use could not have rendered the products alike.[78]

Reaffirming the market-based approach established in *Japan – Alcoholic Beverages II*, the Panel in *EC – Asbestos* did not give weight to public health concerns and took the view that the differences in psychical characteristics and HS codes were not enough to consider the chrysotile asbestos products and their domestic substitute products not to be alike[79]. In so doing, the Panel stated that certain concerns (including public health) are considered to be falling within the scope of Article XX (and not in Article III) of the GATT 1994[80]. As a result, while the Panel found that the product at issue is alike within the meaning of Article III of the GATT, it opined that France's import ban was nonetheless justified under Article XX of the GATT 1994.

2.3.3.2. The Appellate Body Report in EC – Asbestos Dispute

As observed in the Panel Report in *EC – Asbestos,* applying a strict market-based approach may even lead to a situation where one would consider cancer-free and carcinogenic products to be alike, a result which might have rightfully caused public outrage and discredit the WTO. While it can be argued that the general exception clause, Article XX of the GATT 1994, can be invoked to prevent such an undesired

[76] Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 3.422, WTO Doc. WT/DS135/R (adopted Apr. 5, 2001) [hereinafter EC—Asbestos Panel Report].
[77] *Id*. ¶ 3.431-3.432.
[78] *Id*. ¶ 4.433-3.435.
[79] *Id*. ¶ 8.122.
[80] *Id*. ¶ 8.129

outcome, as it will be established in Chapter 4.2.4 of this thesis, it is not always easy to pass the necessity test established in the Article XX(b) of the GATT 1994.

Accordingly, it can be said that the Appellate Body in *EC – Asbestos* tried to find a middle ground between the market-based and intent-based approaches. Reversing the Panel's ruling in likeness analysis, the Appellate Body opined that the Panel erred in not considering all the pertinent evidence, including the public health concerns raised by the EC for the carcinogenic nature of the asbestos that can be found in the imported products. The Appellate Body stated that while analyzing the psychical characteristics of the products, asbestos had formed the "defining aspect" of the psychical characteristics of the products at issue[81]. Moreover, the Appellate Body also stated that the evidence in relation to the health risks associated with a product might be related to the likeness analysis under Article III:4 of the GATT 1994. Accordingly, the Appellate Body found that the products at issue were alike within the meaning of Article III:4 of the GATT 1994[82].

The Appellate Body in *EC – Asbestos* also reversed the Panel's approach towards the interrelation between Articles III:4 and XX of the GATT 1994. The Panel in *EC – Asbestos* opined that considering the evidence in relation to the health risks associated with a product under Article III:4 of the GATT 1994 would largely nullifies the effect of Article XX(b) of the GATT 1994 since Article XX(b) (and not Article III:4) is the provision where public health concerns are regulated and not the Article III:4. However, the Appellate Body rejected this interpretation and stated instead that the scope and the meaning of Article III:4 of the GATT 1994 should not have changed merely because Article XX(b) existed and might be invoked to justify a possible violation of Article III:4 of the GATT 1994[83].

To sum up, the Appellate Body Report in *EC – Asbestos* can be considered as significant progress towards the protection of public health under the GATT 1994, since it partly deviates from the market-based approach in order not to find

[81] EC—Asbestos Appellate Body Report, ¶ 114.
[82] *Id*. at ¶ 132.
[83] *Id*. at ¶ 115.

carcinogenic products as to be alike with the non-carcinogenic products. While the Appellate Body did not explicitly state that it deviated from an objective market-based approach for the analysis of likeness, it nonetheless took into account the health risks posed by a product as a "defining aspect" of the likeness analysis, and it opined that the product at issue could be considered as not alike due to carcinogenic substances in a product, even if such substance did not affect the end-use of the product and that there was no objective evidence on the difference related to consumer tastes and habits.

2.3.4. Derogation Clauses of the Article III of the GATT 1994

Other than the exception clauses such as Article XX and XXI, which are applicable to all provisions of the GATT 1994[84], WTO Members benefit from an additional escape clause in Article III:8 (a) and (b) of the GATT 1994, which provides governments with certain policy space in relation to their government procurement activities as well as subsidies granted exclusively to the domestic producers.

Article III:8(a) is perceived as a derogation from the national treatment obligation, in other words, governmental procurement activities falling under the scope of Article III:8(a) will not be subject to the obligations stemming from Article III[85]. Article III:8(b), on the other hand, is deemed to be invoked as a justification, as such not amounting to a derogation[86].

Due to the focus of this study, only Article III:8(a) of the GATT 1994 will be briefly analyzed since this derogation clause has been invoked on few occasions in relation to government procurement activities regarding energy production by renewable resources[87].

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[84] Note that there is no settled hierarchy among exception clauses of the GATT 1994.
[85] Appellate Body Report, *Canada—Measures Relating to the Feed-in Tariff Program*, ¶ 5.56, WTO Doc. WT/DS412/AB/R, (adopted May 24, 2013) [Hereinafter Canada—FIT Appellate Body Report].
[86] Appellate Body Report, *Brazil—Certain Measures Concerning Taxation and Charges*, ¶ 5.92, WTO Doc. WT/DS472/AB/R, (adopted Aug. 30, 2017) [Hereinafter Brazil—Taxation Appellate Body Report].
[87] *See supra* Chapter 1 (discussing the relationship between public health and climate change mitigation).

2.3.4.1. Article III:8(a) of the GATT 1994

The text of Article III:8(a) of the GATT 1994 is as follows:

> *"The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products 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"*

In relation to the jurisprudence regarding Article III:8(a) of the GATT 1994 derogation which will be explained in the following subchapter, the Appellate Body analyzed in five requirements within the scope of Article III:8(a)[88]. These five cumulative requirements are as follows: (i) an "articulate connection" between the measure and the public procurement, (ii) existence of a governmental agency that makes a procurement, (iii) competitive relationship among the products that are purchased by a governmental agency, (iv) purchase of the products must for governmental purposes and (v) purchase " not be used with a view to commercial resale or with a view to use in the production of goods for commercial sale".

2.3.4.1.1. Disputes that shed light on III:8(a) and its Linkage with Article XX of the GATT 1994: Canada – Renewable Energy and India – Solar Cells

While this article provides Members with a policy space regarding their otherwise GATT-inconsistent governmental purchases, an invocation of this clause in a dispute is a rather recent development. In *Canada – Renewable Energy,* where the consultations between the parties were started in 2010, Japan and the EU challenged the Feed-in Tariff Program of the province of Ontario of Canada. The government of Ontario province provided a guaranteed price for the generators of renewable energy, with the condition that they use a certain amount of domestic content in their means of production. While complainant parties argued that such a measure would violate Article III:4 of the GATT 1994 (along with Article 1.1 of the SCM Agreement and Article 2.1 of the TRIMS Agreement), Canada claimed that Article

[88] Canada—FIT Appellate Body Report, ¶ 5.58-5.79.

III:4 of the GATT 1994 should not be applied to the dispute since Article III:8(a) derogation would be applicable to the dispute at hand.

The Panel in *Canada – Renewable Energy* rejected Canada's invocation of Article III:8(a) since the electricity was bought by the Government of Ontario with a view to commercial resale to the consumers, and such resales were carried out in competition with the other electricity retailers[89]. The Appellate Body, on the other hand, focused on the competitive relationship between the product of foreign origin, which was the equipment to produce electricity, and the products purchased, which is the electricity itself. Since such two products were not in a competitive relationship, the Appellate Body also concluded, albeit with different reasons, that Article III:8(a) derogation was not available to be invoked in the dispute at hand. Accordingly, since the invocation of the derogation clause was rejected and the respondent party did not make any defense under the exception clauses of the GATT, the application of III:4 of the GATT 1994 prevailed. On that note, it is interesting to note that Canada did not prefer to invoke the exception clauses, in particular Article XX of the GATT 1994, which provides various escape clauses to the invoking parties with its ten different subparagraphs.

Following the *Canada – Renewable Energy* dispute, a similar dispute in relation to Article III:8(a) of the GATT 1994 was brought before the Panel by the US against India's measures in 2014. In *India – Solar Cells,* the measure at issue was the domestic content requirements enforced by India regarding their National Solar Mission, which was a program on solar power generators that were selling electricity to the Indian government. Similar to *Canada – Renewable Energy* dispute, India claimed that their measure fell within the scope of Article III:8(a) derogation and therefore would not violate Article III:4 of the GATT 1994.

Both the Panel and the Appellate Body in *India – Solar Cells* confirmed the approach adopted by the Appellate Body in *Canada – Renewable Energy* dispute and took the view that it was not possible to invoke the Article III:8(a) derogation

[89] Panel Report, *Canada—Measures Relating to the Feed-in Tariff Program*, ¶ 7.152, WTO Doc. WT/DS412/R, (adopted May 24, 2013) [Hereinafter Canada—FIT Panel Report].

clause since the purchased product by the Indian government, the electricity, was not in a competitive relationship with the discriminated products, solar cells, and their modules[90]. In contrast with Canada though, India invoked the defense grounds that were available under Article XX(d) and XX(j) of the GATT 1994. However, both the Panel and the Appellate Body rejected such claims and concluded that India violated its obligations under Article III of the GATT 1994.

2.4. ARTICLE XI OF THE GATT 1994 – QUANTITATIVE RESTRICTIONS ON TRADE

Quantitative restrictions can be defined as types of measures that put a limit to the quantity of a good that is imported or exported. Such restrictions are one of the classic examples of non-tariff barriers to trade. Accordingly, they are also regulated under the GATT to neutralize their adverse impacts on international trade. Such quantitative restrictions are regulated Article XI of the GATT 1994, and as a general rule, they are prohibited, albeit with certain exceptions. While the clause may seem irrelevant with the public health regulations and their justification, following the COVID-19 pandemic, its linkage with the protection of public health has manifested itself. In the following subchapters, Article XI:1 of the GATT 1994 which regulates the general prohibition on quantitative restrictions, and the Article XI:2(a) of the GATT 1994 which provides an exemption from the obligations stipulated in Article XI:1 of the GATT 1994 will be analyzed and the importance of this clause in relation to the protection from COVID-19 pandemic will be explained.

2.4.1. Article XI:1 of the GATT 1994 – General Elimination of Quantitative Restrictions

As noted above, Article XI:1 of the GATT 1994 sets out the general principle of prohibition of quantitative restrictions. The text of the Article XI:1 reads as follows:

[90] Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.40-5.41, WTO Doc. WT/DS456/AB/R, (adopted Oct. 14, 2016) [Hereinafter India—Solar Cells Appellate Body Report].

> "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party"*

It is important to note that Article XI:1 of the GATT 1994 is applicable to both import and export measures. As established by the Appellate Body in *Argentina – Import Measures*, two conditions must be fulfilled in order to determine a violation of Article XI:1 of the GATT 1994: (i) the measure at issue must fall under the scope of "quotas, import or export licenses or other measures" and (ii) it must constitute a prohibition or restriction on the exportation or sale for export of a product[91].

The prohibition on quantitative restrictions provided in the Article XI:1 is very broad and consequently, it has been the subject to many WTO disputes, e.g., *US – Shrimp*, *Korea – Various Measures on Beef* and *Brazil – Retreaded Tyres*, which led to certain seminal rulings regarding Article XX of the GATT 1994. Having said this, the importance of Article XI:1 in relation to the protection of public health has particularly revealed itself only very recently.

2.4.1.1. Export Restrictions Arising from COVID-19 Pandemic and Article XI of the GATT 1994

COVID-19, the global pandemic that rapidly and adversely affected almost all countries in the world, caused critical shortages in essential medical products. In order to find a solution to their domestic short supply of such products, many countries have issued new regulations to restrict the exportation of medical supplies and lifted tariff barriers on imports to acquire several medical products[92]. As of 23

[91] Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, ¶ 5.216-5.218, WTO Doc. WT/DS438/AB/R, (adopted Jan. 15, 2015) [Hereinafter Argentina—Import Measures Appellate Body Report].

[92] *See Trade In Medical Goods In The Context Of Tackling COVID-19*, WORLD TRADE ORG., https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf (Last visited May 31, 2021) (detailing out variety of products subjected to export restrictions because of the COVID-19 pandemic).

April 2020, 80 countries have imposed export restrictions or prohibitions due to the COVID-19 pandemic[93].

As it can be understood from the first condition of Article XI:1 of the GATT 1994, most of the imposed measures that mitigate the shortage of medical products may fall under the scope of this Article. That is due to the fact that the term "other measures" that appears in Article XI:1 of the GATT 1994 would contain effectively all quantitative restrictions (except duties, taxes, or other charges applied on the border[94].

Regarding the second condition for a measure to violate Article XI:1 of the GATT 1994, the Appellate Body in *China – Raw Materials* established that such measure must have a limiting effect on the quantity or amount of an imported or exported product[95]. Again, most of the measures that are taken to supply medical products have a limiting quantitative effect, and therefore, it is clear that most of the measures that are aimed to provide essential medical products to domestic demand can be deemed as a violation of the Article XI:1 of the GATT 1994.

To avoid an Article XI:1 violation, Members may rely on Article XI:2(a) of the GATT 1994, which provides an exemption from Article XI:1 obligations. If a measure complies with the requirements of Article XI:2(a) exemption, such a measure is deemed outside the scope of Article XI:1 obligation, and no further defense is needed by the responding party. In other words, as highlighted by the Appellate Body in *China – Raw Materials,* if the requirements of Article XI:2(a) are met, there would be no scope of application of Article XX of the GATT 1994 since no violation of the GATT 1994 norms would occur[96].

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[93]*See Export Prohibitions And Restrictions*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf (Last visited May 30, 2021).

[94]*See* Joost Pauwelyn, *Export Restrictions in Times of Pandemic: Options and Limits Under International Trade Agreements*, 54 J. WORLD TRADE 727, 733 (2020).

[95] Appellate Body Reports, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 120, WTO Doc. WT/DS394/AB/R, (adopted Jan. 30, 2012) [Hereinafter China—Raw Materials Appellate Body Report].

[96] *Id*. at ¶ 334.

2.4.1.2. Article XI:2(a) of the GATT 1994 – A Carve-out from the XI:1 Obligations

Article XI:2(a) of the GATT 1994 allows Members to implement temporary export restrictions in order to relieve critical shortages of foodstuffs and other products that are essential to an exporting country. In the sole jurisprudence regarding Article XI:2(a) of the GATT 1994, *China – Raw Materials*, the Appellate Body focused on the terms "temporary", "essential" and "critical" in the analysis of Article XI:2(a).

Regarding the term "temporary", the Appellate Body stated that a temporary measure shall be applied in order to bridge a passing need and it must be finite[97]. Accordingly, measures taken to solve the medical supply crisis arising from the COVID-19 pandemic would likely be "temporary" within the meaning of Article XI:2(a) of the GATT 1994.

To determine whether a product is "essential" under Article XI:2(a) of the GATT 1994, the Appellate Body opined that such a product should be "absolutely indispensable or necessary" for the exporting Member[98]. In relation to the export restrictions arising from the COVID-19 pandemic, it is plausible that ventilators and surgical masks can be considered as "absolutely indispensable or necessary" under Article XI:2(a). Yet, export restrictions on toilet paper might be disputed under this criterion.

Finally, the Appellate Body noted that the shortages of foodstuffs and other products must be "critical", which means that this shortage should create a crucial crisis, should amount to a situation of decisive importance, and should consequently reach a vitally important or decisive stage or a turning point[99]. In this context, it is arguable that the COVID-19 pandemic has caused critical shortages of several

[97] *Id.* at ¶ 330.
[98] *Id.* at ¶ 326.
[99] *Id.* at ¶ 324.

medical products in certain countries within the meaning of Article XI:2(a) and it even caused political tensions.[100]

In conclusion, Article XI:2(a) derogation seems effective for most of the export restrictions enforced to relieve the shortage of medical supplies domestically. However, it must be underlined that a wide application of export restrictions especially by the industrialized developed countries may cause devastating implications for least-developed and developing countries[101]. Therefore in author's view, it is proposed that especially the term "critical" under Article XI:2(a) of the GATT must be interpreted narrowly to protect those countries without domestic technological and manufacturing capacity. It must also be noted that even if an export restriction imposed by a Member cannot benefit from the Article XI:2(a) derogation, it can still be justified under the exception clauses of the GATT such as Article XX(b), XX(j) or even under Article XXI provided that such measure fulfills the obligations of the said exception clauses. Moreover, even if Article XI:2(a) of the GATT 1994 is interpreted narrowly, the respondent party will still enjoy a certain level of policy space to take export-restrictive measures to relieve any domestic shortages on medical products. Accordingly, a narrow interpretation of Article XI:2(a) would not prevent a Member from imposing necessary measures to tackle the COVID-19 pandemic.

[100] *See* Lara Marlove, *Coronavirus: European Solidarity Sidelined as French Interests Take Priority*, THE IRISH TIMES, https://www.irishtimes.com/news/world/europe/coronavirus-european-solidarity-sidelined-as-french-interests-take-priority-1.4216184 (last visited Mar 30, 2020);
Gavin Lee, *Coronavirus:WHO criticises EU over vaccine export controls*, BBC NEWS, https://www.bbc.com/news/world-europe-55860540 (last visited June 1, 2021).
[101] *See* Jiabgyuan Fu et al., *More Restriction or Facilitation on PPE amid COVID-19: Limitations and Options of International Trade Law*, UN ECON. SOC. COMM'N. ASIA PASIFIC, https://www.unescap.org/sites/default/files/46%20Final%20Team%20Jiangyuan%20Fu-Hong%20Kong.pdf (last visited May 31, 2021).

CHAPTER THREE

WTO COVERED AGREEMENTS AND PUBLIC HEALTH MEASURES

3.1. OVERVIEW

While the primary focus of this study is on the exception clauses of the GATT 1994 concerning the protection of public health, in order to comprehend the overall view, it is also essential to understand the relationship of health and trade in other covered agreements. Moreover, and in accordance with Article II:2 of the WTO Agreement[102], GATT 1994 and certain other annexes of the WTO Agreement are deemed as a single undertaking[103]. Accordingly, understanding other covered agreements is also valuable for interpreting the GATT 1994 provisions and, more specifically, Article XX and XXI of the GATT 1994. In this chapter, the approach in the SPS Agreement, the TBT Agreement, the TRIPS Agreement, the GATS, the Agreement on Agriculture, and the SCM Agreement toward public health and their related exception clauses are analyzed.

3.2. SPS AGREEMENT

Among other Covered Agreements, the SPS Agreement has a central role in regulating Members' concerns related to public health issues. The foundation of the SPS Agreement dates back to the discussions on the Agreement on Agriculture, which is another Annex 1A (Covered) Agreement of the WTO Agreement. During the discussions on the Agreement on Agriculture, the criticism from several Members against possible protectionist agendas in the form of sanitary and phytosanitary regulations led to the creation of the SPS Agreement[104].

3.2.1. Scope of Application of the SPS Agreement

As stipulated in Article 1.1 of the SPS Agreement, it applies to all sanitary and phytosanitary ("SPS") measures that may affect international trade. The definition

[102] *See* art. II:2 at *supra* note 5 ("the agreements and associated legal instruments included in Annexes 1, 2 and 3 are integral parts of this Agreement, binding on all Members").
[103]Appellate Body Report, Brazil—Measures Affecting Desiccated Coconut, at 11-12, WTO Doc. WT/DS22/AB/R, (adopted Feb. 21, 1997).
[104]*See* Melvin Spreij, The SPS Agreement and Biosafety, FOOD AND AGRIC. ASS'N OF THE UNITED NATIONS, www.fao.org/3/bb098e/bb098e.pdf (Last visited June 2, 2021)

of "sanitary and phytosanitary measures" is provided in Annex A of the SPS Agreement. The essential element of the definition relates to the purpose of the measure as well[105]. Accordingly, SPS Agreement covers various issues, including but not limited to the prevention or spread of pests, security of food, and disease prevention[106].

Due to the close linkage between the TBT and the SPS Agreements, determining whether a measure is a sanitary or phytosanitary measure is also important to detect the agreement that needs to be applied to the issue. As provided in Article 1.4 of the SPS Agreement and 1.5 of the TBT Agreement, there is no overlap between these two Agreements. Accordingly, only in circumstances where a measure is not found to be a sanitary and phytosanitary measure within the meaning of the SPS Agreement that this measure will fall within the scope of the TBT Agreement. Note that although the TBT Agreement and the SPS Agreement are mutually exclusive, a single measure can be split into two different measures, depending on the purpose of the measure[107].

3.2.2. Basic Principles of the SPS Agreement

Article 2 of the SPS Agreement stipulates the basic principles of the agreement. While the language of Article 2.1 of the SPS Agreement reflects the language of Article XX(b) of the GATT 1994, Article 2.3 mirrors the language of the *chapeau*[108] of Article XX of the GATT 1994. Moreover, the SPS Agreement requires the governments to base their measures on scientific evidence with Article 2.2. Article 5.7 of the SPS Agreement supplements the concept of scientific evidence by stating that if the related scientific evidence is insufficient, Members may take provisional measures, subject to certain conditions.

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[105] Bossche & Zdouc, *supra* note 56 at 938.
[106] *See* Annex A of the SPS Agreement that has a *numerus clausus* list of subparagraphs from (a) to (d) laying down sanitary and phytosanitary measures.
[107] Panel Report, *European Communities—Approval and Marketing of Biotech Products*, ¶7.165, WTO Doc. WT/DS291/R (adopted Nov. 21, 2006); *see* Bossche & Zdouc, *supra* note 56 at 944.
[108] "*Chapeau*", which means "hat" in French, is commonly referred to describe the introductory part of the Article XX of the GATT 1994.

Article 3 of the SPS Agreement also underlines the importance of harmonization. Accordingly, Members shall base their SPS measures on international standards, guidelines, and recommendations. For instance, the standards, guidelines, and recommendations of the Codex Alimentarius Commission are explicitly recognized regarding food safety. In accordance with Article 3.3 of the SPS Agreement, Members also have the right to introduce SPS measures that may provide a higher level of protection compared to the relevant international standards on the condition that there is a relevant scientific justification.

The SPS Agreement also obliges Members to base their measures on risk assessment. Accordingly, two types of risk assessments apply to an SPS measure, namely the risks from pests or disease and food-borne hazards. The requirements for the risk assessment regarding food-borne risk are less strict than the requirements for the risk assessment regarding pests or diseases[109]. Accordingly, the distinction made between the two types of risk assessments is made to set less strict requirements for the risk assessment where human health is at issue and set more stringent requirements when the risk is related to the animal or plant pests or diseases[110].

3.2.3. Relationship of the SPS Agreement with Article XX of the GATT 1994

Similar to Article XX of the GATT 1994, and in particular, subparagraph (b) of Article XX of the GATT 1994, the provisions of the SPS Agreement aim to strike a balance between trade liberalization and the protection of health[111]. Assessing the relationship between the SPS Agreement and Article XX (b) of the GATT 1994, the Panel in the *US – Poultry (China)* opined that the provisions of the SPS Agreement are indeed the explanation of the disciplines of Article XX (b) of the GATT 1994[112].

[109] *See* Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶ 121, WTO Doc. WT/DS18/AB/R, (adopted Feb.18, 2000) (laying down the requirements of risk assessment regarding pest and diseases).
[110] Bossche & Zdouc, *Supra* note 56 at 957.
[111] *See* the eight recital of the preamble of the SPS Agreement.
[112] US—Poultry Panel Report, ¶ 7.481.

But unlike GATT, under Article 2 of the SPS Agreement, WTO Members have an explicit right to take SPS measures necessary to protect human, animal, or plant life or health. On the other hand, such measures may violate the GATT 1994, yet the respondent party may justify such measures under Article XX of the GATT 1994[113]. Accordingly, the burden of proof regarding regulations about protecting human, animal, and plant life or health shift in these agreements[114].

Moreover, Article 2.4 of the SPS Agreement brings a presumption that if an SPS measure conforms with the SPS Agreement, it is presumed to be in accordance with the GATT, especially with Article XX (b) of the GATT 1994. However, there is no mutual exclusivity between the two agreements. Therefore a measure may fall under the scope of the GATT and the SPS Agreement at the same time[115].

3.2.4. Criticism Towards the SPS Agreement

The SPS Agreement is widely criticized due to the outstanding obligation that it imposes on WTO Members to base their measures towards protecting human, animal, and plant life or health on scientific evidence. The majority of the critics of the SPS Agreement argue that such requirements take away from the decision-making power of Members related to health protection and instead pass it on to less accountable experts[116]. For example, Sykes argues that the scientific benchmark creates unnecessary obstacles for governments that genuinely pursue non-protectionist objectives[117]. On the contrary, some other scholars, including Hudec, argued that the scientific evidence benchmark gives too much discretion to the Members, resulting in protectionism[118]. Despite all the criticism, the current

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[113] S*ee* Appellate Body Report, *Indonesia—Importation of Horticultural Products, Animals and Animal Products,* ¶ 5.51, WTO Doc. DS/478/AB/R, (adopted Nov. 22, 2017) (stating that Article XX of the GATT 1994 should be deemed as an affirmative defence).
[114]Appellate Body Report, *India—Measures Concerning the Importation of Certain Agricultural Products*, ¶ 5.260, WTO Doc. WT/DS/430/AB/R, (adopted June 19, 2015).
[115] Bossche & Zdouc, *supra* note 56 at 944.
[116] *See* Boris Rigot, *The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)*, 24 EUR. J. INT'L. L. 503, 503-504 (2013) (criticising the SPS Agreement).
[117] Alan O. Sykes, *Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View*, 3 CHIC. J. INT'L. L. 353, 353-354 (2002).
[118] *See* Robert E. Hudec, *Science and Post-Discriminatory WTO Law*, 26 B.C.INT'L & COMP. L. REV. 185, 185-189 (2003).

structure of the SPS Agreement may still be perceived as the best possible solution due to the lack of alternatives suggested by the opposing legal scholars and the necessity of creating a balance between trade liberalization and the protection of health[119].

3.3. TBT AGREEMENT

The TBT Agreement bears a resemblance with the 1979 TBT Agreement, along with some improvements such as binding for all WTO Members and having a more robust enforcement mechanism thanks to the DSU[120]. Similar to the GATT 1994 and the SPS Agreement, the TBT Agreement also aims at striking a balance between trade liberalization and the protection of certain societal values, including the protection of human, animal, or plant life or health.

3.3.1. Scope of Application of the TBT Agreement

While the SPS Agreement focuses explicitly on the SPS measures, the TBT Agreement has a broader scope of application. The TBT Agreement deals with technical regulations, standards, and conformity assessment procedures. The definitions of these terms are made in Annex 1 of the TBT Agreement. Determining the scope of these terms brought many discussions, especially regarding non-product-related processes and production methods ("NPR-PPMs"). During the negotiations of the TBT Agreement, the applicability of the NPR-PPMs was discussed by the WTO Members, yet, no consensus was reached following the discussions[121].

NPR-PPMs are mainly referring to processes and production methods that do not affect the psychical characteristics of the final version of a product. For instance, the psychical characteristics of a garment produced in a solar energy-based factory and a garment produced in a conventional carbon-emitting factory are the same.

[119] TRACEY EPPS, INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO'S SPS AGREEMENT 181-202 (2008).
[120] *See supra* Chapter 1.4.4.
[121] Bossche & Zdouc, *supra* note 56 at 887.

Yet, there is a significant difference between these two products based on the carbon emitted during their production.

The discussion regarding NPR-PPMs is still ongoing since related jurisprudence has not yet provided any clear response[122]. The latest jurisprudence on NPR-PPMs discussion regarding the TBT Agreement is made in the *EC-Seals* dispute. Yet, the Appellate Body abstained from making any conclusive remarks, opining that bringing a definitive conclusion to this discussion would raise "important systemic issues"[123].

Article 2.1 of the TBT Agreement regulates the MFN and national treatment principles, which are also core pillars of the GATT 1994. While Article I of the GATT 1994 regulates the MFN principle, Article III deals with the national treatment principle. Accordingly, Members who are laying down technical regulations cannot treat imported products less favorably than like products of national origin. To emphasize, compliance with these principles is compulsory where there are like products. In other words, if the products at issue are not alike, no further discussion is needed to be made by the WTO adjudicating bodies. Accordingly, the concept of "like products" has been one of the main discussion points in various WTO disputes. The concept of likeness under the WTO system is further analyzed in Chapter 2.3.2 of this thesis.

3.3.2. Legitimate Regulatory Distinction Test Under the TBT Agreement

The balance to be established between trade liberalization and protection of certain societal values, including protection of human, animal, and plant life or health is one of the fundamental features of the WTO system. In the GATT 1994, for instance, the general exception clause is the primary provision for a Member to justify its otherwise GATT inconsistent measures if such measures are genuinely brought to protect certain societal values. The SPS Agreement has similar provisions to Article XX(b) of the GATT 1994 to allow SPS measures necessary to

[122] Michael Ming Du, *What is a "Technical Regulation" in the TBT Agreement?* 6 EUR. J. RISK REGUL., 396, 396-404 (2015).
[123] EC—Seals Appellate Body Report, ¶ 5.69.

protect human, animal, and plant life or health. The TBT Agreement also recognizes such societal values in the sixth recital of its preamble. However, the provisions of the TBT Agreement do not contain any provision which a party is allowed or can justify its measures that are necessary to protect its societal values, including the protection of human, animal, and plant life or health[124]. Accordingly, the test of legitimate regulatory distinction has been imposed for the first time by the Appellate Body in the *US – Clove Cigarettes* to fulfill the need for a balancing clause[125]. Considering the object and purpose of the TBT Agreement, the Appellate Body opined that the requirement of "no less favorable treatment" does not prohibit detrimental impacts that stem exclusively from a legitimate regulatory distinction[126]. Although the Appellate Body in the *US – Clove Cigarettes* found that the US measure at issue, which was a tobacco control measure banning all clove cigarettes, was inconsistent with Article 2.1 of the TBT Agreement for certain reasons, it also opined that the Members have the right to adopt measures which pursue legitimate health objectives such as curbing and preventing youth smoking[127]. In order to determine the legitimate regulatory distinction, the Appellate Body stated that the design, architecture, revealing structure, operation, and application of the measure must be taken into account[128]. Moreover, the technical regulation at issue must be imposed in an even-handed manner.

The abovementioned terms are also closely related to the Article XX of the GATT 1994 jurisprudence. The terms design, architecture, revealing structure, and the application of the measure are related to the analysis of the *chapeau* of Article XX[129]. On the other hand, the Appellate Body used the even-handedness test in the *US – Gasoline* to further elaborate the term "measures made effective in conjunction with" under subparagraph (g) of Article XX of the GATT 1994[130].

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[124] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶101, WTO Doc. WT/DS406/AB/R, (adopted Apr. 24, 2012).
[125] *Id*. ¶ 174.
[126] *Id*. ¶ 161.
[127] *Id*. ¶ 235.
[128] *Id*. ¶ 182.
[129] EC—Seal Products Appellate Body Report, ¶ 5.302.
[130] US—Gasoline Appellate Body Report, at 20.

Accordingly, one might think that the concept of even-handedness established by the Appellate Body under Article 2.1 of the TBT Agreement is somehow similar to Article XX(g) of the GATT 1994 analysis. Yet, the Appellate Body considers the *chapeau* analysis established in Article XX of the GATT 1994 as one way to examine the legitimate regulatory distinction test under Article 2.1 of the TBT Agreement[131] (and not the subparagraphs of Article XX). Accordingly, the concept of even-handedness stipulated under Article 2.1 of the TBT Agreement is distinct from the even-handedness test used under subparagraph (g) of Article XX of the GATT 1994[132]. It should be noted that the lack of clarity and unsystematic structure of the legitimate regulatory distinction test made it prone to be widely criticized[133].

3.3.3. Article 2.2 of the TBT Agreement - Obligation to Abstain from Creating Unnecessary Obstacles to International Trade

Before analyzing Article 2.2 of the TBT Agreement, it should be mentioned that this provision adds an additional obligation to the Members. It is therefore not an exception clause to Article 2.1 of the TBT Agreement[134]. Article 2.2 of the TBT Agreement regulates that the Members cannot prepare, adopt or apply measures with a view to or with the effect of creating unnecessary obstacles to international trade. Accordingly, it brings a necessity test to make detection for this purpose. The second sentence of Article 2.2 is as follows: *"... technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create*".

For the determination of the legitimate objectives, the third sentence of Article 2.2 of the TBT Agreement has a *numerus apertus* list of legitimate objectives, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety; animal or plant life or health; or the

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[131] Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products-Recourse to Article 21.5 of the DSU by Mexico*, ¶ 7.94, WTO Docs. WT/DS381/AB/RW, (adopted Dec. 3, 2015).
[132] *See* Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US - Cool*, 8 ASIAN J. WTO & INT'L HEALTH L & POL'Y 1 29 (2013).
[133] *See* Jason Houston-McMillan, *The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement*, 15 *WORLD TRADE REV. 543* (2016).
[134] Marceau, *supra* note 132 at 4.

environment. Accordingly, the protection of public health is explicitly stipulated as a legitimate objective. Regarding the term "to fulfill a legitimate objective", the Appellate Body considers that this term is concerned with the degree of the contribution that the technical regulation in question makes toward achieving the legitimate objective[135].

The final element of Article 2.2 of the TBT Agreement is whether the technical regulation at issue is "more trade-restrictive than necessary" or not, taking account of the risks of non-fulfillment would create. Referring to *Korea – Various Measures on Beef* dispute, the Appellate Body in *the US – Tuna II (Mexico)* analyzed the trade-restrictiveness of the technical regulation, the degree of the contribution that it makes to the achievement of a legitimate objective, the risks of non-fulfillment would create and also determining whether there is a less trade-restrictive alternative to analyze the "necessity" element of the test[136]. Moreover, the Appellate Body also underlined that all abovementioned factors should be taken into consideration while making the necessity analysis account[137]. Although this necessity test under Article 2.2 of the TBT Agreement seems quite similar to the necessity test under Article XX of the GATT 1994, while the necessity test under Article XX of the GATT 1994 focuses on the necessity of the measure, the necessity test under Article 2.2 of the TBT Agreement focuses on to the trade-restrictiveness of the measure, and not the measure itself[138].

Accordingly, a technical regulation brought by a Member to protect public health must fulfill its objective and pass the necessity test on complying with Article 2.2 of the SPS Agreement. A similar necessity test which is made under Article XX(b) of the GATT 1994, will be thoroughly analyzed in Chapter 4.2.4 of this thesis.

On a final note about Article 2.2 of the TBT Agreement regarding the element of "taking account of the risks of non-fulfillment would create", the text of Article 2.2

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[135] Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 315, WTO Docs. WT/DS381/AB/R, (adopted June 13, 2012).
[136] *Id.* ¶ 318.
[137] *Ibid.*
[138] Marceau, *supra* note 132 at 18.

exemplifies what to consider to make such a risk assessment. Accordingly, available scientific information is indicated as one of the considerations. Yet, in contrast with the SPS Agreement, it is not a binding requirement of a Member to base its measure on scientific evidence[139].

3.3.4. Standardization under the TBT Agreement

Article 2.4 of the TBT Agreement regulates that Members shall use the relevant international standards as a basis for their technical regulations if such international standards exist or their completion is imminent. The same article also allows Members to avoid such international standards if they are ineffective or inappropriate to fulfill their pursued legitimate objectives. The term "ineffective" is interpreted by the Panel in *EC – Sardines* as something which is not "having the function of accomplishing"[140]. Accordingly, if a Member wishes to set a higher threshold for its technical regulation in terms of health protection, it can deviate from relevant international standards since pertinent such standards would be considered ineffective for fulfilling the pursued objective of the technical regulation at issue.

3.4. TRIPS AGREEMENT

The TRIPS Agreement has a distinct role in the system of the WTO. While other covered agreements regulate trade in goods or services, the TRIPS Agreement regulates intellectual property ("IP") rights. Nevertheless, it has significant importance for international trade disputes regarding the protection of public health. While the TRIPS Agreement regulates several types of IP rights, the main discussion regarding the protection of public health focuses on the patent issues, and more specifically, the patent protection of pharmaceutical products[141].

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[139] MARIANNA B. KARTTUNEN, TRANSPARENCY IN THE WTO SPS AND TBT AGREEMENTS: THE REAL JEWEL IN THE CROWN 35 (2020).
[140] Panel Report, *European Communities - Trade Description of Sardines*, ¶ 7.116, WTO Doc. WT/DS231/R, (adopted Oct. 23, 2002).
[141] *See* Part II of the TRIPS Agreement for the various types of covered IP rights.

3.4.1. Vital Relationship between Public Health and Patent Protection

Patent protection in the field of pharmaceutical products brings along an important discussion. Pharmaceutical companies who obtain patent rights can set the sale price of the drugs higher than the competitive market, resulting in the encouragement of these companies to invest in research and development ("R&D") activities[142]. Thus, the quality and the number of drugs will be improved. On the other hand, if the determination of drug prices is left in the hands of the pharmaceutical companies whose primary goal is to make a profit, accessibility to certain drugs becomes nearly impossible for the least developed and certain developing countries. Therefore, imposing strict patent protection for certain medications such as HIV drugs may have fatal consequences.

3.4.2. The History and Early Implications of the TRIPS Agreement

Prior to the TRIPS Agreement, the protection of IP rights was limited, and countries had more policy space to regulate their domestic IP system and standards. However, with the lead of the US in the Uruguay Round negotiations, certain developed countries persuaded developing countries to include IP rights protection to be covered in the WTO system[143]. While the TRIPS Agreement limited the policy space of the Members regarding IP regulations, it also provided certain flexibilities for the developing countries, such as more extended transition periods and provisions allowing parallel importation and compulsory licensing. Yet, following the adoption of the TRIPS Agreement, it became clear that the developing countries may not benefit from such flexibilities due to the aggressive approach coming from certain developed countries. For instance, in 1998, soon after adopting the TRIPS Agreement, the US government imposed trade sanctions on South Africa for their

[142] *See Non-Trade Concerns in the Agricultural Negotiations of the World Trade Organization*, INT'L. INST. SUST. DEV., https://www.iisd.org/pdf/2003/investment_sdc_dec_2003_9.pdf (Last visited May 31, 2021).
[143] *See* Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting For a comprehensive analysis of Uruguay Round negotiations regarding the TRIPS Agreement,* 5 J. WORLD INTELLECT. PROP. 765, 775-781 (2005).

implementation of TRIPS-consistent measures, including parallel importation of certain drugs during the HIV pandemic[144].

3.4.3. The Doha Declaration

The aggressive approach of certain developed countries led by the US against developing countries to limit their abilities to benefit from TRIPS flexibilities resulted in the backlash of several developing countries. Therefore, following the demands of the developing countries, this issue was discussed in the Doha Ministerial Conference in 2001, and the "Declaration on the TRIPS Agreement and Public Health" ("Doha Declaration") was adopted on 14 November 2001. The Doha Declaration addresses a range of subjects, including the flexibilities of the TRIPS Agreement, the importance of the protection of public health, and, more specifically, the right to provide access to drugs for all[145].

3.4.4. Compulsory Licensing

The importance of the flexibilities provided in the TRIPS Agreement regarding the protection of public health has already been mentioned in the previous sections. Governments can rely on specific provisions of the TRIPS Agreement to ensure their citizens access the necessary drugs for an affordable price. Among such flexibilities under the TRIPS Agreement, compulsory licensing and parallel importation concepts have been probably the most debated ones.

Compulsory licensing can be defined as the grant of a government to produce a patented product to a third company or to use the patent rights for itself without the patent owner's permission[146]. Article 31 of the TRIPS Agreement permits the government to issue compulsory licenses with certain conditions, including paying adequate remuneration to the patent owner. Accordingly, governments can

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[144]*See* Carlos Correa & Duncan Matthews, The Doha Declaration Ten Years on and Its Impact on Access to Medicines and Right to Health, UNITED NATIONS DEV. PROG. 6 (2011), https://www.undp.org/content/dam/undp/library/hivaids/Discussion_Paper_Doha_Declaration_Public_Health.pdf (Last visited May 31, 2021).

[145]*See infra* note 148 (full text of the Doha Declaration).

[146]*See Compulsory Licensing of Pharmaceuticals and TRIPS*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm (Last visited May 30, 2021).

authorize third-party companies to produce a generic version of a drug to allow its citizens to obtain such a drug at an affordable price.

However in reality, this flexibility may not really be applicable for certain Members. Article 31 (f) of the TRIPS Agreement stipulates that compulsory licenses shall be issued predominantly for the supply of the domestic market. This regulation creates a significant barrier for the Members who cannot manufacture pharmaceutical products because even if they grant compulsory licensing, they may not produce the necessary drugs in sufficient quantity[147]. This problem was recognized in Paragraph 6 of the Doha Declaration, and the TRIPS Council was instructed to find a solution to this problem[148]. Following the Doha Declaration, Members have agreed to waive Article 31 (f) of the TRIPS Agreement in 2003[149]. Finally, the TRIPS Agreement was amended in 2017, and a new article, Article 31*bis*, was adopted. With Article 31*bis*, Members obtained the right to issue compulsory licenses to produce and export generic drugs to the other Members that are unable to produce due to their lack of capacity to produce drugs.

Relying on compulsory licensing has become a current issue following the COVID-19 pandemic. Certain already patented products are currently testing for the COVID-19 treatment, and several Members have shown their intention to issue compulsory licenses to provide access to the treatment[150]. For instance, Bolivia formally notified the WTO to invoke its right to issue compulsory licenses to obtain 15 million doses of vaccine to tackle with the COVID-19 pandemic[151].

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[147] *See* Correa&Mathews, *supra* note 144 at 9.
[148] *See* ¶ 5 (b) at World Trade Organization, Ministerial Declaration of 20 Nov. 2001, *Declaration on the TRIPS agreement and public health*, WTO Doc. WT/MIN(01)/DEC/2 (2002) ("Each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted").
[149] *See* General Council, *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health*, WT/L/540 and Corr.1, (Sep. 1, 2003).
[150] Ellen't Hoen, *Covid-19 and the comeback of compulsory licensing*, MED. L. POL. https://medicineslawandpolicy.org/2020/03/covid-19-and-the-come-back-of-compulsory-licensing/ (last visited May 31, 2021).
[151] World Trade Organization, *Notificación En Virtud Del Acuerdo Sobre Los Adpic Enmendado*, WTO Doc. IP/N/9/BOL/1, (May 11, 2021).

3.4.5. Parallel Importation

Parallel importation refers to the goods legally put on to the market of a country and subsequently exported to another country[152]. The importance of parallel importation about public health protection stems from the fact that Members can purchase drugs at the lowest global price through the possibility of parallel importation. Thus, Members can provide access to drugs for more people.

The right to make parallel imports is closely related to the doctrine of exhaustion. The principle of exhaustion, also known as the first-sale doctrine, refers to the point at which the patent owner's exclusive rights regarding the resale of its product come to an end[153]. In this regard, when the patent owner's exclusive right is "exhausted", the related product becomes legally available for parallel importation.

Article 6 of the TRIPS Agreement, which regulates the issue of exhaustion, gives Members a policy space to determine their legal system regarding parallel importation, subject to the MFN and national treatment obligations[154]. Members' discretion to determine their policies regarding exhaustion is also reaffirmed in Paragraph 5 (d) of the Doha Declaration[155].

3.4.6. Unique Structure of the TRIPS Agreement for the Protection of Societal Values

While the scope of other Covered Agreements is limited to trade in goods or services, the TRIPS Agreement deals with fundamentally distinct IP rights ranging from patents to geographical indications. Therefore, instead of having a single general exception clause like the one that exists in the GATT 1994, the TRIPS

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[152] Christopher Heath, *Parallel Imports and International Trade*, WORLD INTELLECT. PROP. ORG., https://www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf (last visited May 31, 2021).

[153] Junaid Subhan, *Scrutinized: The TRIPS Agreement and Public Health*, 9 MCGILL J. MED. 152, 154 (2006).

[154] Enrico Bonadio, *Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?* 33 EIPR 1, 9 (2011).

[155] *See* ¶ 5 (d) at *supra* note 149 ("The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4").

Agreement provides various special exceptions for multiple types of IP rights[156]. For instance, Article 27.2 of the TRIPS Agreement allows Members to refuse to issue patents for inventions where commercial exploitation needs to be prevented from protecting certain societal values such as human, animal, or plant life or health.

Moreover, Article 8 of the TRIPS Agreement titled "Principles" has a similar language with the one laid down in Article XX of the GATT 1994. Its first paragraph recognizes that the Members can adopt measures that are necessary to protect public health. But unlike Article XX of the GATT 1994, Article 8 of the TRIPS Agreement does not provide for such an exception. In fact, it can only provide guidance for the interpretation of other TRIPS provisions along with its Article 7, which lays down the Agreement's objectives[157]. Paragraph 5 (a) of the Doha Declaration confirms the importance of the principles and objectives of the TRIPS Agreement as an interpretative tool for each provision[158].

Despite the absence of such a general exception clause, the TRIPS Agreement includes a security exception clause in its Article 73. That Article is a mirror provision of Article XXI of the GATT 1994, which will be analyzed in detail in Chapter 4.4 of this study.

3.5. THE GATS

While trade in goods had been regulated through international agreements since the late 1940s, no such treaty work had been achieved in relation to trade in services until the introduction of the GATS into the trading system. However, trade in services had started playing a significant role in the global economy and therefore, rules on trade in services were negotiated during the Uruguay Round which led to the enactment of the GATS[159]. Along with other services sectors, the GATS also

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[156] Ji Yeong Yoo and Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security? 19 J. INT'L. ECON. LAW* 417, 443 (2016).
[157] Bossche & Zdouc, *Supra* note 56 at 997.
[158] *See* ¶ 5 (a) at *supra* note 149 ("In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles").
[159] Juan A. Marchetti & Petros C. Mavroidis, The Genesis of the GATS (General Agreement on Trade in Services) 22 EUR. J. INT. LAW 689, 693 (2011).

covers trade in health services such as private hospital services, health tourism, and telemedicine.

3.5.1. The Structure of the GATS

Except for the GATS and special circumstances of least-developed countries, the obligations stemming from multilateral trade agreements are applicable for all Members at all times, as such, they are not exempted from these obligations. However, this is not the case for the GATS. The GATS provides for both conditional and unconditional obligations for the Members.

If a service falls within the scope of the GATS, certain obligations such as the MFN and transparency are applicable for all Members regarding all such sectors. These unconditional obligations are also called horizontal commitments of the Members[160]. Moreover, suppose a Member made specific undertakings in its schedule of commitments for a particular sector. In that case, certain other commitments such as market access and national treatment commitment become applicable to this Member regarding such sector.

In addition, even if Members made commitments in a specific sector, they can limit their commitments by stipulating such limitations in their schedule of commitments. Accordingly, they can limit their degree of commitments regarding market access and national treatment commitments. Regarding the hospital sector, for instance, the US granted market access to foreign countries, but it reserved its right to enact needs-based quantitative restrictions in order to hold the right to determine the number of hospitals in a particular area[161].

3.5.2. The Scope of Application of the GATS

Determining the scope of the GATS is essential since the unconditional obligations apply to the Members even if they have not made any specific commitments regarding any particular sector. Article I:1 of the Agreement stipulates that the

[160] *See* Jolita Butkeviciene & David Diaz, *GATS Commitments in the Health Services Sector and the Scope for Future Negotiations*, 136 UNCTAD-WHO JOINT PUBLICATION (Last visited May 31, 2021).
[161] *See* Secretariat of the GATS, *Schedule of Specific Commitments of the United States of America*, WTO Doc. GATS/SC/90, (Apr. 15, 1994)

GATS applies to "measures of Members affecting trade in services". Four modes of trade in services are recognized by the Article I:2 of the GATS, which are: (i) cross-border supply such as telemedicine, (ii) consumption abroad such as health tourism, (iii) commercial presence such as the establishment of hospitals in a different country and (iv) presence of natural persons such as export of medical professionals[162].

The GATS covers all service sectors except for services provided in the exercise of governmental authority, along with a specific exception regarding the air transport sector[163]. While the latter exception only impacts a specific sector, the former concerns many more sectors, including health services.

Article I:3(c) of the GATS stipulates that for a service to be considered as a "service provided in the exercise of governmental authority" within the meaning of the GATS, it neither should be supplied on a commercial basis nor should be in competition with one or more service suppliers. Regarding the health sector, the coexistence of public hospitals and private ones raised questions about the potential competition among these hospitals and, accordingly, whether public hospitals may also fall under the scope of the GATS or not[164]. While there is no discussion about public hospitals where the health service is provided free of charge, for the hospital sector of the certain countries where both public and private hospitals are operating on a commercial basis, such as charging the patients for provided treatments, the WTO Secretariat noted that in such case, it is unrealistic to argue that no competitive relationship exists between the two groups of suppliers[165]. Therefore in many countries, even publicly owned hospitals may fall within the scope of the GATS, and unconditional commitments such as the MFN and transparency requirements may apply to such Members.

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[162] *See* WTO&WHO Joint Study, *supra* note 9 at 47-48.
[163] *See* Article 2 of the Annex on Air Transport Sector of the GATS.
[164] Markus Krajevski, Public Services and the Scope of the General Agreement on Trade in Services (GATS), 7 CENTER INT'L ENVTL L., http://www.ciel.org/Publications/PublicServicesScope.pdf (Last visited May 31, 2021).
[165] Background Note by the Secretariat of Council for Trade in Services, Health and Social Services, ¶ 37-39, WTO Doc. S/C/W/50, (Sep. 18, 1998).

Some commentators criticize the application of the GATS to the health sector by arguing that the Agreement has limited the domestic governmental intervention to the health sector only and that countries became less able to shape their domestic health systems[166]. However, opposing views have also argued that the GATS provides Members with a wider margin of discretion thanks to its structure, and to the extent Members prefer not to make commitments on a specific sector, many obligations are out of application for these Members within those sectors[167].

3.5.3. The Exception Clauses of the GATS – Article XIV and Article XIV *bis*

Although the structure of the GATS is quite different from the GATT and Covered Agreements, it nonetheless recognizes the importance of the Members' non-economic policy objectives. Accordingly, Article XIV allows Members to deviate from their conditional or unconditional commitments to genuinely fulfill certain societal objectives such as protecting the human, animal, or plant life or health. However, Members are less likely to rely on exception clauses under the GATS due to the less rigid structure of the Agreement[168]. Therefore until this date, there have only been two cases where a responding party invoked Article XIV of the GATS[169].

Article XIV of the GATS has a similar wording to Article XX of the GATT 1994. Regarding the relationship between these two articles, the Appellate Body in the *US – Gambling* opined that Article XX jurisprudence is considered relevant for the analysis of Article XIV of the GATS[170].

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[166] Allyson M. Pollock & David Price, *Rewriting the Regulations: How the World Trade Organisation Could Accelerate Privatisation in Health-care Systems*, 356 THE LANCET 1995 (2000).; *See generally* SCOTT SINCLAIR, HOW THE WORLD TRADE ORGANIZATION'S NEW "SERVICES" NEGOTIATIONS THREATEN DEMOCRACY (2000) (discussing how GATS limits the policy space of states).

[167] Leah Belsky et al., *The general agreement on trade in services: implications for health policymakers* 23 HEALTH. AFF. 137 (2004); Panos Delimatsis, GATS and Public Health: An Uneasy Relationship, 3 SSRN ELECTRONIC JOURNAL (2012). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001918 (last visited on May 31, 2021).

[168] *See* 6, WTO - TRADE IN SERVICES MAX PLANCK COMMENTARIES ON WORLD TRADE LAW (Rüdiger Wolfrum et al. eds., 2008).

[169] Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [Hereinafter US—Gambling Appellate Body Report]; Appellate Body Report, Argentina—Measures Relating to Trade in Goods and Services, WTO Doc. WT/DS453/AB/R, (adopted May 9, 2016).

[170] *Id*, ¶ 291.

Although the chapeau of the Article XIV of the GATS is almost identical to the chapeau of Article XX of the GATT 1994, specific differences exist between their subparagraphs. Subparagraphs of Article XIV of the GATS embodies less legitimate objectives than Article XX of the GATT 1994 (five instead of ten subparagraphs). Notwithstanding, thanks to is public order exception (XIV(a)) which is considered broad and fairly inclusive, the policy space of the Members under this exception clause might be deemed even wider than the Article XX of the GATT 1994[171].

Regarding the protection of public health, Article XIV has an identical subparagraph with Article XX(b) of the GATT 1994. Through Article XIV(b) of the GATS, Members have been enabled to take measures that are necessary to protect human, animal, or plant life or health. Although the text of the XIV(b) of the GATS is identical to Article XX of the GATT 1994, the extent of these provisions is considered different[172]. This is because, unlike Article XX of the GATT 1994, Article XIV of the GATS does not have a subparagraph concerning environmental concerns. While there are several reasons why Members preferred not to add a subparagraph concerning environmental issues, they have broadly agreed that Article XIV(b) of the GATS also includes measures necessary to protect the environment[173].

Considering these facts, unlike Article XX(b) of the GATT 1994, it is plausible that Article XIV (b) of the GATS also covers measures necessary to protect the environment, at least when such environmental measures are relevant to a certain degree of the protection of human, animal or plant life or health.

The GATS also includes a security exception clause, Article XIV*bis*, similar to the text of Article XXI of the GATT 1994 or Article 73 of the TRIPS Agreement. Differently from GATT 1994 though, while there is no difference in its application

[171] *supra* note 168 at 3.
[172] *Id.* at 11.
[173] WTO Committee on Trade and Environment, *Environment and Services*, ¶ 8, WTO Doc. WT/CTE/W/9, (June 8, 1995).

or interpretation[174], the security exception clause of the GATS was incorporated as a *bis* of the general exception clause of the GATS (Article XIV) and not as a separate article.

3.6. THE AGREEMENT ON AGRICULTURE

The sector of agriculture is essential for many countries and especially for the developing countries in order to both ensure provide food security and provide sufficient income for their relatively more impoverished farmers. These objectives are also recognized among one of the UN Sustainable Development Goals ("SDG")[175]. Considering that approximately one out of nine people globally are undernourished, food security is considered strictly related to public health. Accordingly, the Agreement on Agriculture, which explicitly regulates trade in agricultural products and its effects on public health in relation to food security, will be analyzed in this subchapter.

3.6.1. The Objectives and the Coverage of the Agreement on Agriculture

Prior to the adoption of the Agreement on Agriculture, trade in agricultural products was less regulated compared to other sectors, and governments had more discretion to determine their domestic agricultural policies[176]. Following the adoption of the Agreement on Agriculture, various principles regulating the trade in agricultural products have entered into force. The main objectives of the Agreement are identified as to establish a fair and market-oriented agricultural trading system[177]. Moreover, the Agreement also refers to non-trade concerns, including food security[178].

Annex 1 of the Agreement on Agriculture explicitly enumerates which products are covered by the agreement, referring to their Harmonized System ("HS") codes and headings. In this regard, except for the fish and fish products, the Agreement on

[174] *See* Yoo & Ahn, 442 at *supra* note 156.
[175] *See* Transforming Our World: the 2030 Agenda for Sustainable Development, UNITED NATIONS, UN Doc. A/RES/70/1., https://sustainabledevelopment.un.org/sdg2 (Last visited May 31, 2021).
[176] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [Hereinafter WTO Agreement].
[177] *Id.*, at the second recital of the preamble.
[178] *Ibid.*

Agriculture covers primary agricultural products such as wheat, milk, and livestock and includes processed products, alcoholic beverages, and fibers.

3.6.2. The Scope of the Agreement on Agriculture and its Relationship with the SCM Agreement

Along with its other obligations, the Agreement on Agriculture also regulates domestic supports and export subsidies regarding trade in agriculture. In a similar vein, the SCM Agreement also governs the rules regarding subsidies. However, the approach adopted toward the subsidies in these two agreements is not particularly the same. While the SCM Agreement evaluates export subsidies and subsidies contingent upon domestic over imported goods as prohibited subsidies[179], the Agreement on Agriculture is comparatively flexible towards such regulations. Accordingly, rather than a theoretical discussion, determining the scope of application of these two agreements regarding agricultural products does have practical importance.

The essential rule regarding the relationship between the Agreement on Agriculture and the SCM Agreement is stated in Article 21.1 of the Agreement on Agriculture. This provision stipulated that the provisions of the other Annex 1A Agreements (including the SCM Agreement) shall apply subject to the provisions of the Agreement on Agriculture. Interpreting this provision, the Appellate Body in the *US – Upland Cotton* opined that except to the extent that the Agreement on Agriculture contains specific requirements dealing with the same matter, other Annex 1A Agreements are also applicable[180]. Accordingly, to determine the scope of application of the other Annex 1A Agreements including the SCM Agreement, the specific provisions stipulated in the Agreement on Agriculture that are

[179] *See infra* Chapter 3.7.
[180] Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 532, WTO Doc. WT/DS267/AB/R, (adopted Mar. 21, 2005).

applicable to the case at hand, should be determined at first and only then, the possible application of the other agreements should be analyzed[181].

3.6.3. Core Principles of the Agreement on Agriculture

The Agreement on Agriculture put forward three critical obligations to the Members, which are also called "the three pillars" of the agreement[182]. These three pillars of the Agreement on Agriculture are as follows: (i) market access (Article 4), (ii) domestic support (Article 6), and (iii) export subsidies (Article 9).

Regarding market access, Members are obliged by the agreement to comply with two main requirements, to convert their non-tariff barriers such as quotas or embargoes with tariffs (tariffication) and reduce their tariffs within the determined time[183]. Tariffication is seen as a more transparent and negotiable form of a trade barrier since the other Members can objectively determine it. However, the tariffication under the Agreement on Agriculture was also criticized with the arguments that the developed countries circumvent their obligations with "dirty tariffication", which means interchanging their non-tariff barriers with excessively high-level tariff barriers[184]. Accordingly, the process of tariffication did not create its expected level of market access.

The second pillar of the Agreement on Agriculture, domestic support measures, has been at the center of the debates concerning food security. The Agreement on Agriculture categorizes domestic supports into two main categories, the support which has no or minimal distortive effect on trade (also called "Green Box" measures) and the support which distorts the trade (also called "Amber Box" measures). Domestic support measures that provide price support to the producers of agricultural products are considered distortive supports, and accordingly, they

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[181] Lorand Bartels, *The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System*, 50 J. WORLD TRADE 7 (2016) (discussing the complex relationship between the SCM Agreement and Agreement on Agriculture).
[182] YING CHEN, TRADE, FOOD SECURITY, AND HUMAN RIGHTS: THE RULES FOR INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS AND THE EVOLVING WORLD FOOD CRISIS 87 (1st edition ed. 2014).
[183] THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, (Patrick F.J. Macrory et al. eds.,2005).
[184] See Chen, *supra* note 182 at 90.

fall under the Amber Box. Amber Box measures are considered problematic, and such existing Amber Box measures are needed to be reduced. For the amount of reduction, aggregate measurement of support ("AMS") is taken into account[185].

Moreover, there is also a *de minimis* allowance for the domestic supports that fall under the Amber Box. While developed Members are allowed to provide domestic support up to 5% of their agricultural production, developing Members are able to provide domestic support up to 10%. On the other hand, Green Box measures which are defined in Annex 2 of the Agreement on Agriculture, are allowed without any limits if such measures comply with the requirements stipulated in Annex 2.

Along with the Amber Box and the Green Box categories, there are also Blue Box measures, which are also called the "amber box with conditions"[186]. If Members provide an Amber Box category domestic support to its producers with the condition that they shall limit their production, in other words, making their product less distortive, such domestic support is considered under the category of the Blue Box measures, which are currently allowed under the Agreement on Agriculture[187].

Other than the Amber, Green, and Blue Box categories, Article 6.2 of the Agreement on Agriculture also provides certain exemptions to the developing Members, which are also called S&D Box or Development Box categories.

The last pillar of the Agreement on Agriculture is related to the export subsidies regarding agricultural products. In accordance with Article 9 of the Agreement on Agriculture, Members are obliged to make reduction commitments regarding their export subsidies specified in their GATT Schedule of Concessions[188]. The remaining subsidies are deemed prohibited under Article 8 of the Agreement on

[185] The AMS is calculated by considering the 1986-1988 reference price levels. For the more information regarding the calculation of AMS, see Annex 3 to the Agreement on Agriculture.

[186]See Annex 3 of the Agreement on Agriculture. The AMS is calculated by considering the 1986-1988 reference price levels.

[187] See ¶ 5 of Article 6 of the Agreement on Agriculture (regulating Blue Box measures).

[188]The amount of reduction of agricultural export subsidies differs by the level of economic development of the Members. While the least developed countries are not obliged to make reductions, the minimum level of reduction obliged by the Agreement on Agriculture is different for developed and developing countries. *See Fairer Markets for Farmers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm (Last visited May 31, 2021) (demonstrating specific minimum reduction rates).

Agriculture. In the 10th WTO Ministerial Conference in Nairobi, both developed and developing Members decided to eliminate their existing export subsidies with different implementation periods[189]. It needs to be noted though that the international food aid programs essential to ending hunger and malnutrition on a global scale are exempted from such restrictions if they fulfill the conditions stipulated in the Nairobi Ministerial Declaration [190].

3.6.4. An Unresolved Public Health Issue of the Agreement on Agriculture – Public Stockholding

Many countries, especially developing ones, make governmental purchases of agricultural products from their domestic producers and then distribute them for free or below market price to their needed citizens. Such programs are called public stockholding programs. They are essential to provide food to the needed people, balance the price volatility of the primary agricultural products and support sustainable agricultural production[191].

Except for an exception regarding rural development, the Agreement on Agriculture categorizes public stockholding programs under the Amber Box category when they include purchases from producers at fixed prices[192]. Accordingly, Members may only execute public stockholding programs if the number of such programs does not exceed the *de minimis* limit (10% of the value of production for developing countries)[193]. However, if Members had ongoing public stockholding programs before the Uruguay Round negotiations, their allowed limit can be above 10% if they accept to reduce their domestic support[194]. Before the Uruguay Round

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[189] *See* art. 6-11 at World Trade Organization, Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/DEC (2015).
[190] *Id.* at 23-32.
[191] *See generally Public Stockholding for Food Security Options for Small Developing Countries and LDCs Towards a Permanent Solution at MC11*, 2 CUTS INT'L GENEVA, http://www.cuts-geneva.org/pdf/MC11Notes%20-%20Public%20Food%20Stockholding.pdf (May 30, 2021).
[192] *See Food Security*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/agric_e/food_security_e.htm (Last visited May 31, 2021)
[193] *See supra* Chapter 3.6.3 (discussing de minimis level under the Amber Box).
[194] *See* The Bali Decision on stockholding for food security in developing countries, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm#technicalnotem (Last visited May 31, 2021).

negotiations, most of the developing countries did not have a significant amount of public stockholding programs since the price of the agricultural products was relatively cheaper. Therefore, they did not give commitments to reduce their domestic supports in relation to the public stockholding programs. As a result, most of the developed countries have benefited from higher limits since they had already had domestic support programs. Yet, most of the developing countries became subject to 10% *de minimis* limitation[195].

Therefore, the G33 group (a group of developing countries) led by India wanted to find a permanent solution to public stockholding by amending the Agreement on Agriculture to allow developing countries to support farmers who have low-income or insufficient resources[196]. This issue was discussed during the 9th WTO Ministerial Conference held in Bali, and although Members could not reach to find a permanent solution to the problem, Members have agreed to a temporary solution, which is to adopt a "peace clause" so that the Members could not challenge developing Members in relation with the certain public stockholding programs[197]. While the peace clause would stay in effect until Members reach a permanent solution, they failed to agree upon such a solution during the 11th WTO Ministerial Conference held in Buenos Aires, and the problem is still ongoing to date[198].

3.7. THE SCM AGREEMENT

The Members widely use subsidies to support various sectors, and Members consider subsidies as a tool for shaping and directing their economic and social policies. Such social policies may include various public health matters such as producing and innovating essential pharmaceutical products, providing food security, and protecting the environment. Besides, subsidies are also used to prevent

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[195] Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUMBIA J. ENVIRON. L. 433, 463 (2002).
[196] Committee on Agriculture, *Public Stockholding for Food Security Purposes*, WTO Doc. JOB/AG/27, (July 17, 2014).
[197] World Trade Organization, Ministerial Declaration of 7 December 2013, WTO Doc. WT/MIN(13)/38/, WT/L/913 (2013).
[198] *See* Agriculture Issues, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfagric_e.htm (Last visited May 31, 2021).

market failures. Especially for sectors such as renewable energy, where the capital investment costs disincentivize private investors, subsidization in various forms might be considered essential for the very existence of private investments. Since the SCM Agreement is the most comprehensive agreement regulating the subsidies within the WTO, its main principles and application of the GATT exception clauses to the SCM Agreement will be analyzed in this subchapter[199].

3.7.1. The Concept of Subsidy and its Regulation under the WTO System

Under the multilateral trading system, the concept of subsidy was first referred to in Article XVI of the GATT 1947. However, this Article had not laid down any comprehensive discipline regarding subsidies. Therefore, Members adopted the Tokyo Round Subsidies Code at the end of the Tokyo Round negotiations to elaborate on the existing regulations on the GATT 1947 regarding subsidies and countervailing duties. However, the Tokyo Round Subsidies Code was not perceived to be clear enough, and its rules on subsidies and countervailing duties were not deemed comprehensive either[200]. Therefore, a new agreement regarding subsidies and countervailing measures was negotiated during the Uruguay Round, and the SCM Agreement was adopted along with other covered agreements.

In accordance with Article 1.1 of the SCM Agreement, for a measure to be deemed as a subsidy, three elements must be fulfilled cumulatively: (i) There must be a financial contribution, (ii) the financial contribution should be made by a government or any public body within the territory of a Member and (iii) a benefit must be conferred. While these elements have been thoroughly analyzed by the legal scholars as well as the Panels and the Appellate Body, it will not be further analyzed within this study due to its limits.

[199] Note that while the SCM Agreement regulates two different yet relevant disciplines which are subsidies and countervailing duties, for the purposes of this study, only the discipline of subsidy will be analyzed in this thesis.
[200] Bossche & Zdouc, *Supra* note 56 at 772.

3.7.2. The Categories of Subsidies under the SCM Agreement

At the time of adoption, the SCM Agreement classified subsidies into three categories which are: (i) prohibited subsidies ("red light subsidies"), (ii) actionable subsidies ("yellow light subsidies"), and (iii) non-actionable subsidies ("green light subsidies")[201]. While the first two categories are still in force, the regulation regarding green light subsidies was provisionally adopted, and it expired on 31 December 1999[202].

Prohibited subsidies are regulated in Article 3 of the SCM Agreement. There are two types of prohibited subsidies, which are: (i) subsidies contingent upon export performance (Article 3.1 (a)) and (ii) subsidies contingent upon the use of domestic over imported goods (Article 3.1 (b)). Red light subsidies are prohibited since they are most likely to impact the global trade directly and adversely affect other Members.

Actionable subsidies are not prohibited like the red light subsidies, yet they are subject to challenge if they cause adverse effects on other Members' interests. Moreover, they need to be specific within the meaning of Article 2 of the SCM Agreement in order to be challenged[203]. While actionable (yellow light) subsidies are not as trade distortive as prohibited (red light) subsidies, they can either be challenged via WTO dispute settlement mechanism or be subject to countervailing actions by other Members.

The final category of the subsidies under the SCM Agreement is the non-actionable subsidies. At the time, non-actionable subsidies had provided Members with a policy space that would allow them to provide subsidies towards their (i) R&D activities, (ii) disadvantaged regions, and (iii) environmental adjustment costs[204]. If such subsidies had met the conditions of Article 8.2 of the SCM Agreement, they

[201] These categorization of subsidies is also known as the "traffic light approach", indicating the different evaluations of these categories under the SCM Agreement.
[202] *See* art. 31 of the SCM Agreement. The provisional application of the non-actionable subsidies (Article 8) is stipulated in Article 31 of the SCM Agreement.
[203] Note that unlike the actionable subsidies, prohibited subsidies are deemed to be specific and no further specificity analysis is made for the determination of such subsidies.
[204] *See* art. 8.2 of the SCM Agrement.

were allowed. It was not possible to challenge these subsidies before the WTO dispute settlement system or apply countervailing duties by the other Members. However, the green light category was provisional, and since the SCM Committee could not reach out to a mutual solution regarding the destiny of this category, it ceased to exist on 31 December 1999[205].

3.7.3. Possible Application of Article XX of the GATT 1994 to the SCM Agreement

Following the expiry of Article 8 of the SCM Agreement, which regulates non-actionable subsidies, the policy space of the Members regarding their R&D, regional development, and most importantly, environmental policies became impaired. In the absence of non-actionable subsidies, most of the environmental subsidies have been under threat of possible countervailing measures or even became vulnerable to WTO disputes. Yet, limiting the ability of the Members to find solutions to the environmental problems would create significant problems.

The problem of climate change is growing steadily, and the vast majority of WTO Members have made commitments to reduce their carbon emissions under international agreements. While Members also have other options to mitigate climate change by establishing carbon border adjustment schemes or emissions trading systems, environmental subsidies are seen as easier to implement for the Members[206]. Therefore, limiting Members' ability to impose environmental subsidies may also damage the global effort to climate change mitigations and even impair Members' obligations arising from the MEAs.

Since the balance in the SCM Agreement between economic liberalization and the protection of certain non-economic concepts, including the environment, got struck

[205] Mark Wu, *Re-examining 'Green Light' Subsidies in the Wake of New Green Industrial Policies* 3-4, E15INITIATIVE.ORG http://e15initiative.org/wp-content/uploads/2015/07/E15_Industrial-Policy_Wu_FINAL.pdf (last visited May 31, 2021) (establishing why Members could not reach an agreement to find a mutual solution in detail).

[206] *See* Luca Rubini, *Ain't wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform*, 15 J. INT'L ECON. L. 525, 531 (2012); see in general, Rambod Behboodi & Christopher Hyner, *Countervailing Climate Change: Emissions Trading and the SCM Agreement*, 50 GEO. J. INT'L L. 599 (2019).

with the expiry of Article 8, there has been a wide discussion about finding legal solutions to this problem, including the possible application of Article XX of the GATT 1994 to the SCM Agreement. In the following paragraphs, arguments in favor and against the applicability of Article XX of the GATT 1994 to the SCM Agreement and the approach adopted by the Appellate Body towards the matter are briefly explained, and the view of the author regarding this issue is also provided.

While the SCM Agreement does not contain a preamble in itself, the preamble of the WTO Agreement explicitly recognizes the principle of sustainable development and the protection and preservation of the environment[207]. Moreover, Articles VI and XIV of the GATT 1994 that the SCM Agreement derives from are also subject to Article XX of the GATT 1994. Therefore, if the current text of the SCM Agreement is interpreted in a black-letter law style and no escape clause is provided for the protection of the environment, then the SCM Agreement would be considered to be in conflict with the GATT 1994 where Members have been provided with the policy space to protect their non-societal goals. Such conflict would undermine the "single undertaking" approach of the WTO Agreement[208]. As a potential solution to this problem, it can be argued that the SCM Agreement may be perceived as a *lex specialis* to the GATT 1994 provisions on subsidies and countervailing duties and therefore, the general exception clause of the GATT 1994 can also be invoked by the Members as a defense[209]. Through the application of Article XX of the GATT 1994, it would be possible to reinstate the balance of the SCM Agreement and provide the Members policy space to determine their domestic environmental policies.

On the other hand, opposing views argue that the text of Article XX of the GATT 1994 starts with the expression "*Nothing in this Agreement…*" and therefore, this

[207] *See* the first recital of the WTO Agreement.
[208] Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 21, WTO Doc. WT/DS98/AB/R, (adopted Jan. 12, 2000) (Explaining the concept of single undertaking).
[209] Robert Howse, *Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis*, 17 INT'L. INST. SUST. DEV. https://www.iisd.org/pdf/2009/bali_2_copenhagen_subsidies_legal.pdf (last visited May 31, 2021).

Article is only applicable to the provisions of the GATT 1994 only[210]. Moreover, according to their view, Members had desired to make Article XX of the GATT 1994 applicable to the SCM Agreement, they could have inserted a clause into the SCM Agreement just like the way they had done in several other covered agreements such as the TRIMS Agreement[211]. A possible application of Article XX of the GATT 1994 to the SCM Agreement by the WTO adjudicating bodies would go against the Members' will, and therefore, such an approach might create systemic implications[212]. Considering the current crisis in the WTO dispute settlement system concerning the blockage of the functioning of the Appellate Body[213], it is plausible that such a controversial interpretation of Article XX of the GATT 1994 would even deepen the systemic problems of the WTO system[214].

One of the reasons for the unresolved discussion about the applicability of Article XX of the GATT 1994 to the SCM Agreement stems from the approach that the Appellate Body adopted towards this matter. The Appellate Body abstained from making definitive interpretations regarding the applicability of Article XX to the agreements other than the GATT in relation to the disputes regarding China's Accession Protocol[215]. As such, as it stands, there is no clear stance that one can find within the WTO jurisprudence.

Considering the opposing views and in the absence of clear guidance by the WTO adjudicating bodies, it is difficult to determine the applicability of Article XX of

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[210] *See* Bradly J. Condon, *Disciplining Clean Energy Subsidies to Speed the Transition to a Low-Carbon World* 51 J. WORLD TRADE 675 (2017).

[211] Agreement on Trade-Related Investment Measures art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organizaiton, Annex 1A, 1868 U.N.T.S. 186 [Hereinafter TRIMS] ("All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement").

[212] *See* Rubini, *supra* note 206 at 562

[213]Andrew Walker, *Trade disputes settlement system facing crisis*, BBC NEWS, https://www.bbc.com/news/business-50681431 (Last visited Jan 21, 2021)

[214] *See* Report on the Appellate Body of the World Trade Organization, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Feb. 2020) https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (last visited June 2, 2021) (composes United States' arguments in relation to the Appellate Body's "judicial activism" and the reasons that led to the blockage of appointment of the Appellate Body's members).

[215]*See* e.g.Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶5.74, WTO Doc. WT/DS431/AB/R, (adopted Aug. 29, 2014).

the GATT 1994 to the SCM Agreement. Yet, according to this author's view, mindful of the growing concerns regarding possible catastrophic results of climate change, limiting Members' ability to mitigate global warming by imposing environmental subsidies does neither seem to be logical nor sustainable. Members have explicitly recognized the importance of the protection and the preservation of the environment in the preamble of the WTO Agreement and the Appellate Body in *US-Shrimp*, also referring to this preamble, opined that the text of Article XX(g) of the GATT 1994 must be read in light of the contemporary concerns of the Members about the protection and conservation of the environment[216]. While there may have political consequences to do so, WTO adjudicating bodies should also consider applying this approach to the applicability of Article XX of the GATT 1994 to the SCM Agreement. Even if such interpretation may not be the perfect solution considering the specific structure and underlying concerns of the SCM Agreement, it would nonetheless be a better option compared to a situation where Members' ability to protect the environment in times of a global environmental crisis is undermined.

It should be remembered that Article XX of the GATT 1994 does not provide the Members with a free pass to take any measure they wish in the name of protecting the environment or other societal values stipulated in its subparagraphs. On the contrary, the interpretation of this Article is quite strict and considering the rich jurisprudence found in this matter, one can observe that Members were able to justify their measures under this Article only once to this date[217]. Therefore, this author does not find it realistic to be concerned about the prospect of extending the application of Article XX of the GATT 1994 as argued by the opponents that such an application would help to defend the protectionist and distortive subsidies under the guise of protecting the environment.

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

CHAPTER FOUR

GATT EXCEPTION CLAUSES AND PUBLIC HEALTH MEASURES

4.1. OVERVIEW

For justifying otherwise GATT-inconsistent public health measures, two different exception clauses, namely Article XX and Article XXI of the GATT 1994, can be invoked by a Member. The general exception clause of the GATT 1994, Article XX, allows Members to justify their measures for the protection of various societal values, including the protection of human, animal and plant life or health under subparagraph (b) and the protection of the environment under subparagraph (g), under specific obligations stipulated in each of these subparagraphs. Moreover, such measures should also pass the requirements of the introductory clause of Article XX, also known as the "*chapeau*".

Other than Article XX of the GATT 1994, Members may also invoke the security exception clause of the GATT 1994, Article XXI, in order to justify their public health measures. While invoking the security exception clause is rather unconventional until recently and invocation of this clause for the protection of public health never occurred until this date, difficult set of obligations stipulated by the Appellate Body especially with regards to subparagraph (b) of the GATT 1994 might divert Members to invoke the security clause exception with regards to their public health measures in the near future.

4.2. THE GENERAL EXCEPTION CLAUSE OF THE GATT 1994 – ARTICLE XX

In order to protect various societal values including the protection of public health, governments frequently take certain measures to achieve this goal. Yet, as it can be understood from Chapter 2 of this study, such measures may occasionally restrict trade and as such violate several provisions such as Article I, III, and XI of the GATT 1994. In order not to find any violation of the GATT 1994 with regards to measures that are taken to protect legitimate values such as the protection of public health, Article XX was introduced into the Agreement by the contracting parties.

As a general exception clause, Article XX can be used as a justification for certain measures that can otherwise be found inconsistent with the other provisions of the GATT 1994, provided that they fulfill the requirements of Article XX. In this chapter of this study, a thorough analysis of Article XX of the GATT 1994 and its relation with the protection of public health will be provided.

4.2.1. Nature and the Scope of the Article XX of the GATT 1994

Article XX of the GATT 1994 aims at creating a balance between Members' right to pursue legitimate objectives and to achieve the main objective of the GATT 1994, which can be described as a significant reduction of tariffs and other barriers to international trade, as well as the elimination of discrimination in international trade[218]. Accordingly, while Article XX provides Members with escape clauses from their obligations under the GATT 1994 through its subparagraphs (a) to (j) for certain measures, it also ensures to verify through its *chapeau* test whether such measures are taken with a disguised intention to protect and support their domestic production[219]. Note that the subparagraphs of Article XX of the GATT 1994 are formed in a *numerus clausus* manner, and therefore, it is not possible for the WTO adjudicating bodies to include any new societal value to be covered by the Article XX of the GATT 1994 except for those that are stipulated in subparagraphs (a) through (j). That being said, there is no discussion on whether the protection of public health falls within the scope of Article XX of the GATT 1994 or not, since its subparagraph (b) explicitly refers to the protection of human, animal, and plant life or health. Moreover and in accordance with the settled jurisprudence of the Appellate Body, environmental health measures such as the protection of clean air are also covered by with its subparagraph (g) of the Article XX of the GATT 1994[220].

As to its scope, the introductory clause of Article XX of the GATT 1994 states that "***Nothing*** *in this Agreement shall be construed to prevent the adoption or*

[218] *See* the preamble of the GATT.
[219] US—Shrimp Appellate Body Report, ¶ 158-159.
[220] US—Gasoline Appellate Body Report, at 21.

enforcement by any contracting party of measures…".[221] Accordingly, it is obvious that the scope of the general exception clause of the GATT 1994 is very broad, and it may justify any inconsistencies of any GATT 1994 provision. Therefore, any measure that is taken to protect public health may be justified regardless of the number or sort of the GATT 1994 obligations if they fulfill the conditions of Article XX of the GATT 1994. Note that while there is no debate regarding the applicability of Article XX of the GATT 1994 to the provisions of the GATT 1994, its applicability to the other WTO Agreements must be analyzed on a case-by-case basis[222].

4.2.2. Extraterritorial Application of Article XX of the GATT 1994

In order to understand the actual protection provided by Article XX of the GATT 1994 for public health and environmental health measures, the territorial scope of this Article must be analyzed. The question about its extraterritorial scope arises if a Member imposes a measure that attempts to regulate certain economical activities within the territory of another Member. For instance, imposing a measure that aims at changing the process and production methods of a certain good in another country to specifically protect a societal value of that country can be deemed as a purely extraterritorial activity.

As a concrete example, considering the serious adverse impacts of the cyanide to the local people and the environment, if a Member imposes an import prohibition on gold and golden products of another country due to hazardous mining and leaching of the gold production[223] in that country, both the protected values at stake (public health and environment) and the targeted behavioral change would be outside of the territory of the imposing Member. On the other hand, a Member may also impose a measure that aims at changing the process and production methods in the territory of another Member to protect a societal value that has transboundary

[221] *See* art. XX of the GATT 1994 (emphasis added).
[222] *See e.g., supra* Chapter 3.7.3. (discussing applicability of the GATT Article XX to the SCM Agreement).
[223] *See* Jan G. Laitos, *Cyanide, Mining, and the Environment*, 30 PACE ENVTL. L. REV. 869 (2013) (providing a comprehensive study regarding the role of cyanide in mining activities and its adverse impacts to the public health and environment).

and/or global effects. For instance, imposing a carbon border adjustment measure for certain carbon-intensive products would target changing the process and production methods in another country in order to mitigate the adverse effects of climate change in its own territory. In the latter example, the extraterritorial nature of the measure may not be seen as clear as the former one since while the targeted behavioral change is outside of the territory of the imposing Member, there would be a territorial connection with the imposing Member and the protected values to the certain extent[224]. Accordingly, the question about how to interpret the territorial scope of Article XX may affect the legality of different types of measures.

It must be noted that the territorial scope of Article XX of the GATT 1994 can still be considered as an unchartered territory since the WTO adjudicating bodies preferred not to make a conclusive finding on this issue. In *US – Shrimp* where the measure at issue was an import ban on shrimps harvested via methods that resulted in the death of sea turtles, the Appellate Body stated that while they "do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g)"[225], they refrained from making a definitive comment on the territorial scope of Article XX of the GATT 1994. That being said, the Appellate Body determined a "sufficient nexus" between the endangered migratory sea turtles and the US in the case at hand[226].

With regards to the measures that protect a societal value such as the public health within the territory of another Member, this author takes the view that it is unlikely to justify such measures under Article XX of the GATT 1994 due to several reasons. To begin with, such an intervention to domestic policies of another country would undermine the sovereignty of that country to regulate its policies within its borders. Moreover, it would be extremely difficult (if not impossible) to establish the sought link between the measure and its pursued objective absent any connection with the

[224] Bradley J Condon, Trade, Environment and Sovereignty: Developing Coherence Between WTO Law, International Environmental Law and General International Law 152-153 (2004) (Ph.D. Dissertation at Bond University) (https://research.bond.edu.au/en/studentTheses/trade-environment-and-sovereignty-developing-coherence-between-wt).
[225] US Shrimp—Appellate Body Report, ¶ 121.
[226] *Id.*

imposing country. For instance, as will be tackled in Chapter 4.2.5 of this thesis, for a measure to be justified under Article XX(g) of the GATT 1994 and other requirements, a measure must be made effective in conjunction with the domestic production or consumption. However, for instance, in the given example above, it is not possible to see any adverse impact on the economy of the imposing country since the aforementioned gold mining activities occur outside the imposing country's territory.

While the aforementioned scenario is considered to be outside the scope of application of Article XX of the GATT 1994 exception, the answer could differ with respect to measures that aim at changing the process and production methods of another country in order to protect transboundary or global societal problems such as imposing a carbon tax. Unlike the first scenario, albeit the desired process and production methods change occurs outside of the territory of the imposing country, the adverse societal effects of specified process and production methods can also be observed within the territory of the imposing country. Therefore, it is plausible to claim that a "sufficient nexus" would exist between the protected interest and the imposing country. Accordingly, such measures can be considered within the scope of the Article XX of the GATT 1994[227].

4.2.3. Sequence of Article XX of the GATT 1994

In order to determine whether a measure fulfills the conditions of Article XX of the GATT 1994, WTO adjudicating bodies first analyze whether it falls within the scope of one of its subparagraphs (a) to (j) and if the answer to this question is affirmative, then the *chapeau* test is applied to the measure at issue. As the Appellate Body opined in *US – Gasoline*, this sequence of analysis is not a random choice, it rather is a necessity[228]. This is because it is almost impossible to make a chapeau analysis which should be focused on determining whether there is an abuse

[227] *See* Joel P. Trachtman, *WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxe*s, 481 RESOURCES FOR FUTURE DISCUSSION, https://www.rff.org/publications/working-papers/wto-law-constraints-on-border-tax-adjustment-and-tax-credit-mechanisms-to-reduce-the-competitive-effects-of-carbon-taxes/ (Last visited May 31, 2021).
[228] US—Gasoline Appellate Body Report, at 17.

or misuse of the exemptions stipulated in the subparagraphs of Article XX of the GATT 1994 without first identifying and examining the specific exceptions undermined by such abuse or misuse. Accordingly, such a sequence will also be followed within this study, and relevant subparagraphs of Article XX of the GATT 1994 with regards to the protection of public health will be analyzed in the following subchapters.

4.2.4. Article XX(b) of the GATT 1994

Subparagraph (b) of Article XX of the GATT 1994 can be deemed as the most relevant and therefore crucial subparagraph of this Article with regards to the protection of public health. In accordance with the text of Article XX(b) of the GATT 1994, measures that are necessary to protect human, animal, or plant life or health can be justified. Consequently, many measures that are related to the protection of public health such as the accumulation of waste tyres[229], reduction of the smoking of cigarettes[230], and banning carcinogenic products[231] were analyzed under Article XX(b) of the GATT 1994 analysis. Until this date, Article XX(b) defense has been invoked in eleven disputes.

4.2.4.1. Scope of Application of the Article XX(b) and its Interrelation with Article XX(g)

While Article XX(b) of the GATT 1994 covers measures with regards to the protection of human, animal, or plant life or health in general, its subparagraph (g) may also justify certain measures that are adopted to protect public health, especially those that are designed to protect environmental health. Moreover, while the measures taken to mitigate climate change may be justified under Article XX(g) of the GATT 1994, it may also seem plausible to justify such measures under its subparagraph (b) since the adverse effects of the climate change also jeopardize

[229] *See* Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R, (adopted Dec. 17, 2007) [Hereinafter Brazil—Retreaded Tyres Appellate Body Report].
[230] *See* Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/AB/R, (adopted July 15. 2011).
[231] See *supra* note 6.

human, animal and plant life or health. In this regard, the Panel in *Brazil – Retreaded Tyres* stated that environmental policy measures can be justified under Article XX(b) of the GATT 1994 on the condition that they specifically address risks to human, animal, or plant life or health and not just the environment in general[232].

Although it is possible to argue that there is a simple overlap between the two subparagraphs and both of them lead to same objective, that is to provisionally justify an otherwise GATT inconsistent measure[233], a deeper analysis of these two subparagraphs necessitates making a distinction between the scope of application of these two subparagraphs. While there is no restriction for a Member to invoke several paragraphs of Article XX of the GATT 1994 to justify a certain measure, the differentiated language used in various subparagraphs led the WTO adjudicating bodies to seek a different degree of relationship between the measure and its pursued policy objective[234]. More specifically, while Article XX(b) of the GATT 1994 stated that a measure must be "necessary" to protect human, animal, and plant life and health, Article XX(g) states that a measure must be "relating to" the conservation of exhaustible natural resources.

For the interpretation of the different terms used in the different subparagraphs, the Appellate Body in *Korea – Various Measures on Beef* assimilated these differences to a continuum where on the one end of the continuum there is an indispensable connection; and on the other, there is a simple contribution of the measure to the pursued policy objective[235]. While the term "necessary" is considered as significantly closer to the pole of "indispensable"[236], referring to the Panel Report in the 1987 *Herring and Salmon* case, the Appellate Body in *US – Gasoline* noted that the term "relating to" has a lower level of scrutiny than the term "necessary"[237].

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[232] Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.46, WTO Doc. WT/DS332/AB/R, (adopted Dec. 17, 2007) [hereinafter Brazil—Retreaded Tyres Panel Report].
[233] Note that a measure must also pass the chapeau test in order to be justified under Article XX of the GATT.
[234] US—Gasoline Appellate Body Report, at 17-18.
[235] Korea—Beef Appellate Body Report, ¶ 161.
[236] *Id.*
[237] US—Gasoline Appellate Body Report, at 18.

Accordingly, if a measure is considered within the scope of both Article XX(b) and XX(g) of the GATT 1994, any party who invokes an Article XX defense would logically and almost always rely on Article XX(g) because the term "relating to" sets a lower threshold compared to the term "necessary" under Article XX(b). Considering the obligation of a treaty interpreter not to read an agreement in a manner that would leave part of its text redundant and inutile[238], it is arguable that the overlap between Article XX(b) and XX(g) should be narrowed to the highest extent possible.

In this vein, scholars have proposed to make a distinction based on the location of the environmental concern in order to determine which subparagraph of Article XX of the GATT 1994 would apply to a certain measure[239]. Accordingly, internal measures such as an SPS measure should fall under the scope of subparagraph Article XX(b), and measures that have global or transnational effects must be analyzed under Article XX(g) of the GATT 1994. However, while the transnational application of Article XX(g) is implicitly accepted by the Appellate Body in *US – Shrimp*[240], WTO adjudicating bodies have not clearly analyzed this issue to this date.

4.2.4.2. Elements of Article XX(b) of the GATT 1994

For a measure to be provisionally[241] justified under Article XX(b) of the GATT 1994, two elements must be satisfied: (i) the measure in question must be designed to protect human, animal, or plant life or health; and (ii) the measure must be necessary to protect human, animal or plant life or health[242]. While the first element of the test is comparatively more clear and has not caused significant interpretative issues, determining the necessity of a measure has been one of the most discussed

[238] *Id.* at 23.
[239] *See* Bradley J. Condon, GATT Article XX and Proximity-of-Interest: Determining the Subject Matter of Paragraphs B and G, 9 UCLA J. INT'L L. & FOREIGN AFF. 137 (2004).
[240] US—Shrimp Appellate Body Report, ¶ 133.
[241] *See supra* Chapter 4.2.1.
[242] Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WT/DS2/AB/R, (adopted May 20, 1996) [hereinafter US—Gasoline Panel Report].

issues under Article XX of the GATT 1994. These two elements will be separately analyzed in the following subchapters.

4.2.4.2.1. Interpretation of "Designed to Protect Human, Animal or Plant Life or Health" under Article XX(b) of the GATT 1994

The first element of Article XX(b) test requires a measure to be designed to protect human, animal, or plant life or health to be justified under this subparagraph. In other words, the policy objective of a measure must be to protect human, animal, or plant life or health in order to be deemed eligible for Article XX(b) justification[243].

In order to determine the true policy objective of the measure, the Appellate Body in *EC – Asbestos* stated that a Panel should take into account a Member's articulation of the objective pursued by the measure at issue; however it would not be bound by that articulation[244]. For instance, in China – Raw Materials, China argued that the export restrictions to certain raw materials at issue were part of a comprehensive environmental policy to reduce pollution and protect Chinese people's health[245]. However, the Panel was not satisfied with this justification and consequently opined that China was unable to substantiate its defense that the measures at issue were part of such comprehensive environmental policy. Therefore, it is clear that while the self-assessment of a Member regarding the policy objective of the measure is taken into account by the WTO adjudicating bodies, they are not considered as a definitive factor under this element of Article XX(b).

While the subjective articulation of a Member is not conclusive for the assessment of the policy objective, the Appellate Body in *EC – Seals* stated that to determine the objective pursued by the measure at issue, a panel must be taken into account all evidence put before in this regard, including the text of statutes, legislative

[243] EC—Tariff Preferences Panel Report, ¶ 7.198-7.199.
[244] EC—Seals Appellate Body Report, ¶ 5.144.
[245] Appellate Body Reports, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.498, WTO Doc. WT/DS394/AB/R, (adopted Jan. 30, 2012) [Hereinafter China—Raw Materials Panel Report].

history and other evidence regarding the structure and operation[246]. Therefore, it can be said that for a measure to fulfill the first element of Article XX(b) of the GATT 1994, it must objectively be designed to protect human, animal, or plant life or health.

4.2.4.2.2. Evolving History of the Necessity Test

In accordance with the second element of Article XX(b) analysis, a measure must be "necessary" to protect human, animal, or plant life or health. As it was previously mentioned[247] , the term "necessary" seeks for a comparatively higher degree of connection between the measure at issue and legitimate policy objectives stipulated in the subparagraphs of Article XX of the GATT 1994. However, it has been a complex issue to create a method to determine whether a measure is necessary or not. In this regard, even the Appellate Body has revisited its interpretation of the term "necessity" over the years.

The concept of necessity under Article XX of the GATT 1994 was firstly analyzed by the WTO adjudicating bodies within the context of its subparagraph XX(d)[248]. The GATT Panel in the *US – Section 337 of the Tariff Act of 1930* interpreted the term "necessary" in a dispute between US and EC about patent rights protection. The GATT Panel stated that in order to determine a measure as "necessary", there must be no alternative measure that could reasonably be expected to be employed and which is not inconsistent with other GATT provisions[249]. This method of focusing on the alternative (less trade-restrictive) measures were followed by the WTO adjudicating bodies until the Appellate Body ruling in *Korea – Various Measures on Beef* dispute, again in the context of Article XX(d) of the GATT[250]. While this report will not be further discussed under Article XX(b), it suffices to

[246] EC—Seals Appellate Body Report, ¶ 5.144.
[247] *See supra* Chapter 4.2.4.1.
[248] Note that Article XX(a) and XX(d) also use the term "necessary".
[249] GATT Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, WTO Doc. L/6439-36S/345, (adopted Nov. 7, 1989).
[250] Korea—Beef Appellate Body Report, ¶ 159-186.

point out that the test of determining a less trade-restrictive alternative measure has been supplemented with a new balancing analysis.

In the context of Article XX(b) of the GATT 1994, the Appellate Body in *Brazil – Retreaded Tyres* applied this new approach for the first time while interpreting the term "necessary". The dispute had arisen due to the import ban applied by Brazil on retreaded tyres to prevent dengue fever and malaria diseases caused by the accumulation of waste tyres. The Appellate Body opined that for a measure to be necessary, a panel must make a holistic weighing and balancing analysis considering the relevant factors, particularly; (i) importance of the interests or values at stake; (ii) the extent of the contribution to the achievement of the measure's objective; and (iii) its trade restrictiveness[251]. If such analysis leads to a preliminary decision that the measure is necessary, to confirm this determination, then the measure must be compared with less trade-restrictive possible alternatives that provide an equivalent contribution to the objective of the measure. If no less trade-restrictive alternative that provides an equal contribution to the achievement of the measure's objective can be found, then the measure is deemed to be "necessary".

4.2.4.2.3. Analysis of the Relevant Factors of the Weighing and Balancing Test Under Article XX(b) of the GATT 1994

With regards to the first factor that is the importance of the interests or values at stake, the Appellate Body emphasized that the more the societal value pursued by the measure at issue is important, the easier it is to consider such measure as "necessary" under Article XX(b) of the GATT 1994[252]. Mindful of this approach, we note the Appellate Body's finding in Brazil – Retreaded Tyres, where the Appellate Body has considered the protection of human life and health against diseases as "vital and important to the highest degree"[253]. In the same vein, the Panel

[251] Brazil—Retreaded Tyres Appellate Body Report, ¶ 178.
[252] EC—Asbestos Appellate Body Report, ¶ 172.
[253] Brazil—Retreaded Tyres Appellate Body Report, ¶ 179.

in *Indonesia – Chicken* opined that the protection of human health was of the highest importance[254].

Moreover, the protection of the environment was also considered as important by the Appellate Body in *Brazil – Retreaded Tyres* under Article XX(b) of the GATT 1994[255]. Similarly, in a finding not reviewed by the Appellate Body, the Panel in *Brazil – Taxation* also opined that the reduction of carbon emissions was of high importance[256].

Following the WTO adjudicating bodies' relevant jurisprudence in relation to the first factor of the necessity test, it is now cleared that they attribute utmost importance to the protection of public health. Similarly, the protection of the environment, and especially the protection of environmental health is also deemed to be rather important by the WTO adjudicating bodies.

As for the second factor of the necessity test, namely the contribution of the measure to the achievement of the measure's objective, the Appellate Body in *Brazil – Retreaded Tyres* stated that such contribution exists when there is a genuine relationship of ends and means between the pursued objective and the measure at hand[257]. In order to assess this level of contribution, the Appellate Body stated that the nature, quality, and quantity of a measure could be taken into account. The Appellate Body went on to opine that a panel should enjoy a certain margin of discretion to determine the appropriate methodology to be used.

With regards to the protection of human life or health, the determination of the appropriate methodology gave rise to controversy during the settlement of the *EC – Asbestos* dispute[258]. In its capacity as the complainant in this dispute, Canada argued that chrysotile asbestos poses an only occupational risk and for some "do-

[254] Panel Report, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, ¶ 7.225, WTO Doc. WT/DS484/R, (adopted Nov. 22, 2017) [Hereinafter Indonesia—Chicken Panel Report].
[255] *Id.*
[256] Panel Report, *Brazil—Certain Measures Concerning Taxation and Charges*, ¶ 7.914-7.916, WTO Doc. WT/DS472/R, (adopted Aug. 30, 2017).
[257] Brazil—Retreaded Tyres Appellate Body Report, ¶ 145.
[258] *See supra* Chapter 2.3.3.

it-yourself enthusiasts". Accordingly, Canada argued that instead of implementing a total ban, imposing less trade-restrictive measures such as the controlled use of chrysotile asbestos could have been chosen by the respondent[259]. However, the Appellate Body rejected the practice of quantifying the risk to human life or health and instead opined that a risk towards human life or health might be evaluated either in quantitative or qualitative terms[260]. In the same vein, the Appellate Body in *Brazil – Retreaded Tyres* took the view that the same line of reasoning also applies to the analysis of the level of contribution, and therefore such an analysis can be made either in quantitative or qualitative terms[261].

Following the determination of the appropriate methodology to be used to determine the contribution made by the measure to the achievement of the measure's objective, a panel must assess the evidence brought by the responding party to assess the level of contribution[262]. In other words, the responding party bears the burden of proof to show the contribution of the measure to the desired objective. However, in some cases, the contribution of a measure to the pursued objective may not reveal itself in the short term. For instance, the contribution of a measure that is taken to mitigate climate change may not be observable for many decades because even the danger itself does not reveal its full adverse impact in the short term. Moreover, although imposing a ban on the exportation of certain wild animals might not directly affect public health in the short term, since such animals may cause deadly infectious outbreaks in the future, as they are presumed to cause the recent COVID-19 pandemic[263], the contribution of such measures to the protection of public health could be deemed quite substantial.

The Appellate Body in *Brazil – Retreaded Tyres* addressed this problem and stated that the measures taken to mitigate the effects of global warming and climate

[259] EC—Asbestos Panel Report, ¶ 3.495-3.496.
[260] EC—Asbestos Appellate Body Report, ¶ 167.
[261] Brazil—Retreaded Tyres Appellate Body Report, ¶ 146.
[262] *Id*, at ¶ 151.
[263] Dina Fine Maron, *'Wet Markets' Likely Lounched The Coronavirus. Here's what You Need To Know*, NAT. GEO., https://www.nationalgeographic.com/animals/2020/04/coronavirus-linked-to-chinese-wet-markets/ (last visited Apr. 15, 2021).

change, as well as the preventive actions to decrease the incidence of diseases, may demonstrate themselves after a certain period and therefore they can only be assessed with the benefit of time[264]. In other words, while the WTO adjudicating bodies seek objective evidence for the determination of the level of contribution of a measure, they do not necessitate for certain measures to manifest themselves instantly.

The third and final factor of the necessity analysis is the trade restrictiveness of the measure at issue. While a more trade-restrictive measure becomes less likely to be necessary, it should be noted that the contemporary necessity analysis established by the WTO adjudicating bodies makes a holistic weighing and balancing operation by putting all the variables of the equation together and evaluating them in relation to each other[265]. Therefore, if other variables such as the contribution made by the measure to the achievement of the measure's objective and/or the importance of the protected values at stake enable to do so, even imposing extremely trade-restrictive measures can be considered necessary under Article XX(b) of the GATT 1994. In this vein, the WTO adjudicating bodies in both *EC – Asbestos*[266] and *Indonesia – Chicken*[267] that highly trade-restrictive measures were indeed necessary because of the specific other factors found in each dispute.

4.2.4.2.4. Interpretation of the term "Reasonably Available Alternatives" under the Necessity Test

Under the contemporary application of the necessity test, after applying the weighing and balancing test for the determination of necessity, if such analysis *prima facie* manifests that the measure at issue is necessary within the meaning of Article XX(b) of the GATT 1994, the measure at issue must be compared with possible less trade-restrictive alternatives that provide an equivalent contribution to the objective of the measure. It must be noted that while the burden of proof rests,

[264] Brazil—Retreaded Tyres Appellate Body Report, ¶ 151.
[265] Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.76, WTO Doc. WT/DS461/AB/R, (adopted June 22, 2016).
[266] Indonesia—Chicken Panel Report, ¶ 7.227.
[267] EC—Asbestos Appellate Body Report, ¶ 172-175.

in general, with the respondent party under Article XX of the GATT 1994, the burden of proof to demonstrate an alternative measure under the necessity test lies on the complainant party[268].

In relation to the alternative measures, the Appellate Body in *EC – Asbestos* stated that Members have the right to determine the level of protection of health that they deem appropriate[269]. In other words, WTO adjudicating bodies do not have any authority to evaluate the selected level of protection by a Member with regards to its protected values at stake. Since Members have the policy space to determine their desired level of protection, any alternative measure must provide at least the same contribution as the measure at issue. Therefore, a Member cannot be expected to implement an alternative measure if that measure does not allow it to achieve its desired level of protection concerning the pursued policy objective.

Finally, an alternative measure must be reasonably available to be implemented. In this vein and referring to its findings in the *US – Gasoline*, the Appellate Body in *EC – Asbestos* stated that simple administrative difficulties do not make an alternative unreasonable[270]. However, to date, no clear definition has been made by the WTO adjudicating bodies in relation to the interpretation of the term "reasonably".

In conclusion, it is arguable that the necessity test is interpreted rather strictly by the WTO adjudicating bodies, and that a measure must pass both weighing and balancing test and the comparison with the possible alternatives to be deemed as "necessary" within the meaning of Article XX(b) of the GATT 1994. However, it must also be noted that measures that aim at protecting public health are likely to be less scrutinized under the weighing and balancing test because their vital importance is also recognized by the existing jurisprudence.

[268] Brazil—Retreaded Tyres Appellate Body Report, ¶ 156.
[269] EC—Asbestos Appellate Body Report, ¶ 168.
[270] EC—Asbestos Appellate Body Report, ¶ 170.

4.2.5 Article XX(g) of the GATT 1994

Article XX(g) of the GATT 1994 allows Members to deviate from their obligations stemming from other provisions under the GATT 1994 in order to protect the environment. However, as previously dealt with in this study[271], certain environmental measures may also be related to the protection of public health. For instance, any measure to mitigate carbon emissions could likely protect the environment, but at the same time, it could also protect public health since the adverse effects of climate change considerably harm human life and health as well. Therefore, along with Article XX(b), Article XX(g) of the GATT 1994 should also be analyzed to fully understand the public health justifications provided under the GATT 1994.

4.2.5.1. Elements of Article XX(g) of the GATT 1994

In accordance with the Panel finding not reversed by the Appellate Body in the *US – Gasoline,* the Panel opined that three elements must be satisfied for a measure to pass the Article XX(g) analysis: (i) the policy of the measure at issue must fell within the range of policies related to the conservation of exhaustible natural resources; (ii) the measure at issue must be related to the conservation of exhaustible natural resources and (iii) the measure at issue must be made effective in conjunction with the restrictions on domestic production or consumption[272].

4.2.5.1.1. Interpretation of "Conservation of Exhaustible Natural Resources" under Article XX(g) of the GATT 1994

As for the first element of Article XX(g) of the GATT 1994, the policy of the measure must be related to the "conservation of exhaustible resources". While at first glance, it is possible to think that the term "conservation of exhaustible resources" may not cover a wide range of policies, WTO adjudicating bodies preferred to interpret this term quite broadly. In this vein, the Appellate Body in *China – Raw Materials* interpreted the term "conservation" as "the preservation of

[271] *See supra* Chapter 1.2.
[272] US—Gasoline Panel Report, ¶ 44.

the environment"[273]. Moreover, the sovereignty of the Members on their development and conservation objectives is also recognized by the WTO adjudicating bodies under Article XX(g) of the GATT 1994[274].

Regarding the term "exhaustible natural resources", the Appellate Body in the *US – Shrimp* made an evolutionary interpretation, providing a wider policy space to the Members with regards to their environmental policy objectives. The Appellate Body opined that the term "exhaustible natural resources" must be interpreted in light of the contemporary concerns of the Members about their environmental concerns, keeping in mind the principle of sustainable development. Accordingly, it concluded that living species could be extinct mostly because of human activities and therefore, they should also be covered by the term "exhaustible natural resources".

In accordance with the wide interpretation of the term "conservation of exhaustible resources", it is possible to state that most of the measures that are taken to protect environmental health would fall within the scope of Article XX(b) of the GATT 1994. For instance, a measure taken to combat carbon emissions such as a carbon border adjustment mechanism would likely pass the first element of the Article XX(g) test[275]. This is because following the wide and evolutionary approach of the WTO adjudicating bodies, the atmosphere or the climate of the world should be deemed as an "exhaustible natural resource" within the meaning of Article XX(g) of the GATT 1994. In this vein, it must be reminded that the Appellate Body in *US – Gasoline* considered the clean air under the term "exhaustible natural resources" since the clean air is a natural resource that can be depleted[276]. Consequently, mindful of the existing jurisprudence of the WTO adjudicating bodies, measures

[273] China—Raw Materials Appellate Body Report, ¶ 355.
[274] Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶7.262-7.263, WTO Doc. WT/DS431/R, (adopted Aug. 29, 2014) [hereinafter China—Rare Earths Panel Report].
[275] Jennifer A. Hillman, *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?* CLIMATE & ENERGY POLICY, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3048&context=facpub (Last visited May 31, 2021) (assuming that a carbon measure will be found otherwise inconsistent with the GATT).
[276] US—Gasoline Appellate Body Report, at 14.

taken to deal with contemporary environmental concerns are likely to fall under the scope of Article XX(g) of the GATT 1994.

4.1.5.1.2. Interpretation of "Relating to" under Article XX(g) of the GATT 1994

As for the analysis of the second element of Article XX(g), a measure must be related to the conservation of exhaustible resources. Regarding this link between the measure and its pursued objective, the Appellate Body in the *US – Shrimp* sought "a close and genuine relationship"[277]. In another saying, measures that incidentally or inadvertently aimed to achieve their pursued objective would not satisfy the second element of the Article XX(g) analysis[278]. In any case compared to the necessity test of Article XX(b), the term "relating to" entails a lower degree of connection between a measure and its pursued objective.

It must be noted that in the earlier rulings of the GATT and the WTO adjudicating bodies[279], a measure had to be "primarily aimed at" the conservation of exhaustible resources in order to be deemed as "relating to" under Article XX(g). However, this non-textual determination method found criticism among the legal scholars[280], and the WTO adjudicating bodies seemingly abandoned this "primarily aimed at" with regards to the "relating to" element of Article XX(g)[281]. In accordance with the current interpretation of the WTO adjudicating bodies, the design and structure of a measure must be focused on to determine whether such a measure is "relating to" the exhaustible natural resources[282].

[277] US—Shrimp Appellate Body Report, ¶ 136.
[278] US—Gasoline Appellate Body Report, at 19.
[279] *See e.g.*, GATT Panel Report, Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, ¶ 4.6, WTO Doc. L/6268 - 35S/98, (adopted Mar. 22, 1988); US—Gasoline Appellate Body Report, at 18-19.
[280] *See* Kazumochi Kometani, *Trade and Environment: How Should WTO Panels Review Environmental Regulations under GATT Articles III and XX*, 16 NW. J. INT'L L. & BUS. 441 (1996).
[281] *See* China—Rare Earths Panel Report, ¶ 7.281-7.285. (examining the transformation of the WTO jurisprudence with regards to the "primarily aimed at" approach).
[282] US—Shrimp Appellate Body Report, ¶ 137; China—Rare Earths Appellate Body Report, ¶ 5.111.

4.2.5.1.3. "Made Effective in Conjunction With Restrictions on Domestic Production or Consumption" Requirement under Article XX(g)

The third and final element of Article XX(g) of the GATT 1994 requires that a measure in question must be "made effective in conjunction with the domestic production or consumption". The Appellate Body in the *US – Gasoline* stated that this requirement could be called an "even-handedness" requirement in the imposition of restrictions[283]. Accordingly, if a Member imposes a trade-restrictive measure in order to protect the exhaustible natural resources, the adverse trade impact of such measure must also be reflected in its domestic production or consumption.

With regards to the requirement of even-handedness, the Appellate Body in *China – Rare Earths* opined that it is not necessary to evenly distribute the burden of conservation of exhaustible resources between foreign and domestic producers or consumers[284]. That being said, it would be more difficult to justify a measure under Article XX(g) if a measure imposes substantially more burden on foreign producers or consumers compared to the domestic ones[285]. Yet, if there is no domestic restriction at all, then it would be impossible to justify a measure under Article XX(g) of the GATT 1994[286].

In conclusion, it is revealed by the existing jurisprudence that public health measures that fall under the scope of Article XX(g) are relatively easier to be justified compared to Article XX(b). However, with its "even-handedness" requirement, an additional obligation must be fulfilled, and a measure must affect both domestic and foreign products under Article XX(g). That being said, considering the less trade-restrictive alternative test established under Article

[283] US—Gasoline Appellate Body Report, at 20.
[284] China—Rare Earths Appellate Body Report, ¶ 5.133.
[285] *Id.* at ¶ 5.134.
[286] US—Gasoline Appellate Body Report, at 20-21.

XX(b), it would also be unlikely to justify a measure that only affects foreign producers or consumers as well[287].

4.2.6 The Chapeau of Article XX of the GATT 1994

In accordance with the order of analysis of Article XX established by the Appellate Body, if a measure fulfills the requirements of subparagraph of Article XX, it must then be analyzed under the chapeau of Article XX exception. The text of the chapeau of Article XX is as follows:

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures"*

The Article XX of the GATT 1994 is considered as a balancing clause between the right of a Member to protect its non-economic interests stipulated in the subparagraph of Article XX and the rights of other Members under GATT 1994. Accordingly, while the subparagraphs of Article XX give a right to the Members to protect their non-economic interests such as protection of public health, in order to find the balance between the imposing Member and other Members, the ultimate availability of the Article XX exception is subject to the fulfillment of chapeau requirements. The chapeau of Article XX is deemed as an inspection tool to determine whether the Member who invokes the Article XX exception acted in good faith, not abusing the exception clause provided in the GATT 1994[288].

It must be noted that since the text of the chapeau of Article XX includes the term "applied", the Appellate Body stated that the focus of the chapeau is on the application of the measure at issue, rather than the measure at issue as such. Having

[287] Note that a measure that fulfills the specific requirements of a subparagraph of Article XX must also fulfill the requirements of the *chapeau* of Article XX, a reflection of bona fide obligation in international law under GATT.
[288] US—Shrimp Appellate Body Report, ¶ 158.

said that, it is also stipulated by the Appellate Body that the application of the measure can be discerned from the design, architecture, and the revealing structure of the measure[289].

4.2.6.1. Requirements of the Chapeau of Article XX

According to the Appellate Body report in the *US – Shrimp*, for a measure to be deemed as inconsistent with the chapeau of Article XX, three elements must exist cumulatively: (i) the application of the measure must result in discrimination; (i) the discrimination must be arbitrary or unjustifiable in character; and (iii) the discrimination must occur between the countries where the same conditions prevail[290].

It is noteworthy that while the text of Article XX also includes the term "or a disguised restriction on international trade", this term was not explicitly stated as an element of the chapeau of Article XX. Rather, the Appellate Body opined that the concept of "disguised restriction on international trade" can be read side-by-side with the concepts of "arbitrary or unjustifiable discrimination", which imparted meaning to one another[291]. Although this interpretative approach of the Appellate Body drew criticism[292], the "disguised restriction on international trade" concept will not separately be analyzed in this study. Furthermore, the first two elements of the chapeau will be analyzed together in order not to enter into discussions that are not necessarily relevant for the purpose of this study.

4.2.6.2. Arbitrary or Unjustifiable Discrimination under the Chapeau of Article XX

Prior to the analysis of "arbitrary or unjustifiable discrimination" it must be noted that the term "discrimination" under the chapeau of Article XX is interpreted differently from other discriminations addressed in other provisions of the GATT 1994. Referring to the general rules of interpretation in the Vienna Convention on

[289] EC—Seals Appellate Body Report, ¶ 5.302.
[290] US—Shrimp Appellate Body Report, ¶ 150.
[291] US—Gasoline Appellate Body Report, at 25.
[292] Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction* 109 AM. J. INT'L L. 95, 109 (2015).

the Law of Treaties ("VCLT"), the Appellate Body in the *US – Gasoline* stated that interpreting the term discrimination under Article III:4 of the GATT as the same as the term "discrimination" under Article XX would render the meaning of the term "discrimination" redundant and useless[293]. However, while the Appellate Body stated that the nature and quality of the term "discrimination" under Article XX chapeau would be different from the discriminations under other provisions, it preferred not to further dwell on this issue.

With regards to the analysis of "arbitrary or unjustifiable discrimination", instead of establishing a test to interpret these terms, the Appellate Body chose to focus on the specific facts of individual cases and made new evaluations based on the facts of each case that comes before it. While such a method of analysis is found criticism from a rule of law perspective[294], a wide corpus of jurisprudence with regards to the interpretation of "arbitrary or unjustifiable discrimination" sheds light on the interpretation of many future cases. The finding of the Appellate Body in three different cases, namely *US – Gasoline, US – Shrimp,* and *Brazil – Retreaded Tyres* will be briefly summarized in the following paragraphs.

4.2.6.2.1. Analysis of the Selected Case-Law for the Interpretation of "Arbitrary or Unjustifiable Discrimination"

The first dispute in which the Appellate Body made determinations about Article XX of the GATT 1994 was *US – Gasoline.* In *US – Gasoline,* the measure at issue was the "Gasoline Rule" under the US Clean Air Act that presented rules for constituting baseline figures for the gasoline sold in the US in order to regulate the emission effects of the gasoline to prevent air pollution. To put it simply, the Gasoline Rule prescribed different calculation methods for domestic and imported gasoline in practice.

While the Appellate Body in *US – Gasoline* reversed the Panel's findings and opined that the protection of clean air falls under the scope of Article XX(g) of the

[293] US—Gasoline Appellate Body Report, at 23.
[294]Michael G. Johnston, *Meaning of the Terms "Arbitrary or Unjustifiable Discrimination" in the Chapeau of GATT Article XX* 6 GJPLR 1 (2018).

GATT 1994, it stated that the "Gasoline Rule" constitutes an "unjustifiable discrimination" under the chapeau of Article XX because of two omissions of the US. The Appellate Body stated that the US had not adequately explored to mitigate the administrative problems of the complaining parties, and the US did not count the costs of foreign refiners that result from the imposition of statutory baselines. Accordingly, the Appellate Body concluded that the application of the Gasoline Rule is not foreseen and avoidable for the complaining parties and therefore, it is deemed as "unjustifiable discrimination" under the chapeau of Article XX. It is notable the Appellate Body *US – Gasoline* did not separately analyze the meanings of arbitrary discrimination and unjustifiable discrimination, albeit it only found the discrimination of the measure at issue as "unjustifiable".

In *US – Shrimp,* where the measure at issue was an import ban on shrimps harvested via methods that resulted in the death of sea turtles, while the measure at issue is provisionally justified under Article XX(g) of the GATT 1994, the Appellate Body found the US measure at issue are arbitrary and unjustifiable under the chapeau of Article XX for several reasons. The Appellate Body stated that forcing other Members to adopt essentially the same policy with the imposing Member's policies without considering the particular conditions of those countries was deemed as unjustifiable discrimination under Article XX of the GATT 1994[295]. Moreover, the importing Members have a similar regulation with the imposing Members that are comparable in effectiveness, not considering the appropriateness of such measures and denying them with no legitimate reason was also deemed as unjustifiable discrimination under Article XX.

The Appellate Body in *US – Shrimp* also noted that in case the pursued objective of the measure demands cooperative efforts of multiple countries, the imposing party must enter into serious across-the-board negotiations with the objective of concluding bilateral or multilateral agreements[296]. This finding has particular importance for the various concerns with regards to the protection of public health.

[295] US—Shrimp Appellate Body Report, ¶ 164.
[296] *Id.* ¶ 166.

Accordingly, a public health concern that more than one Member should not seek any unilateral solution before trying to find a bilateral and multilateral solution in the first place. With this regard, public health problems that affect more than one Member such as the COVID-19 pandemic or climate change crisis should be tackled with a multilateral solution. However, it must be underlined that in the compliance review procedure of the *US – Shrimp* dispute under Article 21.5 of the DSU, the Appellate Body underlined that, if the imposing Member made serious attempts in good faith to find a multilateral solution, not concluding a treaty would not make the measure "unjustifiable" under the chapeau of Article XX[297]. In other words, the efforts of a Member to conclude a bilateral or multilateral treaty were taken into account by the Appellate Body, not the results of it.

With regards to the "arbitrary discrimination", Appellate Body in *US – Shrimp* stated that the rigid and inflexible nature of the measure at issue also caused arbitrary discrimination under the chapeau of Article XX[298]. Moreover, lack of transparency and predictability in the due process is also considered as "arbitrary discrimination" under the chapeau requirement. Accordingly, the Appellate Body in *US – Shrimp* found the US measure at issue as "arbitrary and unjustifiable" and therefore found it as inconsistent with Article XX of the GATT 1994.

In *Brazil – Retreaded Tyres*, the measure at issue was Brazil's import ban on retreaded tires in order to protect public health from mosquito-borne diseases and tire fires. Having said that, as a member of the Southern Common Market ("MERCOSUR")[299], in order to comply with a MERCOSUR arbitration ruling, Brazil exempted MERCOSUR members from this obligation.

The Panel in *Brazil – Retreaded Tyres* opined that complying with an arbitration ruling which has binding legal effects for the imposing country should not be considered as "*a priori* unreasonable" since Article XXIV of the GATT 1994 recognizes the formation of agreements such as the MERCOSUR and allows

[297] US—Shrimp (Article 21.5 Malaysia) Appellate Body Report, ¶123.
[298] US—Shrimp Appellate Body Report, ¶ 177.
[299] MERCOSUR is a regional trade agreement between Brazil, Argentina, Uruguay, and Paraguay.

discrimination between the members of such agreements and other countries[300]. The Panel stated that if the trade impact of the exemption significantly undermined the objective of the measure, it could constitute unjustifiable discrimination under the chapeau. However, since the volumes of retreaded tires under the exemption is not significant in the case at hand, MERCOSUR exemption has not caused arbitrary or unjustifiable discrimination under Article XX of the GATT 1994.

After reminding the previous reports, the Appellate Body in *Brazil – Retreaded Tyres* stated that the analysis of arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to justify its existence[301]. Since the MERCOSUR exemption provided for compliance with the tribunal ruling and not for the protection of public health, the Appellate Body stipulated that it is not plausible to justify a measure that goes against the objective that was provisionally justified under the subparagraphs of Article XX[302]. In other words, since the exemption given to the MERCOSUR Members conflicts with the objective of protecting public health from mosquito-borne diseases and tire fires, the Appellate Body deemed this exemption as "arbitrary or unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994.

4.2.6.2.2. "Between the Countries Where the Same Conditions Prevail" Element of the Chapeau of Article XX

The final element of the chapeau of Article XX is that the same conditions must prevail between the countries. In other words, if the same conditions do not prevail between the countries, then even arbitrary or unjustifiable discrimination can be justified under Article XX of the GATT 1994. Depending on the specific circumstances of the case at hand, the analysis of the same conditions may involve different exporting Members as well as the concerned exporting and importing Members[303].

[300] Brazil—Retreaded Tyres Panel Report, ¶ 217.
[301] Brazil—Retreaded Tyres Appellate Body Report, ¶ 226.
[302] *Id.* ¶ 227.
[303] US—Shrimp Appellate Body Report, ¶ 150.

Unlike the concept of "arbitrary or unjustifiable discrimination", the concept of "between the countries where the same conditions prevail" was not focused in the chapeau analysis made by the Appellate Body. Rather in most of the cases, the Appellate Body assumed the conditions of the countries as the same and not made any analysis with regards to this term. Accordingly, in all of the cases in which the chapeau analysis was made until this date, the Appellate Body not even once ruled that the same conditions did not prevail between the countries. Therefore, it is arguable that there is a "pro-exporter" tendency with regards to the concept of "between the countries where the same conditions prevail"[304].

By contrast with the aforementioned interpretation of the Appellate Body, in relatively recent jurisprudence, in *EC – Seals* where the welfare of seals were the protected interests at stake, the Appellate Body implicitly opined that the responding party could prove that the conditions of the protected interests are "relevantly different" between the countries, albeit it could not be proved in the case at hand[305]. Suppose this new approach of the Appellate Body is to be followed in future cases, and an actual analysis will be made with regards to the concept of "between the countries where the same condition prevail" rather than assuming that the conditions are the same. In that case, there might be a chance for imposing countries to even justify their "arbitrary or unjustifiable discriminations" under Article XX of the GATT 1994.

4.3. ANALYSIS OF LEGAL CHANGE PROPOSALS REGARDING ARTICLE XX OF THE GATT 1994

Article XX of the GATT 1994, which can be described as the most powerful legal tool for Members to protect their policy space under GATT, has become a matter of discussion in conjunction with the pressing societal concerns. In this subchapter, recent proposals made by legal scholars regarding textual and interpretative

[304] See Emily Lydgate, *Do the same conditions ever prevail? Globalizing national regulation for international trade* 50 J. WORLD TRADE 971 (2016).
[305] EC—Seals Appellate Body Report, ¶ 5.317.

modifications of Article XX and the adoption of a waiver or a peace clause regarding certain public health and environmental health measures are analyzed.

4.3.1. The Reason Why A Legal Change Regarding Article XX is A Topic Of Discussion

As it is established in the previous subchapter, a high threshold has been set by the WTO adjudicating bodies with regards to the interpretation of Article XX of the GATT 1994, and more specifically, under the necessity test and the chapeau requirements. Moreover, it is even possible to argue that the case-by-case analysis method preferred by the WTO adjudicating bodies creates a certain level of ambiguity regarding their verdicts on future disputes for certain issues that are not settled yet[306].

Along with the existing high threshold under Article XX and potential ambiguities because of its ambiguous nature, the growing problem of climate change, which has the potential to create existential threat towards the environmental health of many countries, led to the criticisms that the current implication of the GATT 1994 is insufficient to assess the measures that are taken to mitigate the climate change. For instance, since there has not been any WTO dispute that assessed the carbon tax measure of a Member that is taken pursuant to an MEA such as the Paris Agreement, such ambiguity has a potential effect of having a chilling effect on Members to take such measures, and it may also undermine the emerging multilateral climate system[307]. It is also arguable that even if WTO adjudicating bodies favors the measures that aim to mitigate climate change despite their trade-restrictive nature, the necessity of giving an imminent response to prevent catastrophic effects of climate change necessitates not to wait for a future dispute and act immediately to make legal changes in the WTO legal system.

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[306] Kasturi Das *et al*, Making the International Trade System Work for Climate Change: Assessing the Options, CLIMATE STRATEGIES, https://climatestrategies.org/wp-content/uploads/2018/07/CS-Report-_Trade-WP4.pdf (last visited June 2, 2021).

[307] *See generally* Bacchus, James. *The Content of a WTO Climate Waiver*, 31 CEN. INT'L GOVERN. INNV., http://www.jstor.org/stable/resrep24964.2. (last visited May 31, 2021).

4.3.2. Amendment of Article XX of the GATT 1994

As a radical solution towards asserted claims that Article XX does not provide sufficient policy space to the Members with regards to their measures relevant to the protection of public health and environmental health, amending Article XX would be a theoretically effective legal option. While it is presumable to claim that the current text of Article XX allows non-protectionist public health and environmental measures including measures that are taken to mitigate climate change, in order to clear any doubts and manifest that such measures can be justified under Article XX of the GATT 1994, amending Article XX would be useful. In this context, subparagraphs (b) and (g) of Article XX and its chapeau would be the subjects of such amendments.

Current case-by-case interpretation of the term "necessary" under Article XX(b) sets a difficult and somewhat unforeseeable obligation for Members to justify their public health measures. Accordingly, amending the term "necessary" would be a step forward towards widening the margin of discretion of Members to take measures relevant to the protection of public health and environmental health. For instance, amending Article XX(b) of the GATT 1994 as follows can be deemed as an alternative: *"implemented to protect human, animal or plant life or health*[308]*"*.

Such an alternative would serve to reduce the high threshold of the necessity test and annihilate the "less trade-restrictive alternative" analysis established by the Appellate Body, which is criticized for curtailing the regulatory freedom afforded to the Members under GATT 1994[309]. Alternatively, the "relating to" conjunction can be used instead of "necessary" as well. Such an amendment would also provide a wider margin of discretion to the Members to justify their public health and environmental measures. While more alternatives can be produced to replace the term "necessary" under Article XX(b) of the GATT 1994, replacing this term with less strict terms would make an end to the current interpretation of Article XX(b)

[308] Rick A. Waltman, *Amending WTO Rules to Alleviate Constraints on Renewable Energy Subsidies*, 23 WILLAMETTE J. INT'L L. & DIS. RES. 367, 393 (2016).
[309] Gisele Kapterian, *A CRITIQUE OF THE WTO JURISPRUDENCE ON NECESSITY*, 59 INT'L & COMP. L.Q. 89, 91 (2010).

of the GATT 1994, which requires multiple separate analysis as explained in subchapters 4.2.4.2.3 and 4.2.4.2.4 of this thesis and public health and environmental measures would be more likely to be deemed as GATT inconsistent.

Amending subparagraph (g) of Article XX of the GATT 1994 would be another option to widen the policy space of Members towards taking environmental health measures. It must be noted that the "relating to" conjunction stipulated in Article XX(g) necessitates a less strict requirement compared to the necessity analysis made under Article XX(b) of the GATT 1994, and therefore it is conceivable that amending this subparagraph would be unnecessary. Having said that, since subparagraph (g) of Article XX is the most relevant provision for justification of environmental measures, and the main reason for growing calls regarding a legal change in the WTO system is arisen because of climate change-related concerns, amendment of the Article XX(g) would also be useful to widen the policy space of Members to take measures to combat climate change. In this vein, adding a sentence to subparagraph (g) of the GATT 1994 *"including taking climate change-related measures taken in accordance with the multilateral environmental agreements"* would clarify the position of the measures that are taken to mitigate climate change. Yet, it must be underlined that this addition to Article XX(g) should only be considered as an illustrative example, and more in-depth analysis should be made before making an amendment proposal to Article XX(g).

Amending the chapeau of Article XX would also be a positive step towards widening the margin of discretion of Members to protect public health and environmental health. Just as the subparagraph (b) of the GATT 1994, the chapeau of the GATT 1994 is generally assessed on a case-by-case basis, and until this day, no climate change-related measure is analyzed under the chapeau. Accordingly, a somewhat unforeseeable interpretation approach of the Appellate Body would be clarified with an appropriate amendment to the chapeau of Article XX. Accordingly, similar to the proposal made for the amendment of Article XX(g), a provision such as:

"*Unless proven otherwise, measures aimed to mitigate the climate change are presumed to be not applied in a means of arbitrary or unjustifiable discrimination between the countries where the same conditions prevail, or a disguised restriction on international trade."*

Such an additional sentence would shift the burden of proof in favor of the responding party under the chapeau of the GATT 1994 with regards to the measures that are aimed to mitigate climate change. This would create an exception of the current system of burden of proof under Article XX of the GATT 1994, where the burden of proof rests upon the responding party[310], and it would make the justification of measures mitigating the climate change. Instead of establishing an irrefutable presumption, a refutable presumption would be a more balanced provision since measures aimed to mitigate climate change could be implemented to serve a hidden protectionist agenda, and therefore Members should not be prevented from proving such illegitimate aspects of a measure that damages international trade.

After establishing the possible amendments to be made to Article XX of the GATT 1994 and their benefits for widening the policy space of Members with regards to the protection of public health and environmental health, it must be stated that it is not plausible to implement such amendments, at least in the short term. In accordance with Article X of the WTO Agreement, to amend Article XX of the GATT 1994, there must be a consensus among Members in principle. If no consensus exists among the Members, a two-thirds majority of the Members are needed for an amendment to come into effect. As it might be expected, such an acceptance would not only be politically very difficult, but also it would be time-consuming since it requires the ratification processes of 110 Members (two-thirds of the current 164 Members). Moreover, only the Members that accept an amendment to Article XX would be bound with such an amendment. In other words, Members that do not accept an amendment to Article XX can still be subject to the unamended (current) version of the GATT. Accordingly, it is nearly

[310] US—Gasoline Appellate Body Report, at 22.

impossible to claim that the intended public health and environmental health protection can be achieved with an amendment of Article XX of the GATT 1994.

4.3.3. Adapting An Authoritative Interpretation on Article XX of the GATT 1994

Another legal modification alternative concerning Article XX of the GATT 1994 in order to expand public health and environmental protection under the WTO legal system would be to invoke Article IX:2 of the WTO Agreement which stipulates the authoritative interpretation. Article IX:2 of the WTO Agreement gives authority to the Ministerial Conference and the General Council to have the exclusive authority to adopt interpretations with regards to the WTO agreements including GATT 1994.

Authoritative interpretation provides clarification to the existing WTO obligations. Accordingly, the adoption of an authoritative interpretation can be useful for the interpretation of Article XX and its relationship with the public health and environmental health-related measures such as a carbon tax or emissions trading schemes.

It must be underlined that the authoritative interpretation can only be used to clarify the meaning of the existing WTO provisions, and it cannot modify their content[311]. From this aspect, the intervention of the authoritative interpretation to the current legal WTO regime is limited compared to the amendments. Focusing on Article XX of the GATT 1994, it is plausible to claim that the textual language of Article XX does not have any terminology that causes an unnecessary limitation to the margin of discretion of the Members with regards to their public health or environment-related measures. Rather the complex and case-by-case analysis method followed by the WTO adjudicating bodies create somewhat uncertainties regarding future disputes. Therefore, with regards to the Article XX of the GATT 1994, a less

[311] Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas-Recourse to Recourse to Article 21.5 of the DSU by Ecuador*, ¶ 393, WTO Doc. WT/DS27/AB/R, (adopted Dec. 11, 2008).

interventionist authoritative interpretation can be deemed preferable rather than an amendment.

While the authoritative interpretation can be deemed preferable to the amendment of Article XX, adoption of an authoritative interpretation can be even more difficult than amending Article XX of the GATT 1994 in practice. Article IX of the WTO Agreement necessitates an approval of a three-fourth majority of the Members (123 Members out of 164), yet consensus has been the norm in practice[312]. For this reason, a proposal to adopt an authoritative interpretation rarely occurs, and until this date, neither Ministerial Conference nor General Council has ever adopted any decision on authoritative interpretation[313].

4.3.4. Adopting a Waiver or a Temporary Peace Clause Regarding Certain Public Health Measures

Instead of implementing permanent and radical legal modifications such as a textual amendment or authoritative interpretation, a waiver, or a peace clause, temporary legal powers which are relatively easier to implement, can be considered for the protection of public health and environmental health. Adopting a waiver is suggested for climate change mitigation[314] and it became a current issue for certain TRIPS obligations in response to the COVID-19 pandemic as well[315]. Likewise, the implementation of a peace clause for emerging public health and environmental health threats can be considered as another alternative legal option under WTO legal system.

A waiver can be defined as a powerful escape clause providing an option to Members to lawfully implement measures which, in the absence of a waiver, can

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[312] Claus-Dieter Ehlermann, Lothar Ehring, *The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements* 8 J. INT'L ECON. L. 803, 806 (2005).
[313] *See* Tarcisio Gazzini, *Can Authoritative Interpretation under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members*, 57 INT'L & COMP. L.Q. 169 (2008).
[314] *See generally* Bacchus, *supra* note 56 at 303.
[315] *see Members discuss TRIPS waiver request, exchange views on IP role amid a pandemic*, WORLD TRADE ORG., https://www.wto.org/english/news_e/news21_e/trip_23feb21_e.htm (last visited June 2, 2021).

be considered as inconsistent with the WTO law[316]. The right to waiver is stipulated under Article IX:3 of the WTO Agreement. Accordingly, in exceptional circumstances, the Ministerial Conference has exclusive power to decide to waive an obligation imposed on a Member under any WTO agreement. While waivers are generally implemented to relieve certain individual Members from their certain obligations in the presence of exceptional circumstances, they can exceptionally be implemented collectively as well[317].

Adoption of a waiver can provide positive impacts for tackling certain public health and environmental health problems in the short term. This is because with the adoption of a waiver regarding specific public health or environmental problem, Members need not to concern about the response of the WTO adjudicating bodies towards their measures, and this may encourage Members to have further measures to protect public health and environmental health.

While the adoption of a waiver may have positive consequences with regards to the protection of public health and environmental health, it also has several negative sides. Firstly, just like the adoption of a textual amendment and authoritative interpretation, adopting a waiver is a difficult task since it requires the approval of three-fourths of the Members, the majority of the Members (123 Members out of 164), yet consensus has been the norm in practice. Moreover, waivers can be adopted temporarily and a waiver adopted for more than a year is subject to the review of the Ministerial Conference and it can be terminated by a simple majority in each review. Therefore, while it may be reasonable to adopt waivers for short-term issues such as the COVID-19 pandemic, it may be inadequate to tackle the long-lasting issues such as climate change which needs to be tackled for many decades[318]. Yet, a waiver can be useful as an interim solution for long-lasting issues until Members can agree upon a permanent solution.

[316] *See generally* Bacchus, *supra* note 56 at 303.
[317] Council for Trade in Goods, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WTO Doc. G/C/W/432/Rev.1, (Feb. 24, 2003).
[318] Das, *supra* note 306 at 20.

Other than adopting a waiver, the adoption of a peace clause with regards to the protection of public health and environmental health can also be considered[319]. Adopting a peace clause has some similarities with adopting a waiver since both legal powers eliminate the power of the WTO adjudicating bodies with regards to the specified issues for a temporary time. The difference between a peace clause from a waiver is that while the peace clause solely prohibits the Members from resorting to the dispute settlement system regarding a specified issue, a waiver makes an otherwise WTO-inconsistent measure to be deemed as a lawful WTO-consistent measure.

A peace clause can be amended through a Ministerial Decision as it is stipulated under Article IX:1 of the WTO Agreement. It is plausible to claim that a peace clause can be adopted more straightforwardly, and although consensus is the norm in practice, Article IX:1 of the WTO Agreement only necessitates a simple majority in case a consensus cannot be reached. As a matter of fact, a peace clause with regards to the protection of public health has already been adopted in order to provide food security in developing countries[320].

Adopting a peace clause under the WTO law has similar positive and negative aspects with adopting a waiver with regards to the protection of public health and environmental health. Peace clauses can be useful for eliminating the somewhat ambiguous and unpredictable approach of the WTO adjudicating bodies since it commands Members not to take any legal action through the dispute settlement on the covered issues and thereby encourages Members to take more measures to protect public health and environmental health. On the other hand, a peace clause intends to provide temporary protection; just like a waiver, it does not provide a permanent solution for long-lasting issues such as climate change.

4.4. THE SECURITY EXCEPTION CLAUSE OF THE GATT 1994 – ARTICLE XXI

[319] *Id.* at 21.
[320] *See supra* Chapter 3.6.4.

The security exception clause of the GATT 1994, Article XXI, allows Members to deviate from their GATT 1994 obligations in order to protect their national security. Since national security is deemed more important than the economic benefits procured by the international trade agreements, wide discretion is provided to the Members to protect and regulate their national security policies.

Since the requirements set under the XXI are undoubtedly less strict than the requirements of Article XX of the GATT 1994, invoking this exception clause could arguably be more tempting for the regulating countries. In this vein, it must be noted that a variety of measures could potentially fall under the scope of this exception clause, including several public health measures such as measures tackling climate change or food security. However, Members abstained from invoking the Article XXI exception for nearly seven decades to not open "Pandora's box" because of the wide discretion given to the Members, which allows the high potential for abuse of this clause. However, Pandora's box is opened in a recent dispute, namely in *Russia – Traffic in Transit*. Subsequently, under GATT 1994[321] and TRIPS[322], several imposing Members preferred to invoke the security exception clause following the commencement of the dispute.

With *Russia – Traffic in Transit* Panel Report, adopted on 26 April 2019, the nature and the scope of Article XXI examined by the WTO adjudicating bodies for the first time. After briefly analyzing the text of Article XX, key findings of the *Russia – Traffic in Transit* dispute with regards to Article XXI of the GATT 1994 will be briefly analyzed. Subsequently, possible justification of several public health measures under Article XXI will be examined.

4.4.1. Interpretation of the Text of Article XXI of the GATT 1994

The security exception clause of the GATT 1994, Article XXI, consists of three paragraphs. Paragraph (a) of Article XXI of the GATT 1994 gives any Member a

[321] Request for Consultations by Qatar, *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. G/L/118; IP/D/35; S/L/415;WT/DS526/1. (July 31, 2017).
[322] Request for Consultations by the European Union, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. G/L/1243;G/SG/DS54/1;WT/DS548/1, (June 1, 2018)

discretion for not to provide any information which it considers contrary to its essential security interests, and Paragraph (c) of Article XXI of the GATT 1994 allows any Member to take any action in pursuance to its obligations under UN Charter for the maintenance of international peace of security.

While the structure of these aforementioned two paragraphs is different from Article XX of the GATT 1994 as a whole, Article XXI(b) of the GATT 1994, on the other hand, is consisted of a chapeau and subparagraphs, similar to the structure of Article XX. The chapeau of Article XXI(b) allows any Member to take any action necessary to protect its essential security interests. The chapeau of Article XXI(b) is followed by three enumerated subparagraphs, including subparagraph (iii), stating "taking in time of war or other crisis in international relations".

As it can be understood from the text of the chapeau of Article XXI(b) of the GATT 1994, it bears a significant difference from Article XX of the GATT 1994. The chapeau of Article XXI of the GATT 1994 states "which it considers necessary", giving Members a margin of discretion for the determination of the necessity of a measure unlike Article XX of the GATT 1994, albeit the level of this discretion caused significant discrepancies, as it is occurred in *Russia – Traffic in Transit* dispute. Moreover, the concept of "other crisis in international relations" under Article XXI(b)(iii) of the GATT 1994, a vague and uninterpreted concept by the WTO adjudicating bodies until the *Russia – Traffic in Transit* dispute, also complicated the determination of the scope of the security exception clause of the GATT 1994. In this vein, the Panel Report in *Russia – Traffic in Transit* elucidates various unresolved aspects of the interpretation of Article XXI, and more specifically, Article XXI(b)(iii) of the GATT 1994.

4.4.1.1. Key findings of the Panel in *Russia – Traffic in Transit*

The first issue that the Panel had to resolve in the *Russia – Traffic in Transit* dispute was whether the Panel had the jurisdiction to solve the dispute. This is because Russia, the respondent party, argued that the Panel must limit its findings to conclude that the Article XXI clause has been invoked. In other words, Russia argued that under Article XXI(b)(iii) of the GATT 1994 is a self-judging provision

and the determination of essential security interests of a Member and the determination of the necessity of the measures that are taken for the protection of such interests are at the sole discretion of the invoking Member[323]. On the other hand, Ukraine claimed that such an interpretation would imply that the assessment of the GATT consistency of a measure would be decided by the invoking Member, instead of a panel, and such unilateral determination would violate various provisions of the DSU[324].

The Panel made a thorough analysis to determine its jurisdictional limits under Article XXI of the GATT 1994, and more specifically, its Article XXI(b)(iii). First of all, the Panel evaluated the suggestion made by Russia, which is to consider the adjectival clause "which it considers" under the chapeau of Article XXI(b) also to qualify the specific circumstances stipulated in the enumerated subparagraphs. Such an interpretation would give total power to assess these circumstances to the invoking Member. Yet, assessing the meanings of the circumstances specified under the subparagraphs of Article XXI(b) in accordance with Article 31(1) of the VCLT, the Panel opined that such circumstances objective state of affairs in nature, and therefore they are subject to objective determination[325]. Accordingly, the Panel ruled that the Panel has jurisdiction to assess such factual determinations under Article XXI(b)(iii) of the GATT 1994. In other words, the adjectival clause "which it considers" does not extend to the specific circumstances under the subparagraphs of Article XXI(b) of the GATT 1994[326].

After establishing that the adjectival clause "which it considers" is not applicable for the subparagraphs of Article XX(b), the Panel then analyzed whether "which it considers" qualifies the necessity of the measure solely, or it also qualifies the concept of "essential security interests" as well. While Russia argued that the adjectival clause "which it considers" extends to both the necessity of the measure and the "essential security interests", Ukraine stated that although WTO Members

[323] Panel Report, Russia—Measures Concerning Traffic in Transit, ¶ 7.27, WTO Doc. WT/DS512/R, (adopted Apr. 26, 2019) [Hereinafter Russia—Traffic in Transit Panel Report].
[324] *Id.* ¶ 7.31.
[325] *Id.* ¶ 7.77.
[326] *Id.* ¶ 7.101.

have the right to determine their level of protection of the essential security interests, Article XXI does not give power to Members to define what their essential security interests are unilateral[327].

The Panel stated that, in general, Members have the discretion to define what they consider as their essential security interests. However, reminding that the obligation of good faith is a general principle of international law under the VCLT, the Panel opined that like every provision, this obligation is applicable to Article XXI of the GATT 1994 as well. Accordingly, the Member invoking the Article XXI exception must articulate their essential security interests to a level sufficient enough to show their veracity. Otherwise, Members would have released themselves from their obligations under GATT simply by "re-labeling" their trade interests as "essential security interests"[328]. It must be noted that if this approach of the Panel in *Russia – Traffic in Transit* to be adopted in the ongoing and future disputes, measures such as Section 232 of the Trade Expansion Act, which is used by the US to justify import prohibitions on steel and aluminum products on the grounds of national security would not be eligible for Article XXI exception.

The final aspect of the *Russia – Traffic in Transit* to be analyzed in this thesis is the analysis of the concept of "other emergency in international relations" under subparagraph (iii) of Article XXI(b) of the GATT 1994. For the analysis of this concept, the Panel focused on the ordinary meaning of the words used under this concept and referred to the dictionary definitions of the terms "emergency" and international relations". Concluding its analysis, the Panel stated that an emergency in international relations would refer to "a situation of armed conflict, or latent armed conflict, or of heightened tension or crisis, or general instability engulfing or surrounding a state"[329]. In light of this interpretation of the Panel in *Russia – Traffic in Transit*, the potential invocation of two different public health and environmental health measures, namely the measures taken to mitigate climate change and

[327] *Id*. ¶ 7.129.
[328] *Id*. ¶ 7.133.
[329] *Id*. ¶ 7.76.

measures taken to deal with serious infectious diseases under Article XXI(b)(iii) of the GATT 1994 will be analyzed in the following subchapters.

4.4.2. Justification of Climate Change Measures under Article XXI(b)(iii) of the GATT 1994

Based on the fact that the negative effects of climate change are noticeably increasing, measures taken by countries regarding this issue are on the rise with each passing day. However, potential justification of measures that are taken to mitigate climate change under the national security exception may not be deemed necessary since such measures fall under the scope of Article XX(b) and XX(g) of the GATT 1994. However, as is previously explained[330], both of these subparagraphs require separate requirements, and they are also subject to the conditions of the chapeau test. Moreover, Article XX(g) of the GATT 1994, which requires a less strict "relating to" link between the measure and its protected objective, might have particular difficulties to pass the requirements of Article XX of the GATT 1994 exception with regards to measures concerning climate change. This is because, as explained in detail in Chapter 4.2.2, extraterritorial application of measures taken to mitigate climate change is rather limited. Accordingly, it is reasonable to claim that it is quite challenging for a Member to successfully justify a measure that is taken to mitigate climate change under Article XX of the GATT 1994 exception. Therefore, Members may prefer to rely on Article XXI of the GATT 1994 exception in future disputes.

It should be underlined that climate change is already considered a national security threat by various WTO Members, including the European Union and China[331]. Note that while Trump Administration was reluctant to accept the adverse effects of climate change, with the new Biden Administration, the US considered climate change as a national security threat as well[332]. Therefore, it is not unexpected for

[330] *See supra* Chapters 4.2.4— 4.2.5.
[331] *See* EU—China Leaders' Statement On Climate Change And Clean Energy, EUROPEAN COMMISSION, https://ec.europa.eu/clima/sites/clima/files/news/20180713_statement_en.pdf (Last visited May 31, 2021).
[332] *See President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government*, THE WHITE HOUSE,

WTO Members to consider climate change as "essential security interests" under Article XXI(b) of the GATT 1994. In such a case, in accordance with the ruling of the Panel in *Russia – Traffic in Transit,* two determinations must be made. First of all, the Member invoking the Article XXI exception must articulate its essential security interests to a level sufficient enough to show their veracity. Considering the international acceptance of the seriousness of the adverse effects of climate change, it should be possible for Members to articulate their essential security interests about the threat of climate change.

Secondly, and in accordance with the report of the Panel in *Russia – Traffic in Transit*, an objective assessment of subparagraph (iii) of Article XXI(b) of the GATT 1994 must also be made by the WTO adjudicating bodies. Accordingly, the measure at issue must be taken "in time of war or other emergencies in international relations". Since the term "war" is irrelevant for the problems caused by climate change at the moment, the concept of "other emergency in international relations" must be analyzed. Regarding the term "emergency" under Article XXI(b)(iii) of the GATT 1994 the Panel in *Russia – Traffic in Transit* stated that:

> *"emergency" includes a 'situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action', and a 'pressing need ... a condition or danger or disaster throughout a region' as 'a situation, a danger or conflict that arises unexpectedly and requires urgent action', as well as 'pressing need ... a condition or danger or disaster throughout a region'".*[333]

While the unexpectedness of climate change might be deemed as a relative concept, it is commonly accepted that it requires urgent action[334]. Climate change may also cause a pressing need, a danger, and even a disaster throughout a region for various

https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet- president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/ (Last visited May 31, 2021).

[333] Russia—Traffic in Transit Panel Report, ¶ 7.72.

[334] *See* U.N. Sustainable Development Goals, ¶ 13 ("Take urgent action to combat climate change and its impacts").

reasons. For instance, climate change is already causing famine[335] and drought[336] in certain regions of the world. Accordingly, it is presumable that climate change can be deemed as an "emergency" under Article XXI(b)(iii) of the GATT 1994.

After establishing that climate change may be considered as an "emergency" under Article XXI(b)(iii), this emergency must also have occurred in international relations. Pursuant to the report of the Panel in *Russia – Traffic in Transit*, the concept of "international relations" is defined as "world politics or global political interaction, primarily among sovereign states". Moreover, the Panel also stated that an emergency in international relations generally refers to "a situation of armed conflict, or latent armed conflict, or heightened tension or crisis, or of general instability engulfing or surrounding a state".

At least for the present time, it is unlikely to claim that climate change has caused a situation of armed conflict or latent armed conflict. However, adverse effects of climate change are already raising concerns of conflict, especially where fragile political relationships exist, such as in the Middle East and Africa[337]. Moreover, drought and famine caused by climate change are also started to cause large-scale human migrations, endangering the stability of the affected states[338]. Accordingly, considering the current rate of acceleration of climate change, it will be plausible to justify measures that are taken to mitigate climate change under Article XXI of GATT 1994 in the recent future, if not today.

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[335] Andrew Harding, *Climate Change Has Brought Parts Of Zambia To The Brink Of Famine*, BBC NEWS, https://www.bbc.com/news/av/world-africa-50976829 (last visited Mar. 18, 2021)

[336]Dan Shepard, *Global Warming: Severe Consequences For Africa*, THE UNITED NATIONS, https://www.un.org/africarenewal/magazine/december-2018-march-2019/global-warming-severe-consequences-africa (last visited Feb. 13, 2021).

[337] Caitlin E. Werrell and Francesco Femia, Climate Change Raises Conflict Concerns, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORG., https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns (Last visited June 2, 2021).

[338]Guy J. Abel *et al.*, *Climate, conflict and forced migration* 54 GLOB. ENVIRON. CHANGE 329 (2019).

4.4.3. Justification of Measures Taken to Combat with Infectious Diseases under Article XXI(b)(iii) of the GATT 1994

Another possible invocation of the Article XXI of the GATT 1994 with regards to the concept of public health may be plausible for measures taken to contend with infectious diseases. Although it is obvious that small-scale and nonfatal infectious diseases are irrelevant for general security exception, the recent COVID-19 pandemic revealed that certain infectious diseases might actually create catastrophic problems for countries. Due to the continuous increase of the human population and its interference with wildlife, such serious infectious diseases are likely to be seen in the near future as well.

In order to combat infectious diseases, countries generally prefer to take measures to sustain and provide medical supplies and protective gears, as is seen in the COVID-19 pandemic. Yet, if the infectious disease is catastrophic enough to disrupt the chain of foodstuffs, the countries' food security can also be at risk. Accordingly, it is plausible to argue that certain infectious diseases may necessitate countries to take various trade-related measures to mitigate their adverse effects on society.

Although any measure to tackle the adverse effects of infectious diseases can be justified under Article XX(b) of the GATT 1994, considering the high threshold stipulated in the necessity test under this provision, Members may prefer to invoke the security exception clause for serious infectious diseases that threaten the life and health of its citizens at a massive scale. Yet, considering that Article XI:2(a) of the GATT 1994 also provides a carve-out for temporary quantitative restrictions[339], the scope of application of the security exception clause is rather limited within the context of the measures dealing with infectious diseases.

For the justification of measures dealing with the adverse effects of the infectious diseases under Article XXI(b)(iii) of the GATT 1994, pursuant to the ruling of the Panel in *Russia – Traffic in Transit*, the measure at issue must be taken "in time of war or other emergencies in international relations," and the Member invoking this

[339] *See supra* Chapter 2.4.1.

exception clause must articulate its essential security interests to a level sufficient enough to show its veracity. Firstly, the timing of the measure in question must be consistent with the crisis caused by the infectious disease at hand. Secondly, considering the definition of "emergency in international relations," the infectious disease at issue must at least create tension or crisis, or a general instability engulfing or surrounding the Member invoking a measure. In this vein, it is plausible to claim that COVID-19 and its future equivalents are possibly falling under this definition since it has been seen that the COVID-19 pandemic created "tension or crisis" among the countries[340]. Yet, it must be underlined that in the case of infectious diseases that have regional or global adverse effects such as COVID-19, unilateral measures such as export prohibitions may cause catastrophic consequences for less-developed countries that do not possess adequate production facilities. Therefore, the margin of discretion provided to the Members under Article XXI(b)(iii) of the GATT 1994 must be used cautiously, and possible vulnerabilities of other Members must be taken into consideration by the invoking Members. Otherwise, such unilateral measures may damage international cooperation and may cause questioning of the entire multilateral trading system[341].

[340] *See COVID-19 'Profoundly Affecting Peace across the Globe', Says Secretary-General, in Address to Security Council*, UNITED NATIONS, https://www.un.org/press/en/2020/sc14241.doc.htm (Last visited 2 June 2021).
[341] *See* Vittoriia Lapa, *GATT Article XXI as a way to justify food trade restrictions adopted as a response to COVID-19?*, REGULATING FOR GLOBALIZATION, http://regulatingforglobalization.com/2020/04/10/gatt-article-xxi-as-a-way-to-justify-food-trade-restrictions-adopted-as-a-response-to-covid-19/#_ftn1 (last visited May 12, 2021).

CONCLUSION

This dissertation aimed at analyzing the exception provisions of the GATT 1994 and certain other covered agreements of the WTO to understand the current WTO disciplines that are and may be applicable to public health measures. In order to do so, the concept of public health and its interrelation with trade, the fundamental principles of the GATT 1994, and the most relevant covered agreements of the WTO to public health have been analyzed. In addition, various aspects of Article XX of the GATT 1994 with regards to the protection of public health have been tackled. Finally, the increasing trend to invoke the security exception clause of the GATT 1994 has been pointed out, and the possibility to justify certain public health measures through this clause has been explored.

Understanding the concept of public health is necessary to comprehend the interrelation of GATT exception clauses and the protection of public health. The concept of public health has an evolving nature. Similarly, it must be borne in mind that certain vital environmental problems such as climate change are directly relevant to the issue of public health protection. Therefore, in order to fully understand the scope and pressing issues of public health, environmental health problems and their current legal position must also be analyzed since the adverse impacts of environmental problems to public health reveal themselves by day. Accordingly, understanding international agreements relevant to the protection of public health as well as environmental health is crucial to grasp pressing public health concerns.

Under the current WTO legal regime, various specific trade agreements regulate many different disciplines. For instance, while the GATS applies, *inter alia*, to health services such as telemedicine and the establishment of hospitals, TRIPS Agreement applies to the protection of patents which is a vital legal issue in relation to the equitable accessibility of vaccines and medicines to both developed and developing world. Fundamental provisions and exception clauses of these specific agreements as well as the legal assessment brought by the WTO adjudicating bodies

to those provisions shed light on the understanding and interpretation of the exception clauses within the GATT 1994.

Measures that are taken to protect public health may violate certain GATT 1994 provisions, including the MFN principle, national treatment as well as the elimination of quantitative restrictions obligations. Understanding these fundamental GATT 1994 provisions and their interpretation by the WTO adjudicating bodies is crucial in understanding the justification provisions of the GATT 1994, which allow the Members to defend their legitimate, but otherwise GATT-inconsistent policies.

The GATT 1994's most frequently used exception clause for justification of otherwise GATT-inconsistent measures is Article XX. Article XX of the GATT 1994 is a two-tiered exception clause that contains several requirements that should be met in order to justify a measure. While public health measures indisputably fall within the scope of subparagraph (b), environmental health measures are presumably covered by the scope of subparagraph (g) of Article XX of the GATT 1994. Therefore, the consistency of such requirements laid down in these specific subparagraphs along with the introductory clause of the Article XX of the GATT 1994 must be vigorously assessed in each dispute.

As clarified above through analysis of the WTO adjudicating bodies' jurisprudence, Article XX requirements appear to place a high threshold for Members to justify their certain measures, such as protecting public health, among others. Arguably though, the response that is found within the existing WTO jurisprudence related to certain environmental health measures still lacks clarity to a certain extent. Accordingly, some recent calls have been made to make legal changes in the WTO dispute settlement system, and more specifically, within Article XX of the GATT 1994, to allow Members to give proper responses to emerging crises such as climate change. However, as argued in Chapter Four of this thesis, bringing substantial changes in Article XX of the GATT 1994 seems currently unrealistic due to somewhat stalled trade negotiations.

In addition to the applicability and analysis of Article XX to public and environmental health matters, this thesis has also argued that Article XXI of the GATT 1994, the security exception clause of the agreement, can be deemed as another alternative to justify a limited number of public health measures. While the scope of this provision is narrower than the general exception clause, it provides a considerable margin of discretion to Members.

Although Article XXI of the GATT 1994 is generally perceived as a Pandora's Box and that the Members abstained in the past from invoking this powerful justification clause in fear of systemic implications, this former cautious approach towards invoking Article XXI now seems to be fading. Accordingly, while the invocation of Article XXI of the GATT 1994 in relation to public health or environmental health measures might have been considered as extreme in the past, it now seems arguably possible to justify those measures since public health and environmental occurrences may potentially have catastrophic impacts and therefore may also become a national security threat for Members. Having said that, the imposition of unilateral and self-centered measures towards public health crisis such as COVID-19 pandemic that, in fact, essentially requires a global response, would damage not only the international cooperation among Members but also jeopardize the viability of the rules-based multilateral trading system. Therefore, this author argues that the Members and the WTO adjudicating bodies must act carefully and responsibly about the potential invocation of Article XXI of the GATT 1994 in such circumstances.

Consequently, this thesis essentially argues that the public and environmental health problems, such as climate change and emerging new threats like the COVID-19 pandemic manifest themselves in an ever-growing manner, and thus the search for a global and effective solution to overcome these threats becomes crucially important. International trade is a major contributor in countries' welfare and their future becomes increasingly relevant within the public and environmental health discussions, since the measures that Members adopt in order to tackle such above-mentioned problems can be quite trade-restrictive and may also violate fundamental

WTO norms. In this context, Article XX and Article XXI of the GATT 1994 play a vital role in the quest for GATT compatibility of the measures implemented to protect public and environmental health. Accordingly, this thesis sought to focus on the interpretation of those fundamental exception provisions within the WTO legal system and established that recent public and environmental health crises in the world rendered reference to those provisions all the more relevant and indispensable. Thus, international trade regulation is arguably entering a new era where both the Membership and the WTO adjudicating bodies will likely need to explore new ways to employ existing disciplines and revise them where the changes become inevitable.

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