A NEW INTERPRETIVE APPROACH TO AN OLD ISSUE UNDER THE WTO: TURNING THE CHAPEAU OF GATT ARTICLE XX INTO A WILD CARD FOR GREATER DOMESTIC REGULATORY AUTONOMY

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DISSERTATION

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ABSTRACT

The current anti-globalization movements can be seen as counter movements against neo-liberalism staged by social groups who have not benefited much from global economic integration. The WTO has been criticized for restricting domestic regulatory autonomy that could accommodate the interests of some of the disadvantaged social groups by having very narrow and strict exceptions to trade disciplines. Particularly, the WTO judiciary has repeatedly refused to exempt domestic regulatory measures having policy objectives beyond the closed-end list prescribed in the exception clause of GATT Article XX in its jurisprudence by declining various approaches to circumvent that list. However, I argue and try to demonstrate that the interpretation of the chapeau of Article XX by the Appellate Body in recent years can be used to reconstruct the chapeau to exempt highly flexible domestic measures with objectives listed in Article XX and even domestic measures with objectives not listed in Article XX. This is only a tentative development so far, not yet substantiated by explicit Appellate Body endorsement and successful application in WTO dispute settlement. But it should be followed in order to help the WTO endure and finally survive the attacks from the counter movements around the world. Nevertheless, the new interpretation and the interpretations of the closely related texts, particularly the lettered subparagraphs of Article XX, need tweaks to be more internally consistent with one another. A number of WTO Agreements also contain clauses serving basically the same purpose of Article XX, which is to exempt domestic measures otherwise in violation of trade disciplines. The new interpretation of Article XX needs to be transplanted into these Agreements as well to achieve internal consistency of the WTO jurisprudence. Therefore, after reconstructing the chapeau of Article XX, I will make my suggestions supported by careful analysis of the relevant legal texts and previous cases in these two regards.
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This study focuses on how the World Trade Organization (WTO) should police its Members’ domestic regulations. The balance between domestic regulatory autonomy and trade disciplines under WTO rules is very fundamental to the world trading system. Among the few most important substantive rules, which are tariff caps, quantitative restriction elimination, Most Favored Nation Treatment (MFN), and National Treatment (NT), the NT obligation has turned out to be most demanding, having incidental but quite restrictive impacts on any imaginable domestic matter, even if it is basically of a non-trade nature. Therefore, the NT obligation is most intrusive and its interaction with domestic regulations has been one of the focal points of the relationship between international obligations and national sovereignty under the WTO.

However, in the on-going trade war, the significance of this issue seems to have become less apparent. The trade war President Donald Trump started against many US trading partners, particularly China, has created the biggest crisis for the WTO. An even more imminent threat to the WTO arises from the Trump administration’s practice of blocking appointment of the Appellate Body (AB) members. The AB will soon become unable to operate at all when the tenure of two more members comes to an end in 2019. These are the gravest issues a world trading system could possibly face. One can argue, however, the current more serious crisis has its roots in the failure to properly balance the NT obligation and domestic regulatory autonomy. Ruggie once argued that the world trading system after World War II was built on the concept of “embedded liberalism,” which allowed nations to take various regulatory measures to accommodate special domestic needs. Market liberalization across national borders, if not embedded in non-economic social institutions, would help widen economic and social inequalities within a country. Capitalists and their agents would benefit more from globalization and trade liberalization while other social groups, particularly people selling their labor, would benefit less or even lose in the process. As is already evident today, the disadvantaged social groups would mount counter-movements against the movement of trade liberalization to protect themselves. As right-wing populists have gained momentum in both Europe and the United States, it is obvious that the WTO should respond one way or another, allowing national

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governments to protect those disadvantaged social groups who have not benefited from trade liberalization. The failure to do so would seriously undermine the WTO’s legitimacy and draw strong political opposition.

When trade multilateralism reached its culmination in 1995, the new WTO not only cured the “birth defects” of the General Agreement on Tariffs and Trade (GATT) by establishing a formal institution, but also expanded from trade in goods into new domains of trade in services and intellectual property, strengthened substantive trade disciplines, and upgraded the dispute settlement mechanism. The achievements are truly tremendous. However, in the following twenty plus years, the political function of the WTO has not worked productively to address important issues faced by the world trading system, which is very unfortunate. Equally unfortunately, the WTO judiciary has been a little too cautious and rigid, and has not made enough efforts to understand and respond to the dynamics of international trade either. Problems including the one this study focuses on have been avoided and thus accumulated.

When issues keep accumulating, not only will crises inevitably come, but also the WTO organs entrusted to address them would lose authority and respect. It is reasonable to say that the WTO judiciary is at least partially responsible for the on-going trade war and the very misfortune its AB is suffering. Jackson had warned that the WTO judiciary should not apply the WTO law too legalistically.\(^2\) It is desirable for the WTO judiciary to promote stability and predictability through consistent application of the rules. Jackson especially saw and welcomed the rule-oriented approach taken by the WTO to deal with international trade issues.\(^3\) But “[a]ny legal system must accommodate the inherent ambiguities of rules and the constant changes of practical needs of human society.”\(^4\) Especially when the WTO political function is paralyzed, the hope of addressing tough issues lies only with the judiciary. The balance between domestic regulatory autonomy and trade disciplines has been treated as a legal issue. It can definitely be dealt with through the judicial approach.

Nevertheless, if we count on the judiciary approach, we need to understand the relevant legal technicalities and develop jurisprudential routes with innovative interpretation to address

the issue of our concern. In WTO jurisprudence, domestic regulatory autonomy is greatly restricted first by the rule-exception structure in the GATT. Trade disciplines are the rules while domestic regulations are exceptions that have to be defended when they have impacts on trade. Restrictions on domestic regulatory autonomy are also embodied in the cumbersome conditions the exceptions have to meet. Finally, the most serious restriction may be that domestic regulations must have legitimate policy objectives that are on a short list prescribed in the exception clause. To circumvent these restrictions on domestic regulations, the extant literature has focused on reinterpreting GATT Article III – the NT clause – to accommodate more domestic regulatory autonomy. Some of those proposals are particularly able to circumvent the closed-end list in the exception clause and enable domestic regulatory measures to be justified with limitless policy objectives. Unfortunately, the WTO judiciary has repeatedly refused to reinterpret Article III.

Scholars seem to think that it is impossible to find a way to circumvent the closed-end list if we try to expand domestic regulatory autonomy under the exception clause. This is why they repeatedly propose to reinterpret GATT Article III even when the WTO judiciary has repeatedly declined their proposals. After all, that list is prescribed in the exception clause. But is it true that there is less room for reinterpretation under the exception clause to expand domestic regulatory autonomy? This study is going to probe where it has been thought impossible. Particularly, this study suggests that the WTO judiciary has left openings in the case law concerning the chapeau of the exception clause to help domestic regulatory measures to circumvent some of the restrictions imposed on Members’ autonomy. With some clarifications and reinterpretation, the chapeau of the exception clause can provide accommodation to domestic regulatory measures that have policy objectives not based on the closed-end list maintained by the subparagraphs of the exception clause that imposes the most serious restriction on domestic regulatory autonomy.

Roadmap of this study

In the common law tradition, it is not uncommon for courts to take initiatives regarding some important issues. Nevertheless, a judicial solution cannot be viewed as successful if it only

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5 For example, one scholar commented, “Article XX provides a closed list of legitimate objectives to justify government intervention...the WTO judicial body is not in a position to expand the list so as to better handle the newly emerging challenges”. See Michael Ming Du, ‘The Rise of National Regulatory Autonomy in the GATT/WTO Regime’, 14 (3) Journal of International Economic Law 639-675 (2011), pp.671-672.
offers a blunt tool for important changes. A good judicial solution should be able to preserve the stability and predictability of the law as much as possible. In Chapter 1, after presenting the research question in more detail and showing the significance of the research, this study will first review the major alternatives proposed in the literature to solve the issue of our concern. An assessment of these alternatives will be made to see whether they are able to be incorporated into the jurisprudence without much difficulty.

When Hudec first started academic discussion of the issue of policing domestic regulatory autonomy under the WTO, he proposed to introduce an “aim and effects” test into the determination of “like products” under GATT Articles III:2 and III:4. Thus, policy objectives would be considered and used to justify domestic regulatory measures impacting on trade without having to be subjected to the jurisprudential hurdles in the exception clause.6 But the AB clearly rejected the “aim and effects” test.7 People later proposed a resurrection of the “aim and effects” test regarding the interpretation and application of “treatment no less favourable” under GATT Article III:4.8 However, the AB again rejected the “aim and effects” test in a footnote of an important case.9 This issue was also discussed as part of the “linkage” issue or the “fragmentation” issue. It was argued that the right to regulate is a right also recognized and based on general international law and the rights and obligations of the WTO Members under the WTO law should be determined not only by the WTO law but also by general international law as applicable law and interpretative material.10 Domestic regulation for non-trade values is therefore less constrained by the restrictive WTO rules. The WTO judiciary does take consideration of general international law, but it has been reluctant to apply substantive rules of external international law that are in conflict with trade disciplines.

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9 WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, fn.372
This study then proposes the central thesis that the most promising approach to expand domestic regulatory autonomy is to make use of the opening provided by the AB in *EC – Seal Products* to reinterpret the chapeau of the exception clauses in the GATT and GATS Agreements. Particularly, the reinterpretation should allow domestic regulatory measures violating substantive obligations to be justified by their policy rationales not listed in the subparagraphs of the exception clause. This approach not only satisfies the need to circumvent the closed-end list of legitimate policy objectives as prescribed in the GATT Article XX and GATS Article XIV subparagraphs, but also is more favored by the AB in recent years when compared with alternatives proposed in the literature. Moreover, my proposition is obviously applicable to both the trade-in-goods context and the trade-in-services context while some of the alternative propositions reviewed can only work with the GATT Agreement. Although in practice, the domestic regulatory autonomy issue is much more prominent in the GATT context, in the GATS context, it is equally important in theory and will possibly become more practically important in the future when trade in services becomes more regulated by the WTO. My proposition, however, is based only on a tentative development of the GATT Article XX chapeau so far. It is not yet substantiated by explicit AB endorsement and successful application in WTO dispute settlement. Therefore, in Chapter 2, I will first review the major cases concerning the development of the chapeau of the exception clause, trying to assess the acceptability of my proposition in the WTO case law.

Chapter 2 reviews the jurisprudential history from the pre-WTO era of the world trading system to present. There is only one positive case supporting my proposition, which is *EC – Seal Products*. But it would be difficult to take *EC – Seal Products* seriously if it is only an isolated case overwhelmed by a body of negative precedents, particularly when the AB’s new interpretation in *EC – Seal Products* was somewhat vague and its application did not finally justify the EU’s measure. However, if there are a series of cases opening to, supporting or incrementally leading to the reinterpretation of GATT Article XX Chapeau in *EC – Seal Products*, not only the foundations for establishing *EC – Seal Products* as an important case would be more solid, but also proposed further jurisprudential developments in the vein of *EC – Seal Products* would be more feasible. A careful review finds there are some cases (not only GATT cases, but also cases concerning the GATS, TBT and SPS Agreements) containing openings that support the positive case. However, this chapter also finds a very negative case
prior to the positive case, which is Brazil – Retreaded Tyres. The influence of the negative case is still present today, and the positive case is vague on the specifics of the new development. Therefore, although my proposition has not been explicitly turned down by the WTO judiciary like the “aim and effects” test, and although there are some cases supporting EC – Seal Products, the development under the chapeau of the exception clause is only more promising instead of having been undoubtedly established.

Nevertheless, the rich history can provide us with jurisprudential details for further analysis and synthesis regarding the particular standards or tests the new development would have and its implications for the expansion of Members’ domestic regulatory space, which will be discussed in later chapters.

The key development of the chapeau of the exception clause will be discussed in detail in Chapter 3. Briefly, assessing the legitimacy of trade measures violating substantive trade disciplines will focus on assessing the rationales behind the measures under the chapeau of the exception clause. If a disputed measure can be justified with its rationale not listed in the subparagraphs of the exception clause, on what conditions can it be justified? What elements should a test have to be able to perform this task? The EC – Seal Products revealed some key components for testing measures in the perspective of the rationales not on the short list. But the AB did not try to outline a complete test. Fortunately, earlier cases, particularly the TBT cases, have also provided clues to construct a more comprehensive test. Therefore this chapter will try to draw on EC – Seal Products and other cases to propose a reconstruction of the chapeau jurisprudence that can handle the examination of cases that need (or need not) to be justified by rationales not on the closed-end list.

Chapter 4 will discuss the expanded scope of acceptable policy objectives if the WTO judiciary embraces the tentative development in EC – Seal Products. The scope can undoubtedly be expanded if my proposition is taken, but is there still a boundary? What criteria are needed to draw such a boundary? The reconstruction proposal of the chapeau of the exception clause in Chapter 3 will definitely discuss the test that will determine whether a policy rationale is acceptable or not under the chapeau, but the discussion is only a part of the overall reconstruction of the chapeau and not the focus. Chapter 4 will continue the discussion that will only be briefly touched upon in the previous chapter and try to shed more light. In the more detailed discussion in chapter 4, this study will first resort to discussion of standard of review.
under the WTO, which is the most relevant jurisprudential theory about policing WTO Members’ domestic regulations. Then this chapter will suggest that the possible scope of acceptable rationales may be probed in two ways. The first one is to establish a general standard for acceptable policy objectives while the second one is to interpret the exception clause more expansively. This chapter will also discuss whether some high-profile contentious policy objectives and some low-profile but trendy policy rationales are acceptable or not.

Nevertheless, the chapeau does not stand alone. The interpretations of the closely related texts may need tweaks to be more internally consistent with the reconstructed chapeau. Chapter 5 will first try to examine the subparagraphs of the exception clause and the non-discrimination clauses, particularly the subparagraphs of GATT Article XX and GATT Article III:4. Basically, this study will argue that the subparagraph jurisprudence should keep rejecting examining any discrimination caused by the disputed measures. As long as discrimination is not examined under the subparagraphs of the exception clause, the disputed measures can easily survive the subparagraphs and hence have a chance to be finally justified under the chapeau by their rationales not listed in the subparagraphs. However, GATT Article (g) contains an explicit non-discrimination requirement, which requires specific attention. A general review of the necessity test will also be conducted. It is possible to introduce the necessity test into the chapeau to assess whether discrimination can be explained by either the purported policy objectives, or most importantly, by other rationales. The subparagraphs are the right place for a look of a full-fledged necessity test. There is one element of the necessity test, which is analysis of “reasonable availability” of alternatives, may overlap with the analysis of “administrative difficulties” under the chapeau. Therefore, a comparison or contrast of the two is needed to harmonize the relationship between the chapeau and the subparagraphs. Then, if the chapeau of the exception clause is relied upon to exonerate measures that can only be justified by rationales not listed in the subparagraphs, what should we do with Article III in the GATT context? Basically, the Article III jurisprudence, particularly the rejection of the “aim and effects” test, should remain intact, which will be further discussed.

Two other WTO Agreements, the TBT Agreement and the SPS Agreement, also contain clauses serving basically the same purpose of GATT Articles III and XX combined, which is to maintain a balance between trade liberalization and domestic regulatory autonomy. The new interpretation of the exception clause needs to be transplanted into these Agreements as well to
achieve internal consistency of the WTO jurisprudence. Chapter 5 will particularly focus on the implications of the reconstructed chapeau for the TBT Agreement and the SPS Agreement. It may not be necessary to dramatically reconstruct the relevant clauses in these two Agreements, but the relevant texts and jurisprudence, particularly the texts and jurisprudence of TBT Article 2.1 and SPS Article 5.5, need to be reoriented for the reception of the reconstructed chapeau of the exception clause. In terms of jurisprudential technicality, we may see the same re-balancing issue may pose itself differently in the TBT context and the SPS context with an understanding that this issue will be somewhat redefined in terms of jurisprudential details. After Chapter 5, this study will conclude by summarizing its key findings.
CHAPTER 1: THE ISSUE, ITS SIGNIFICANCE, AND LITERATURE REVIEW

Before engaging in detailed discussions of how the WTO judiciary should re-adjust the balance between trade disciplines and domestic regulatory autonomy, it is necessary to present the research question in more detail. It is particularly important to understand the legal technicalities concerning the issue of our concern in order to appreciate discussions in the interpretive approach in later chapters. The significance of this issue will be discussed next. The issue of our concern seems not so important in the face of the on-going trade war and the imminent threat to the AB. However, this issue, along with other issues, are actually at the root of the current crises faced with the WTO. This study then reviews the major alternatives proposed in the literature to solve the issue of our concern. An assessment of these alternatives will be made to see whether they are able to be incorporated into the jurisprudence without much difficulty. Unfortunately, they are not. Therefore, at the end of this chapter, this study proposes to re-interpret the chapeau of the exception clause to re-adjust the balance between trade disciplines and domestic regulatory autonomy by following EC – Seal Products.

1.1 The issue

The issue of how the WTO should police domestic regulatory measures was acutely presented by Robert E. Hudec about 20 years ago.11 In his view, the issue arises from the fact that domestic regulations may sometimes negatively impact on trade. He argues that some domestic regulations may explicitly discriminate, that is to intentionally impose more burdensome treatment on imports, or other domestic regulations may not discriminate based on origin but nevertheless treat imports with de facto discrimination. Therefore, it is inevitable for the WTO to police domestic regulations to guard against protectionism and promote trade

liberalization. While explicit discrimination that is more likely to be protectionist and illegitimate deserves to be governed by more severe rules, *de facto* discrimination may have legitimate reasons and hence should not be governed by the same severe rules. However, Hudec finds that, because the relevant legal texts do not provide a basis for distinguishing these two types of discrimination, the WTO law, primarily GATT Article III as a substantive clause containing the national treatment obligation and Article XX as a general exception clause, has treated both explicit discrimination and origin-neutral discrimination very strictly without any difference, which in his opinion would undermine the delicate balance between trade disciplines and domestic regulatory autonomy and draw strong political opposition.¹²

From the jurisprudential perspective, Hudec suggested that the roots of the issue were two GATT clauses, Article III and Article XX. Article III contains the national treatment obligation. Articles III:1, III:2, and III:4 are the key sub-clauses, which read:

Article III: National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

[Ad note to Articles III:2] A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or

substitutable product which was not similarly taxed.

…

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

…

Article III:1 is the introduction. It informs the entire Article III and sets forth the purpose or principle, which is that domestic fiscal and other regulatory measures “should not be applied to imported or domestic products so as to afford protection to domestic production”. Article III:2 is one of the two operative clauses in Article III that are of interest for this study. Article III:2 is concerned with domestic fiscal measures. Its first sentence requires WTO Members not to charge foreign products taxes and fees higher than those applied to “like” domestic products. Its second sentence with its ad note is concerned with “directly competitive or substitutable products” instead of “like products”. However, since competitive or substitutable products may be very different in terms of tax classification, Article III:2, second sentence does not have the same specific requirement as the first sentence. Instead, it refers back to the general non-protective principle in Article III:1. Article III:4 is concerned with more variety of domestic regulations and requires foreign products should not be less favorably treated than domestic “like products”. Different from Article III:2, Article III:4 is not concerned with competitive or substitutable products, nor does it refer back to the principle set forth in Article III:1.

When there is a prima facie violation of national treatment obligation, it is standard exercise to invoke GATT Article XX for an affirmative defense. The key clauses in Article XX read:

Article XX: General Exceptions

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

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;

... 
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

... 
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

... 

To justify a measure found in violation of Article III and some other trade disciplines, the measure has to pass the examination under one of the ten subparagraphs of Article XX. So far, subparagraphs (a), (b), (d), and (g) have been invoked in WTO dispute settlement. If the measure meets the standard set forth in one of the subparagraphs, it has to go through the examination of the chapeau – the introductory clause – of Article XX before it is finally justified.

Other WTO Agreements including the GATS Agreement, the TBT Agreement, and the SPS Agreements contain clauses analogous to GATT Article III and/or Article XX. They help to provide balance between domestic regulatory autonomy and trade disciplines, particularly the national treatment obligation, in areas concerning trade in services, standards, and sanitary and phytosanitary matters. The lines drawn between domestic regulatory autonomy and trade disciplines in the different legal instruments may vary due to variations of their specific non-discrimination requirements and justifications provided. Overall, GATT Article III and Article XX are the most important clauses in the WTO law regarding policing domestic regulations because of their widest coverage.
One of the biggest constraints the WTO imposes on domestic regulatory autonomy is that domestic regulatory measures, when negatively impacting on imports, must have an acceptable policy objective as specified in a closed-end list particularly provided by GATT Article XX subparagraphs (and its equivalents in the GATS Agreement) in order to survive a challenge under the WTO law.\textsuperscript{13} WTO Members can only exercise their regulatory autonomy when they implement a limited number of policy objectives in their measures if they impact on trade. There appears to be no way in which WTO Members can possibly pursue policy objectives that are not explicitly recognized by the list as long as their measures negatively impact imports. However, national governments have to perform their duties to provide public goods or protect the interests of their constituents without the limit of a short list. There is no doubt that an irreconcilable tension between WTO trade disciplines and domestic regulatory autonomy therefore exists.

In the following years, things have evolved a little differently from what Hudec had in mind regarding this issue. Most importantly, domestic regulatory measures that have purported policy objectives not on the list provided in GATT Article XX have not really been challenged under the WTO. Maybe, WTO Members, with the list in mind, have tried to avoid having domestic regulations with purported policy objectives clearly not on the list. What really reveals the problem of the short list is domestic regulatory measures having internal inconsistencies. These measures are usually flexible about the levels of attainment of their purported policy objectives and choices of implementing means. Some of them have carve-outs that do not contribute to the achievement of their purported policy goals at all or even go against them. Flexibilities and carve-outs create internal inconsistencies and hence discrimination. Products or services associated with low levels of attainment of the regulatory policy objectives or less infringing implementing means, or covered by the carve-outs apparently enjoy better competitive opportunities. Nevertheless, more and more of the discriminatory measures challenged under the WTO have been this type of measure. They take consideration of other values or interests affected and grant certain exemptions, which is reasonable and even imperative in today’s complicated and highly integrated society. However, even if these measures do have purported policy objectives falling on the list provided by the exception clause, because they are “flawed” with internal inconsistencies, there are doubts raised as to whether these measures’ purported

policy objectives are genuine.\textsuperscript{14} While WTO Members may have compelling reasons for having measures with internal inconsistencies,\textsuperscript{15} it seems that measures have to be designed and implemented with full commitment to their purported objectives in order to survive challenges under the WTO law.\textsuperscript{16} The current jurisprudence seems to be very unfriendly to flexible regulatory measures or measures with exemptions while these measures are becoming more popular. Then tension between trade disciplines and domestic regulatory autonomy is thus intensified.

In \textit{US – Gasoline}, for example, when the United States imposed gasoline quality requirements on both domestic and foreign refiners for the objective of conserving clean air, it had different baseline requirements for domestic and foreign refiners. While domestic refiners were required to reduce pollutants against individual baselines, foreign refiners were asked to reduce pollutants against a more demanding statutory baseline. An internal inconsistency and hence discrimination was thus created. Article XX (g), the conservation exception, was invoked to justify its violation of the NT obligation as provided in GATT Article III. However, the conservation exception could not justify the internal inconsistency of the US measure. Obviously, if the US measure is to conserve clean air, there is no reason to treat domestic and foreign refiners differently. Therefore, the measure eventually failed the chapeau of GATT Article XX. The United States tried to explain the discrimination with enforcement considerations, but these considerations were obviously not related to any of the policy objectives on the list. It seems that, in principle, it is nearly impossible for measures with internal inconsistencies to survive the WTO law when justifications of discrimination are limited to those provided on the short list. Even if their purported policy objectives are on the list, they are


\textsuperscript{16}Scholars once observed that “the WTO permits Members to implement regulatory and legislative acts freely to promote whatever public policy they deem appropriate for their national interests, as long as these measures do not discriminate between imported and domestically produced goods of the same kind, or between trading partners”. Discrimination meant in this statement is discrimination in the perspective of the “regulatory and legislative acts” or the perspectives of the immediate policy objectives of these “regulatory and legislative acts”. See Henrik Horn, Giovanni Maggi & Robert W. Staiger, ‘Trade Agreements as Endogenously Incomplete Contracts’, NBER Working Paper No.12745, 2006, available at http://www.nber.org/papers/w12745.
categorically unable to explain the internal inconsistencies. While some other policy rationales may be able to explain the internal inconsistencies, they are most usually not on the list or may even undermine the purported policy objectives that are on the list. Measures of this kind are almost doomed.

Take Brazil – Retreaded Tyres for another example. Brazil prohibited importation of retreaded and used tires for a health objective. However, it carved out two exemptions, allowing importation of retreaded tires from certain origins and importation of used tires for domestic manufacturers to produce retreaded tires. The exemptions created internal inconsistencies and hence discrimination although they did not necessarily give rise to the MFN or NT issues in the technical sense. The policy objective of the Brazilian measure was invoked under Article XX (b) to justify its violation of certain GATT obligations. Although the health objective was on the list, it is obvious that it could not justify the internal inconsistencies of the Brazilian measure. Brazil argued that the exemptions were carved out in order to comply with an international tribunal ruling and a domestic court ruling. However, following court orders was not a rationale related to any policy objective recognized by the list. They even undermined the health policy objective of the Brazilian measure. Again, it is apparent that measures with internal inconsistencies are particularly prone to being struck down because of the limited coverage of the list.

There are also a couple of more developments worth mentioning. First, most domestic regulatory measures challenged in the WTO tribunals have been origin-neutral. Discrimination explicitly based on origin has rarely been found. It is possible that WTO Members have learned how to turn explicitly discriminatory measures into origin-neutral ones. Since more and more disputed measures are recognized to have a legitimate policy objective as listed in the exception clause, what is really at issue is their internal inconsistencies. In such a case, traditional explicit discrimination based on origin can hardly be found. EC – Hormones us a clear example. In that case, the European Union prohibited imported meat products treated with hormones for growth purposes,17 claiming that growth hormones pose health risks.18 The US beef was most impacted for the usage of growth hormones is common in the United States. Domestic European beef was not affected because growth hormones were discouraged in Europe although the usage of some

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other hormones, which may pose the same level of health risks, were still allowed. We can see a discrimination was created, not nakedly based on origins but on a tailored health policy. Particularly, even if discrimination caused by the internal inconsistency of a disputed measure may actually be based on origin, as in US – Gasoline and a few other cases, it may still be able to disguise itself by cloaking the entire measure with a legitimate policy objective. But explicit discrimination does not simply disappear, it may disguise itself as de facto discrimination.\footnote{James Flett commented on the distinction made by Hudec between explicit discrimination and de facto discrimination, saying “[i]t cannot be that the exercise of local regulatory autonomy, even when facially origin neutral, is always beyond the purview of federal trade adjudicators, because it may happen that regulations are adopted without any true regulatory purpose, but rather with the sole object and effect of restricting trade.” James Flett, ‘WTO Space for National Regulation: Requiem for a Diagonal Vector Test’, 16 (1) Journal of International Economic Law 37-90 (2013), p. 43.}

Disguised de facto discrimination is different from de facto discrimination. De facto discrimination, according to Hudec, accidentally discriminates against imports or accidentally has negative impact on trade, therefore “guilty of nothing more than transgressing certain abstract notions of ‘likeness’.”\footnote{Robert E. Hudec, ‘Scope for GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test’, 32 (3) International Lawyer 619-649 (1998), p. 626.}

Disguised de facto discrimination may design and implement policies with particular distinctions to perfectly match origins. It is as bad as explicit discrimination, or even worse. In that case, disguised de facto discrimination may warrant imposing strict rules on it. Second, to achieve certain regulatory objectives, the measures taken by WTO Members need not only be domestic measures, border measures can also be used to achieve the same objectives.\footnote{Although a ban on the importation of foreign products were held to be a domestic measure enforced “at the time or point of importation” by the Panel in EC – Asbestos. See WTO Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC - Asbestos), WT/DS135/R, adopted 5 April 2001, para. 8.99. However, the ban on importation was implemented together with the ban on manufacture, processing, sale, placing on the domestic market and transfer. Therefore, it may be argued that the ban on importation is the logical corollary of the general domestic regulations of asbestos products. However, in US – Shrimp, the United States imposed a ban on the importation of shrimp without further domestic regulations of shrimps. The US ban was only examined as a quantitative border measure. See US – Shrimp, Panel report, para. 8.1. If in EC – Asbestos, there were only the ban on importation, it was possible that it would have been examined as a border measure. Also see Joel P. Trachtman, Regulatory Jurisdiction and the WTO, 10 (3) Journal of International Economic Law 631-651 (2007), p. 634.}

Take US – Shrimp for an example. The US measure was an import ban of shrimp if foreign shrimp fishing vessels did not install “turtle exclusion devises (TEDs)” to conserve sea turtles.\footnote{WTO Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimps), WT/DS58/R, adopted 6 November 1998, paras. 2.4-2.16.} Discrimination was clearly created among the trading partners of the United States—those who adopted essentially the same turtle conservation program as the United States were allowed to export shrimp to the United States while those who did not were
prohibited from exporting shrimp to the United States. More importantly here, a *de facto* discrimination was also created between domestic shrimp and foreign shrimp that was not allowed to be imported. The balance between trade disciplines and domestic regulatory autonomy has actually turned into a balance between trade disciplines on the one hand and domestic measures and border measures on the other hand. Therefore, recent scholarship on this topic has avoided using the concept of “domestic” regulations. Yet, in most cases, the measures pursuing regulatory objectives that have been challenged under the WTO are still domestic regulatory measures.

While the straightjacket the WTO put on domestic regulatory autonomy has remained, the developments related to this issue have made it more complicated. The possibility that bad faith discrimination may disguise itself as non-explicit discrimination makes the WTO judiciary reluctant to relax restrictions on measures violating GATT Article III. Border measures that implement national regulatory policies can blur the line between quantitative trade restrictions and discrimination. Hence the WTO may have to deal with the balancing issue under the exception clause because the exception clause can balance both domestic measures and border measures. These developments appearing evasive of the strict rules are probably prompted by the restrictions the WTO put on domestic regulatory autonomy. Conversely, the developments make the WTO judiciary more careful and reluctant to relax its policing efforts, which in turn makes the WTO look even more intrusive.

1.2 Why is the issue important?

How the WTO restricts its Members’ domestic autonomy is definitely important in terms of legal technicalities, but it matters little in terms of the political opposition created. Ordinary people do not understand the difference between measures with internal inconsistencies and domestic regulations in Hudec’s mind, nor do they care. What matters is that people see that domestic regulatory measures have repeatedly been struck down by the WTO. When the measures struck down by the WTO protect the interests of certain social groups in WTO Member countries, these groups may get very upset about the WTO and hence globalization and free trade that the WTO stands for.
The WTO, succeeding the GATT after its 40 plus years’ evolution, represents the highest achievement of free trade institutionalism and globalization. Its success was based on the popularity of the Washington Consensus after the downfall of the Soviet Union and the communist governments in its satellites, the debt crisis in South American counties that tried the import substitution development model, and the rise of the United States as the only super power and its championing of neo-liberalism. However, that ideological consensus achieved in Washington did not last very long. The most fundamental idea of free trade seems not accepted any more by the general public and their representatives in some of the major countries as some social groups do not benefit from free trade and the institutions that promote it.

“[The] ascendancy of market rationality…must be related to the political and cultural ascendance of the middle classes”23. On the other hand, the increased resentment of free trade and intensified anti-globalization sentiments must be associated with the rise of social groups who have not benefited in the liberalization of world market, particularly those groups in developed democracies where their political power is somewhat more guaranteed. Nobel laureate Joseph Stiglitz previously focused his studies of the discontent of disadvantaged social groups at globalization in developing countries, but in his new book about globalization, he acknowledged that his theories about anti-globalization were equally applicable to the reality in developed countries.24 Actually, it is the discontent in the developed countries that has produced important political changes at the domestic level and the international level. As the middle classes in the developed countries are shrinking, the political and cultural powers of other social groups begin to grow, and they may seek to restrain market ideologies that have not served them well and promote the agendas they care about most. “The battle of Seattle” and protests accompanying other WTO Ministerial conferences demonstrated the powers and resolve of social groups whose interests and hence ideologies are at odds with free trade. But the emergence and ascendance of radical right populist parties in some European countries are more troubling signs that the relative power of the social groups that are against globalization and cross-border integration has become dominant in the politics of developed democracies.25 The victory of Trump in the 2016

general election in the United States more or less resonated with the right-turning trend in Europe.  

Basically, the rise of right-wing political power and the anti-globalization movements can be explained by the failure of governments to redistribute the aggregated benefits generated from trade. Workers in certain industries would certainly suffer job losses due to international trade, which is natural economic re-adjustment to international competition. It is unavoidable that domestic distribution of the benefits from international trade is uneven among all industries. As a result, job losses in some industries may not be the result of unfair competition and these losses are possibly compensated by job creation in other industries if we consider a nation as a single economic entity. However, while some industries in developed countries such as the high-tech and financial industries may well benefit from international trade, people who are in the failing industries are not compensated. As the discontent of the disadvantaged social groups that do not benefit through trade and globalization has accumulated, trade and globalization have become targets of criticism from these groups. Therefore, the theory of comparative advantage is not wrong, the problem is that capitalism and the free market do not make all social groups better off. As the international institutions based on neo-liberalism promote trade and globalization, they are necessarily the targets of criticism at the international level. Particularly when nationalism is popular, international institutions like the WTO are perfect outlets of discontent. When WTO law further restrains domestic re-adjustments that are often in the forms of domestic regulations and other national regulations protecting various domestic interests, it looks like that the WTO is holding a smoking gun when discontented people are looking for a scapegoat to vent their anger.

It is a deeply-held belief by some people that an economy is supposed to be embedded in social relations and serve non-economic purposes. The movement of capitalism, particularly the rise of self-regulating markets, domestically or internationally, forces people to take their chances in the market where they are absolutely disadvantaged vis-a-vis capital. Naturally, those groups who do not benefit from market liberalization would try to protect themselves through

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counter-movements against market power, including demanding protection by the government. When their disadvantage is institutionalized and their demand for protection is refused, their dissatisfaction grows even greater.\(^{29}\) Fortunately, as Ruggie argued, the world trading system in the post-War era could be defined as embedded liberalism, which allowed highly discretionary accommodations of various non-economic domestic needs.\(^{30}\) Therefore, the development of the world trading system did not really prompt an anti-trade or anti-globalization movement at the beginning.

In the early years of the GATT, tariffs were still high. Non-trade barriers were still waiting for their time to become regulated; therefore legal instruments concerning them were pretty much under-developed and less intrusive. The GATT dispute settlement mechanism was negotiation-oriented at the beginning although it gradually became more legalistic.\(^{31}\) Overall, the world trading system was not very restrictive on domestic measures that provided social protections to certain social groups and non-economic interests. Moreover, developed countries experienced long economic booms in the aftermath of the Second World War and they were more internationally competitive vis-à-vis developing countries. They had the luxury to offer protections to underprivileged social groups and pay great attention to non-economic values while sacrificing economic efficiency or competitiveness.

With tariffs reduced to 4.7% on average and non-tariff barriers beginning to be constrained in the 1970s,\(^{32}\) members of the international economic system began to feel greater international competitive pressures. In such a situation, the French School’s argument that more intense international competition in globalization could constrain the domestic policy choices that provides social protections sounded true.\(^{33}\) For the United States, due to the recovery of the European countries and the rise of the East Asian Tigers, American companies began to lose competitive advantages. To make things worse, the oil crises in the early 1970s crippled certain

\(^{29}\) Polanyi’s double movements framework is useful in explaining how laissez-faire policies institutionalize the disadvantage of certain social groups, particularly the working class and how the disadvantaged social groups would resist and counter-balance the market power. See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (second paperback edition), Boston: Beacon Press, 2001, pp. 171, 213.


major American industries that were not as energy efficient as their foreign competitors, say Japanese companies. At home, the New Deal legacy was therefore discarded in the 1970s to cut costs.\textsuperscript{34} And the United States adopted more conservative economic policies under the Regan Administration.\textsuperscript{35} On the international front, the United States began to push for reforms of the world trading system to restrict its trading partners’ non-tariff trade restrictive measures so as to gain more foreign market access for its economy. That is a bit paradoxical. At the domestic level, national policies are becoming conservative, but at the international level, countries are pushing for more liberal institutions. However, the logic is simple. The liberalization at the international level is a demand primarily targeting trading partners although any country taking part in the world trading system has to offer something in exchange. Within a certain extent, the conflicts between national policies and international institutions can be contained.

Eventually, in the heyday of neo-liberalism after the downfall of the Soviet Union and the communist governments of its satellites, the Uruguay Round of GATT trade talks upgraded the GATT to the WTO which corrected the “birth defects” of the GATT. With the WTO in place, market forces and capital within national borders and around the world got reinforced. Domestic market liberalization had one stronger excuse, which is that Members have binding obligations under the WTO to be more liberal. With the international movement of liberalization had such a sweeping victory, the conflicts between national policies and international institutions reached a new height and may not be contained any more.

When the world trading system was upgraded from the GATT to the WTO in 1995, it was said with approval that the “birth defect” of the world trading system was cured\textsuperscript{36} and that the era of the rule of law was ushered in.\textsuperscript{37} However, some people were more critical, seeing that the “side agreements” refining the original GATT texts and particularly the judicialization of dispute settlement took too much flexibility away from the trading system and resulted in greatly

restricting national regulatory autonomy.\textsuperscript{38} Being more powerful and shielding itself with more technocracy, the world trading system became more able to ignore pressures from stakeholders outside the trade community. Despite the fact that the WTO Agreement more explicitly advocates for the promotion of diversified interests and values, people saw that the WTO had deviated from the original “embedded liberalism.”\textsuperscript{39}

The power of anti-globalization began to build up afterwards. The “battle in Seattle” demonstrated the power against neo-liberalism. The WTO immediately lost its momentum after it reached its culmination. It was proposed in the new round of trade talks in the WTO to include non-trade issues such as environment issues and labor issues. However, no more progress in liberalization has been made. The WTO has been stopped from moving forward for more than 20 years. However, the anti-globalization movements did not have effective ways to push further back. Government measures trying to intervene with foreign human rights or labor rights are met with strong opposition. Government measures trying to protect domestic interests are seen as violations of the rules of the international free trade and investment institutions. Private enforcement of Corporate Social Responsibilities (CSRs) faces many problems like ineffective auditing,\textsuperscript{40} lack of government incentives,\textsuperscript{41} and sustainability issues after the initial momentum’s exhaustion.\textsuperscript{42}

Then, how would anti-globalization forces built up so powerfully find an outlet and push back? The ordinary people, mostly the working class, may be easily misled and manipulated by radicals when they are left helpless and confused. Populist nationalism, with its rhetoric against free trade, becomes very attractive to disadvantaged social groups.\textsuperscript{43} This was what happened right before the First World War and the Second World War. Their powers were taken advantage of, not for their interests, but for their greater suffering. However, capitalists did not really


compromise and cooperate when the forces against liberal market tried to push back, which is not conducive to the creation of a constructive outlet for the conflicts. Therefore, we had two world wars and working class revolutions around the world.

Today, international neo-liberalism has built insurmountable technical barriers for the anti-globalization movements to find a way to push back more peacefully. One of the biggest problems is that only national governments are legal entities under most international institutions such as the WTO. And international diplomacy has a strong tradition of secrecy to exclude domestic influence. Although unsatisfactory, various social powers do have access to domestic political life and institution building. However, they are excluded from international politics and institution building. They may try to impact upon international institutions through domestic political activities, but the difficulties are doubled. They have to face the very confusing mechanisms, procedures, and rules that all pose great barriers for them to exert their powers peacefully. If capitalists insist foolishly on the formal rigidity and confusing technicalities, which are created unfairly to the disadvantage of the underprivileged social groups in the first place, what would happen could be that the anti-globalization movements have to smash everything, and just for the world to go through another circle of violence and destruction again.

So, hopefully, the current institutions should be more open to the demands of the underprivileged social groups, allowing their voice to be heard and powers to be peacefully exercised not only domestically but also internationally. Thus, international institutions can help to reach a balance of benefits for both capitalists and those underprivileged. Then there can be more domestic regulatory autonomy for domestic authorities to deal with social issues. The powers of market liberalization and the anti-globalization movement can reach an equilibrium without a devastating clash of the two.

1.3 Possible routes to expand domestic regulatory space under the WTO: A literature review

As the counter movements against neo-liberalism began to gain momentum in the late 1990s, as an institution, the WTO, also susceptible to the law of survival, began to feel the pressures. When the power of the anti-globalization movements grows strong enough, the WTO has to respond one way or another. With regard to the issue raised by Hudec, the commentators
have argued that the WTO should expand domestic regulatory autonomy by allowing Members to take domestic regulatory measures to address social issues much more freely. More specifically, domestic regulatory measures that are becoming more flexible and often in violation of substantive WTO obligations should be justified with acceptable policy rationales that are not on the short list as provided in the exception clauses of the relevant WTO Agreements. However, although changes through political actions under the WTO are possible in theory, it would be extremely difficult because of the consensus decision-making mechanisms. Fortunately, judicial interpretation may work to a certain extent. In fact, the WTO judiciary has gradually tuned the WTO case law in certain aspects to better accommodate the needs of Members to meet the challenges posed by the anti-globalization movements. These interpretative developments have inspired commentators to propose ways to expand domestic regulatory autonomy of WTO Members. Of course, as will be shown below, the interpretative developments have been very slow and insufficient in some key aspects. Nevertheless, it is where the developments have been slow that have prompted commentators to make creative suggestions and proposals.

Next, I will review the extant literature on how the WTO should leave more room for domestic regulations, particularly how the WTO should circumvent the constraints imposed on Members by the limited list in the exception clause. Major proposals that will be reviewed include: (1) the proposal to introduce an “aim and effects” test into the determination of “like products” under GATT Articles III:2 and III:4; (2) the proposal to resurrect the “aim and effects” test regarding the interpretation and application of “treatment no less favourable” under GATT Article III:4; and (3) the proposal to introduce general international law into WTO dispute settlement to counter balance trade disciplines. Jurisprudential developments have been made under GATT Article XX to expand domestic regulatory autonomy although those developments are only incremental compared with the three major proposals. Those developments and relevant academic discussions will be reviewed as well.

1.3.1 Early version of the “aim and effects” test proposal

To respond to the anti-liberalism movements at the domestic level, national governments may need to adopt and implement policies prioritizing non-trade values and protecting domestic interests. Most likely, these measures are in the form of domestic regulations and fiscal measures. Therefore, these measures would likely violate the national treatment obligations
under the WTO. Hudec made the proposal that, if the WTO would choose to respond to political opposition generated by its restrictions on domestic regulatory autonomy, it should choose to exonerate regulatory measures from national treatment obligation violation if they meet certain conditions.\textsuperscript{44}

To be more specific, Hudec’s proposal was to introduce an “aim and effects” test into the determination of “like products” under GATT Articles III:2 and III:4. The prevailing WTO jurisprudence on “like products” has embraced an economic test focusing on the competitive relationship between products without consideration of policy objectives of the disputed measures.\textsuperscript{45} The economic approach to the “like products” test has been clearly specified. For example, in \textit{EC – Asbestos}, the AB stated that in both GATT Articles III:2 and III:4, “likeness” should be interpreted by considering four general characteristics of products as outlined in the \textit{Report of the Working Party on Border Tax Adjustments}:

(i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceived and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.\textsuperscript{46}

Although this market competitiveness approach has been largely followed by panels and the AB since 1970,\textsuperscript{47} GATT panels in two cases adopted a “regulatory likeness” approach.\textsuperscript{48} The panel in the \textit{US – Malt Beverages} case first came up with the “aim and effects” test.\textsuperscript{49} Hudec

\begin{quotation}
\end{quotation}
analyzed this case and found that, although the panel discussed the traditional test, it made its conclusion regarding the issue of “like products” after it examined the purpose and the effect of the US measure. The panel also stated that “in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made ‘so as to afford protection to domestic production’.”

Therefore, US – Malt Beverages can be counted as a precedent supporting the “aim and effects” test. Scholars agree that the panel in the unadopted US – Taxes on Automobiles elaborated the “aim and effects” test. In US – Taxes on Automobiles, without relying on the traditional test, the panel relied on GATT Article III:1 to establish that, to determine whether imported and domestic products are “like”, a consideration of the aims and effects of the disputed measures should be included besides the traditional factors of consideration. The Panel then elaborated how the “aim and effects” approach should work in the “like products” test:

A measure could be said to have the aim of affording protection if an analysis of the circumstances in which it was adopted, in particular an analysis of the instruments available to the contracting party to achieve the declared domestic policy goal, demonstrated that a change in competitive opportunities in favour of domestic products was a desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal. A measure could be said to have the effect of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products. The effect of a measure in terms of trade flows was not relevant for the purposes of Article III, since a change in the volume or proportion of imports could be due to many factors other than government measures. (emphasis original)

53 GATT Panel Report, United States – Taxes on Automobiles (US – Automobiles), DS31/R, circulated 11 October 1994 (unadopted), paras. 5.6-5.10.
This passage makes it clear that the “aim and effects” test, if adopted, could render the traditional approach to determining “like products” less important and instead relies heavily on an examination of the policy objectives of disputed measures and their trade effects.\textsuperscript{55}

Hudec and other commentators praised the “aim and effects” test for leaving more room for domestic regulations.\textsuperscript{56} The most important substantive benefit of conducting an analysis of the regulatory purpose under Article III is that, if the analysis of regulatory purpose is deferred to GATT Article XX, only measures with regulatory objectives on a very limited list can be spared from being found illegal.\textsuperscript{57} It was also suggested that it was difficult for the disputed measures to meet the more burdensome conditions set forth under GATT Article XX.\textsuperscript{58} There is also a shift of the burden of proof. If an assessment of the policy objectives of the disputed measures is conducted under Article III, the burden of proof is on the complainants who have to present a \textit{prima facie} case that there is no legitimate policy objective behind the disputed measures, while the burden of proof is on the respondents who have to convince the WTO judiciary that the measures have legitimate policy concerns if the policy analysis is conducted in an affirmative defense under the exception clause.\textsuperscript{59} An important normative reason has also been offered, which is that when economic competitiveness approach to interpretation of the key elements in Article III is adopted, it undermines the institutional legitimacy of WTO.\textsuperscript{60} That is, the WTO would appear to be less legitimate if it makes those justifiable measures to be found violating Article III, even if it would later pardon them under Article XX. The violation and exception framework as embodied in the relationship between Article III and Article XX reflects a pro-market bias.\textsuperscript{61} However, John H. Jackson indicated that the institutional and moral arguments.

may not be valid, only representing views of certain groups from certain countries.\textsuperscript{62} Adopting the “aim and effects” test also helps to harmonize the national treatment clause under the GATT with the similar clauses in the TBT and the SPS, in which there is no general exception clause and policy analysis of the disputed measures may have to be carried out under the national treatment clauses.\textsuperscript{63}

Figure 1.1: Measures falling under GATT Article III:2 and Article III:4

Moreover, if the “like product” test does not include a policy analysis, a disparity between Article III:2 and Article III:4 would be created. The second sentence of Article III:2, with its ad note, requires a policy analysis when examining disputed fiscal measures regarding directly competitive and substitutable products. While the first sentence of Article III:2 and Article III:4, which examine fiscal measures and domestic regulations concerning “like products,” would not require a policy analysis, measures falling under Article III:4 would be examined without a policy analysis while some measures falling under Article III:2 would be examined with a policy analysis. That is, when the “like products” analysis does not include the “aim and effects” test under both Articles III:2 and III:4, all measures falling under Article III:4 cannot invoke policy justification while only some measures falling under Article III:2 are deprived of policy


justification. As shown in Figure 1, although the overall coverage of goods under Article III:2 is greater than that under Article III:4, the coverage of “like products” is smaller under Article III:2 than that under Article III:4.\(^6^4\) The absence of the inquiry into the purpose of the disputed measures concerning “like products” would possibly result in more findings of Article III:4 violation than findings of Article III:2 violation since the coverage of “like products” is greater under Article III:4 than that under Article III:2, other things being equal.\(^6^5\) This creates an obvious disparity between Articles III:2 and Article III:4.

However, the AB stressed that Article III:1 “informs the first sentence and the second sentence of Article III:2 in different ways.”\(^6^6\) People arguing for the “aim and effects” test acknowledge that the complicated structure in Article III, particularly Article III:2 second sentence, makes it difficult to draw on Article III:1 to introduce the “aim and effects” test under Article III:2 first sentence and Article III:4.\(^6^7\) Article III:1, which is the general introduction to Article III requiring domestic measures “should not be applied to imported or domestic products so as to afford protection to domestic production,” informs the rest of Article III.\(^6^8\) However, while Article III:4, along with Article III:2 first sentence, do not refer back to Article III:1 in their texts, Article III:2 second sentence specifically refers back to the principle set forth in Article III:1, which creates some difficulty to map the relationships between Article III:1 on the one hand and Article III:2 and Article III:4 on the other hand. If Article III:4 and Article III:2, first sentence, without explicit reference to Article III:1, is interpreted as to require an inquiry whether a disputed regulatory measure is applied “so as to afford protection,” it would render the reference to Article III:1 by Article III:2, second sentence redundant. Therefore, it makes Article III more internally coherent if we understand that Article III:4 and Article III:2, first sentence, are able to carry out the principle set forth in Article III:1 by examining disputed measures with objective standards without further inquiring into the policy objectives of the disputed measures.


There is no consensus on the structural implications of GATT Article III, but there is no doubt about the relationship between Article III and Article XX. If the “aim and effects” test is adopted, a major structural problem would be definitely created, which is that the general exception clause of the GATT would be rendered “virtually redundant.”

Eventually, the WTO AB clearly re-affirmed, in Japan – Alcoholic Beverages II, the traditional approach set out in the Report of the Working Party on Border Tax Adjustments regarding the interpretation of “like products.” Japan – Alcoholic Beverages II was a case concerned only with the interpretation of “like products” under GATT Article III:2, first sentence. Before long, in EC – Bananas III, the AB made it clear that it was inappropriate to inquire into the purpose of the disputed measure under GATT Article III:4. In the same case, the AB also rejected applying the “aim and effects” test to non-discrimination analysis under Article II or Article XVII of the GATS, stating that “[w]e see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the ‘aims and effects’ of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions.”

Even if some scholars would claim the “aim and effects” test was adopted in the GATT era, it was effectively rejected when the WTO age came.

It is always possible to find statements by the panels and the AB that support a probe into the regulatory purposes and the discriminatory effects of the disputed measures in some cases. Particularly, EC – Asbestos, a case after Japan – Alcoholic Beverages II, has been used as a major example for the lingering of the “aim and effects” test. however, it may require a little more concrete evidence to claim the resurrection of the “aim and effects” test in determining

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70 WTO Appellate Body Report, Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages), WT/DS8, 10 & 11/AB/R, adopted 1 November 1996, p.25
“like products”. Although Hudec claimed that the implicit application of “aim and effects” test is inevitable,75 people including Hudec have acknowledged that a requiem had been held.76

1.3.2 Resurrection of the “aim and effects” test

In US – Clove Cigarettes, which was followed by US – Tuna II (Mexico) and US – COOL, the Panels and the AB interpreted the TBT national treatment clause contained in Article 2.1 for the first time. Since the TBT Agreement does not have a general exception clause as there is in the GATT Agreement, the AB was forced to create a counter balance to the national treatment obligation within TBT Article 2.1, interpreting “treatment no less favorable” as to require an inquiry whether the different treatment between domestic products and imports, to the detriment of imports, stems from a legitimate regulatory distinction.77 This interpretation generated great repercussions. Weihuang Zhou argued that the “treatment no less favourable” standard under Article III:4 should follow the approach taken by the AB in the TBT cases by incorporating a policy analysis.78 Professors Davey and Makus made a similar argument as well.79

Professor Davey combed the history of the interpretation of Article III:4, concluding that the AB had kept refusing to consider the policy objectives of the regulatory measures in dispute.80 In the very first case where the AB interpreted “treatment no less favourable” under GATT Article III:4, the AB made it very clear that it was not necessary to consider whether a measure was applied “so as to afford protection.”81 This interpretation had created confusion and attracted criticism,82 but only after the US – Clove Cigarettes, more explicit and louder opposition to the AB’s position surfaced as commentators saw the obvious interpretative

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disparity of “treatment no less favourable” in the GATT Article III:4 context and the TBT Article 2.1 context.

Some other scholars, inspired by the TBT cases, also called for the resurrection of the “aim and effects” not only regarding the element of “treatment no less favourable” but also regarding Article III in general.\(^{83}\) For example, it was argued that the “aim and effects” test should be resurrected in the analysis under Article III:2 and the analysis of “treatment no less favourable” under Article III:4.\(^ {84}\) According to another scholar’s resurrection analysis, in \(EC – Asbestos\), the AB said the existence of Article XX should not warrant a broadened or restricted interpretation of Article III:4, which was used to imply that regulatory objectives can still be considered in Article III:4 in general.\(^ {85}\)

The resurrection argument is not totally new from Hudec’s position. As said earlier, there are always cases that can be used to support to a certain extent the reintroduction of the “aim and effects” test into the “like products” assessment, but these cases are ambiguous themselves and not explicit enough to overrule precedents that refused to adopt an “aim and effects” approach to the “like products” test. Moreover, Flett particularly argued that since the typical approach taken by the WTO judiciary to conduct the “like products” assessment is a diagonal comparison between substitutable or directly competitive products in different countries instead of a comparison of real “like products,” it is difficult to properly incorporate a policy analysis. Therefore, it is better to conduct a policy analysis only within the element of “treatment no less favourable.”\(^ {86}\)

How a policy analysis in determining “treatment no less favorable” would go has not had a chance of being stated by a panel or the AB, but it may replicate an “aim and effects” test as elaborated in the unadopted \(US – Taxes on Automobiles\) panel report. There is already an “effects” requirement in determining “treatment no less favourable,” as clearly demonstrated by


a typical interpretation of “treatment no less favourable.” Once the policy analysis regarding “treatment no less favourable” under TBT Article 2.1 is introduced into GATT Article III:4, we may have an “aim and effects” test quite similar to the one in determining “like products” in US – Taxes on Automobiles.

The pros and cons associated with introducing a policy analysis in the element of “treatment no less favourable” are very similar to those discussed above regarding the earlier version of the “aim and effects” test. Again, to circumvent the closed-end list in GATT Article XX is definitely a major consideration. Nevertheless, to introduce the “aim and effects” test into the “treatment no less favourable” analysis does have a strong support from the TBT cases, which is not applicable in the “like products” context. Disparity between identical or similar texts in sister legal instruments should be definitely avoided when possible.\(^{87}\) TBT Article 2.1 and GATT Article III:4 have very similar formulations and the same core terms,\(^{88}\) the AB in US – Clove Cigarettes took great efforts to establish its position that GATT Article III:4 informs the understanding of TBT Article 2.1 and that ‘like products’ in both TBT Article 2.1 and GATT Article III:4 should be interpreted in the same manner.\(^{89}\) The same logic should equally apply to the interpretation of “treatment no less favourable.”\(^{90}\) But on the other hand, introducing the “aim and effects” test into “treatment no less favourable” cannot completely address the disparity between TBT Article 2.1 and GATT Article III. In that case, domestic regulations in the form of fiscal measures covered by GATT Article III:2 still do not have a chance to survive Article III if they are found discriminatory in the economic sense while only measures covered by Article III:4 have a chance to escape the danger of being found guilty under Article III if they have legitimate policy objectives.

Nevertheless, there is no WTO case on Article III:4 clearly suggesting that a policy analysis should be incorporated into “treatment no less favourable” under Article III:4. A typical interpretation of “treatment no less favourable” goes like this:

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\(^{88}\) WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, paras. 91, 100.

\(^{89}\) WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, paras. 107-156.

“an analysis under Article III:4 must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue. Such scrutiny may well involve—but does not require—an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market. In any event, there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably.” 91

The most interesting thing is that when the US – Clove Cigarettes panel tried to argue that importing a policy purpose analysis into the “treatment no less favourable” standard was supported by the equivalent analysis under Article III:4 by the AB in Dominican Republic—Import and Sale of Cigarettes, the AB acknowledged that it said in Dominican Republic—Import and Sale of Cigarettes that the “treatment no less favorable” analysis may need to consider “factors or circumstances unrelated to the foreign origin of the products,” but in a footnote it clarified that it did not mean that policy purposes should be considered. 92 Although the footnote was not liked by people who want the WTO judiciary to take a more friendly stance towards domestic regulations under Article III, it sends out a clear message.

One commentator suggests that the AB had created the flexibility in GATT Article III:4 jurisprudence for “purpose inquiries under the ‘treatment no less favourable’ test” in Dominican Republic—Import and Sale of Cigarettes and a later case, Thailand – Cigarettes (Philippines). 93 However, both cases are not very useful. First, although Dominican Republic—Import and Sale of Cigarettes left a real opening to policy analysis in “treatment no less favourable”, 94 he cannot ignore what the AB said about it in the footnote in US – Clove Cigarettes. Second, Professors Davey and Makus, after a careful analysis of Thailand – Cigarettes (Philippines), commented disappointedly that the AB had not really tried to incorporate a policy analysis in “treatment no

92 WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, fn. 372
less favourable” under Article III:4. In the recent EC – Seal Products, a case very important for the issues addressed in this thesis, another chance seemed to present itself for a reconsideration of the disparity between TBT Article 2.1 and GATT Article III:4 in terms of the interpretation of “treatment no less favourable,” but the AB turned it down and no change was made.

Interestingly, also in In EC – Seal Products, the respondent tried to introduce an “aim and effects” test into GATT Article I:1 regarding the obligation of MFN in the granting of “any advantage, favour, privilege or immunity” with respect to “all matters referred to in paragraphs 2 and 4 of Article III”. The respondent’s major argument was that “the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement” should be transplanted not only to GATT Article III:4 but also Article I:1. Again, the AB emphasized that the MFN obligations under GATT Article I:1 were only concerned with competitive opportunities, refusing to incorporate a policy consideration.

1.3.3 From clinical isolation to the unity of the International Law

A more general approach has been proposed to address the problems created by the constraints of the WTO law on Members’ autonomy to make and implement its policies to address social problems. This approach was best illustrated by Pauwelyn in his well-known treatise and some articles. Pauwelyn’s major proposition is that the WTO law does not exist in “clinical isolation” but is a part of general public international law. Therefore, all international law rules that are relevant to the issues presented should be used as interpretative material and more importantly as applicable law in WTO dispute settlement. As Pauwelyn sees it, if the WTO is allowed to be isolated from general international law, powerful domestic groups, primarily multinationals, would be able to circumvent domestic regulatory constraints in the

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form of concerted international initiatives or biased domestic regulations.\textsuperscript{101} When the WTO is embedded back into the general international law, even if a \textit{prima facie} case of violation of the WTO law, say GATT Article III, is established, the finding would be overturned based on external international law, even before resorting to GATT Article XX. That is, when the disputed measures are supported by international laws other than the WTO law, a joint application of both may lead to results different from findings made only under WTO law. According to this approach, domestic regulations responding to the anti-liberalism movements at the domestic level would not be circumvented and WTO Members’ autonomy to act would not be limited by the list in the exception clause and the legal standards contained in it.

Pauwelyn’s proposition also responded to the debates concerning the “fragmentation” issue in public international law and drew on the relevant discussions that started immediately after the Second World War.\textsuperscript{102} This issue became more prominent after the conflicts between trade liberalization and environmental protection, health issues, labor standards, and human rights became more than hypothetical under the GATT in the 1980s and later under the WTO. The International Court of Justice (ICJ) and the UN International Law Commission both paid great attention to it around the millennium.\textsuperscript{103}

In agreement with Pauwelyn, Bartels stressed that the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) did not bar the application of general international law while Article 2 of the DSU and its Appendix 2 only served to define the scope of the WTO jurisdiction, which covers issues arising out of the covered WTO Agreements only.\textsuperscript{104} Articles 3.2 and 19.2 require that dispute settlement cannot add or diminish the rights and obligations of WTO Members. If applying substantive rules in external international laws together with the WTO law, it is likely that Members’ negotiated rights and obligations are influenced. However, Pauwelyn argued that it is impossible for the WTO judiciary to exclude

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external international law when it adjudicates and WTO Members must have anticipated application of external international law when they negotiated their rights and obligations.\(^{105}\) The AB did make it clear that the WTO judiciary should interpret the WTO according to customary international law concerning treaty interpretation and stated that the WTO law should “not be read in clinical isolation from public international law” in the first case it heard.\(^{106}\) Therefore, it seems that the WTO does open its door to external international law.

However, Pauwelyn himself made a clear distinction between introducing external international law into the WTO as interpretative material and as applicable law.\(^{107}\) Although external international law can also influence the rights and obligations of WTO Members when they are used as interpretive material, its influence is much limited by the WTO text it is supposed to help interpret. In WTO dispute settlement practice, most external international law is introduced into the WTO dispute settlement as interpretative material to clarify the meaning of certain clauses of the WTO Agreements. The best example is the interpretation of “exhaustible natural resources” in GATT Article XX (g), which will be discussed in detail later.

Nevertheless, people arguing for the unitary approach do find support in WTO law for introducing external international law as applicable law to WTO disputes. The most obvious example of external international law applicable to WTO disputes is that explicitly instructed by the WTO to apply. The most well-known are the customary international law concerning treaty interpretation as codified in the Vienna Convention.\(^{108}\) There are more. For example, the TRIPS Agreement also instructed that, for particular issues, the Paris Convention for the Protection of Industrial Property, the Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization, and the Convention on the Integrated Circuit Intellectual Property are authoritative.\(^{109}\) Pauwelyn also identified a second group of external international law applicable to WTO disputes even without explicit instruction by WTO law, which are general principles of


international law concerning burden of proof and standard of proof, evidence, good faith, due process, attribution, jurisdiction, countermeasures and treaty interpretation. It is true that the WTO judiciary often relies on general international law to fill the gaps in the WTO law. These general principles are very fundamental to maintaining the basic operation of the international law and WTO law, but they are mostly concerned with procedural or miscellaneous matters that are only remotely related to the substantive rights and obligations of WTO Members.

International law as a source of law under the WTO as identified by Mavroidis mostly falls into these above two groups. The digest compiled by Cook covers more statements by the WTO adjudicators regarding more diverse issues, but I see in Cook’s work that the WTO generally opens its door to only these two groups of external international law as well. To the disappointment of some commentators, these two groups of international law usually do not include substantive rules in other specific branches of international law such as environment law, labor standards, and human rights while the interaction of these rules with the WTO law is more immediately important regarding domestic regulatory autonomy. For these two groups of international law, they are unlikely to be in conflict with the WTO law, or the legal rights and obligations of these groups and the WTO are “accumulative.” Or people simply “fall back” to general international law when there are gaps in the WTO law. Therefore, they are unable to trump the restrictive rules in the WTO, particularly GATT Articles III and XX.

The group of international law that contains substantive rules in other international law branches is most important for the purpose of retaining or expanding domestic regulatory

111 For the most comprehensive digest of the WTO case law concerning referencing general international law, see Graham Cook, A Digest of WTO Jurisprudence on Public International Law Concepts and Principles. Cambridge: Cambridge University Press, 2015.
113 A look at the table of contents can help form the general impression while more careful reading is helpful but not very necessary because Cook’s work consists mostly of the excerpts of WTO Panel and AB reports instead of analysis. See Graham Cook, A Digest of WTO Jurisprudence on Public International Law Concepts and Principles. Cambridge: Cambridge University Press, 2015.
autonomy. When they are in conflict with the WTO law, their application may justify Members’ regulatory measure in violation of WTO rules if they are given priority in dispute settlement. However, commentators’ views are very diverse. Yearwood revealed two opposite positions and a middle ground between the two.\textsuperscript{118} Trachtman represents the position that the WTO judiciary should not apply substantive external international law unless incorporated in the WTO corpus.\textsuperscript{119} Pauwelyn represents the opposite position that the WTO judiciary should apply all international law rules that are relevant to the issues presented and provide legal answers accordingly.\textsuperscript{120} Bartels seems to stand in the middle, arguing although the first position is too restrictive, specific WTO rules should be given priority over external international law.\textsuperscript{121}

In WTO dispute settlement practice, the WTO judiciary is still reluctant to apply substantive external international law. But it is worth noting that scholars taking the unitary approach, particularly regarding the applicability of external international law in the WTO dispute settlement, have proposed thoughtful ways to solve the conflicts between the WTO rules and external international law. The unitary approach can make use of a number of concepts and principles in general public international law to determine the specific relationships between the WTO law and general public international law. Of course, they tend to prioritize external international law over the WTO law.

One of the important concepts is the hierarchy of the “sources” of international law. Article 38 of the Statute of the ICJ provides an authoritative illustration of the sources of international law, which include: a, international conventions; b, international custom; c, the general principles of law; d, judicial decisions and the teachings of the most highly qualified publicists. Pauwelyn also supplemented the list with other forms of international law.\textsuperscript{122} There is


\textsuperscript{122} Joost Pauwelyn, \textit{Conflict of Norms in Public International Law, How WTO Law Relates to other Rules of
a rough hierarchy recognized among these sources. For example, judicial decisions and the teachings of the most highly qualified publicists are said to be “subsidiary” compared with the other sources listed in Article 38 of the Statute of the ICJ.\(^\text{123}\) When external international law sources are superior to the WTO law in the hierarchy, \textit{prima facie} violation of the WTO law can be justified by external international law. But in reality, a rough hierarchy is not enough to provide guidance in many situations. Although it has been argued that trade law serves as means to the end of achieving more important objectives,\(^\text{124}\) international law experts cannot come up with a clear hierarchy that has a general application.\(^\text{125}\) Pauwelyn also acknowledged that the concept of hierarchy of international law sources was of very limited use in general.\(^\text{126}\)

\textit{Jus cogens} is a related concept that can be used to introduce external international law into WTO dispute settlement and render the WTO law in conflict with it void. Article 53 of the Vienna Convention defines \textit{Jus cogens} as (1) norms; (2) accepted and recognized by the international community of states as a whole; (3) from which no derogation is permitted. Both Articles 53 and 54 provide that international treaties in conflict with \textit{jus cogens} would be void.\(^\text{127}\) Therefore, WTO law may not justify Members’ derogation from \textit{jus cogens}. But the concept of \textit{jus cogens} has its own problems as well. Although the concept of \textit{jus cogens} has been widely accepted, what it includes is far from settled. The most fundamental problem is that there is not a standard for people to determine whether an international norm is \textit{jus cogens} or not.\(^\text{128}\) International tribunals also tried not to clarify the nature or general qualifications of \textit{jus cogens}. It has to be admitted that progress has been made by identifying some individual norms that are

\(^{123}\) Article 38(1)\(d\) of the Statute of the ICJ: “subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as \textit{subsidiary means} for the determination of rules of law.”


\(^{127}\) Article 53 of the Vienna Convention:” A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law…” Article 64 of the Vienna Convention: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

thought to be qualified as *jus cogens* in case law.\footnote{For example, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, ICJ Reports 2012, para. 99.} Nevertheless, many issues remain even regarding those identified norms, particularly their detailed contents.\footnote{See Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”. 11, A/Cn.4/L.682, 13 April 2006, footnote 522.}

Other concepts and rules of conflict are also proposed to determine the priority of the WTO and external international law.\footnote{The most comprehensive treatment of this topic is still Pauwelyn’s treatise: Conflict of Norms in Public International Law, How WTO Law Relates to other Rules of International Law. Cambridge University Press, 2003.} Again, it has to be admitted that some of the proposals are hard to rebut. Scholars taking the unitary approach demonstrate that applying external international law to the WTO law is inevitable in some cases if we accept the validity of some fundamental concepts and rules of conflict in international law. However, as said earlier, although using external international law as interpretative material and applying non-substantive international law is accepted by the WTO judiciary, treating it as applicable law in general is still resisted.

1.3.4 Unsatisfactory progress under the exception clause

Compared with the static development under GATT Article III, the interpretation of GATT Article XX has gone through gradual transitions in favor of greater domestic regulatory autonomy over the years. But interestingly, commentators are still more interested in proposing new approaches to the balance between trade discipline and domestic regulatory autonomy under GATT Article III because it has the potential to circumvent the short list of legitimate policy objectives in Article XX that domestic measures should have. While the Article XX jurisprudence has made some progress, commentators have not proposed anything like the “aim and effects” test that can greatly change the balance between trade disciplines and domestic regulatory autonomy. They still have not treated Article XX as the key to a possible breakthrough. Professor Davey once argued that “a rational measure could be crafted to achieve the Government’s policy goal and still satisfy the terms of Article XX.”\footnote{William J. Davey, Non-discrimination in the World Trade Organization: The Rules and the Exceptions, The Hague: The Hague Academy of International Law, 2012, p. 248.} In his view, the exception clause could be flexible enough to achieve what people want to achieve under Article III regarding readjusting the balance between domestic regulatory autonomy and trade
disciplines. Unfortunately, Professor Davey’s comment is still waiting for more serious academic explorations and the exception jurisprudence has not made enough progress yet.

Nevertheless, Article XX has generated a large body of literature. This stream of literature and the relevant jurisprudence are interesting, but they do not have concentrated focuses and clear approaches. Therefore, it is difficult to summarize. I will organize the review here into four parts. First, I will review jurisprudential developments that seem to tap in the unitary approach to the relationship between the WTO law and external international law. I will also review the relevant comments. Second, I will review three overarching issues under Article XX, which are the structure of Article XX, the definition of a “measure,” and the legitimacy of process and production methods (PPMs). Third, I will review the jurisprudential development of the “necessity” test under some of the subparagraphs and the relevant comments. Fourth, I will review the jurisprudential developments under the chapeau and the relevant comments. GATS Article XIV is another major exception clause in the WTO. But, since GATS Article XIV has been viewed by the AB as analogous GATT Article XX, a separate review of the development of GATS Article XIV jurisprudence and the relevant debates is not necessary.

1.3.4.1 External international law in the context of GATT Article XX

Some changes under GATT Article XX may be viewed as the success of the unitary approach discussed earlier. For example, In US – Shrimp, the AB was faced with the issue whether certain species of turtles were “exhaustible natural resources” within GATT Article XX (g). The AB first introduced the evolutionary interpretation method, then interpreted “exhaustible natural resources” by relying on external environmental agreements such as the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity to expand its scope from minerals to endangered living species. This example is often cited by scholars who support introducing external international law into the WTO dispute settlement. However, the external environmental treaties are only used as interpretative material.

In this case, multilateral environmental agreements (MEAs) became the only important interpretative material. Although they were not applicable laws, they could change the interpretation of an important element in subparagraph (g) of GATT Article XX. However, the AB in this case did not faithfully follow the customary rules of international law it had repeatedly claimed to be following in WTO law interpretation. According to the Vienna Convention Articles 31 and 32, the AB should give great weight to primary interpretative materials such as the ordinary meaning of the phrase to be interpreted, the textual context, and the interpretation in the case law. It should also give weight to legislative history. However, it seemed the AB ignored all these materials, particularly the very clear case law and legislative history that supports interpreting “exhaustible natural resources” as minerals, and only relied on MEAs to draw its conclusion.

The WTO judiciary has also tapped in general international law in its GATT Article XX chapeau jurisprudence. It characterized GATT Article XX chapeau as the expression of an important principle of general international law, which would make scholars supporting introducing external international law into WTO dispute settlement happy. For example, the AB in US – Shrimp said the chapeau is “one expression of the principle of good faith,” which is “a general principle of law and a general principle of international law”. This statement has been often cited by later cases.

However, the WTO judiciary stresses that treating the chapeau as an expression of the principle of good faith in international law is not for the purpose of expanding domestic regulatory autonomy, but to prevent the abuse of the exceptions as provided in the subparagraphs. It is observed that the WTO judiciary in US – Gasoline and some later cases worried about discriminatory measures getting away without being caught, particularly after the AB had decided not to examine discrimination under the subparagraphs. The principle of good faith, as will be discussed in Chapter Three, has been employed to erect a difficult hurdle for the

disputed measure to overcome under the chapeau before it is finally justified under the exception clause.

1.3.4.2 Some overarching issues under Article XX

There have been some jurisprudential developments concerning a number of overarching issues under GATT Article XX. Among them, developments concerning the structure of Article XX analysis, the definition of a “measure,” and the treatment of PPMs are more interesting. Some of these issues have evolved in the jurisprudence in the direction of expanding domestic regulatory autonomy.

The structure of Article XX analysis

The two-tier structure of the analysis under Article XX was first established by the AB in *United States – Gasoline*,\(^{140}\) and soon affirmed in *United States – Shrimp*.\(^{141}\) According to the two-tier structure, a disputed measure must first be provisionally justified under one of the subparagraphs, then it would be examined next under the chapeau. This structure seems to go along with the balance between exceptions as provided in the subparagraphs and prevention of abuse as provided in the chapeau.\(^{142}\)

However, this structure was regarded as superficial or even counter-productive.\(^{143}\) The reason offered is similar to that for criticizing the treatment of chapeau as a good faith principle and as a counterbalance for the abuse of exceptions,\(^{144}\) which will be discussed in detail in Chapter Three. Particularly, the fixed order of the two-tier analysis is not necessary. The conditions a disputed measure has to meet under the subparagraphs and the chapeau are cumulative, the order does not matter in terms of the final result.\(^{145}\) If a disputed measure would obviously fail the chapeau, it is not efficient to examine it first under one of the subparagraphs.


\(^{145}\) Lorand Bartels, ‘The chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A
Although it is true the two-tier structure is superficial, it was one of the steps taken to appease the opposition of groups like the environmentalists to the world trading system. The environmentalists would feel a little better if the disputed environmental measure was justified under subparagraph (b) of GATT Article XX, even though it then would fail the chapeau. As mentioned earlier and will be discussed later, with the jurisprudential developments under the subparagraphs and the wider definition of a “measure,” it would be certainly easier for a disputed measure to pass the examination under one of the subparagraphs. Coupled with the two-tier structure of analysis, this definitely helps to make Article XX appear a little friendlier to domestic regulations.

The definition of a “measure”

In the GATT case US – Section 337, the Panel said that when Article XX (d) was invoked to justify a disputed measure violating GATT disciplines, “what has to be justified as "necessary" under Article XX (d) is each of the inconsistencies with another GATT Article found to exist”.146 When examining whether a disputed measure can be exempted under the subparagraphs of Article XX, it makes sense to focus the analysis on part of the disputed measure that is actually in violation of substantive GATT clauses. In other words, what needs to be justified under Article XX is only the part of a disputed measure that causes violation, not the entire measure when the other parts of it are in compliance with the WTO law.

However, in the very first case heard by the WTO AB, the AB overruled the precedent set in the GATT case, stating that when considering the disputed US gasoline baseline standards under Article XX(g), it was wrong to consider “whether the refusal to provide individualized baselines to foreign refiners was primarily aimed at the conservation of natural resources” and the right question to ask was “whether the ‘measure’, i.e. the baseline establishment rules, were ‘primarily aimed at’ conservation of clean air.”147 In US – Gasoline, Brazil and Venezuela did not challenge the entire baseline establishment rules. The entire rules were easily found to be primarily aimed at environmental protection, however, it was much more difficult to establish such a connection between the part of the rules that imposed a uniform baseline for foreign

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refiners or the internal inconsistency of the US baseline rules and the legitimate purpose to protection the environment. Therefore, it can be imagined that the AB made it easier for domestic regulatory measures that violate other GATT clauses to be exempted under Article XX and hence provided Members with more domestic regulatory space.

The AB had followed the approach to the interpretation of “measure” in Article XX (g) since US – Gasoline without discussing the scope of “measure” in later cases until Thailand – Cigarettes (Philippines). In Thailand – Cigarettes (Philippines), the AB reinstated the US – Section 337 precedent, stating that “when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX (d) defense should focus on whether those regulatory differences are ‘necessary’ to secure compliance with ‘laws and regulations’ that are not GATT-inconsistent”. Clearly, the AB focused its attention on the internal inconsistencies of a disputed measure instead of the entire measure in Thailand – Cigarettes (Philippines). However, later in EC – Seal Products, the AB interpreted Thailand – Cigarettes (Philippines) as to ask panels to consider the whole measure. It said the inconsistencies with GATT non-discrimination obligations were caused by “the combined operation” of both “the ‘ban’ that restrict market access” and “the IC exception” and the other exceptions. Therefore, even when the exemptions lowered the contribution of the entire seal scheme could make to the fulfilment of its purported policy objective, the entire scheme was still found to be necessary for the achievement of its purported policy objective.

PPMs

The PPMs issue in the WTO context arises when a Member conditions market access or regulatory measures on the production and process methods of products. Hudec discussed this issue in the GATT Article III context not long after the WTO was established, stating that

determining like products according to PPMs is “simply viewed as a priori illegitimate”. But with knowledge of the GATT era cases in which the PPMs issue arose in the GATT Article III context, he did not discuss this issue in the exception clause context. This issue in the exception clause context came up in *US – Shrimp* after the establishment of the WTO in the exception clause context and disappeared in the GATT Article III context. In that case, the US banned shrimp harvested with methods dangerous to turtles. However, this ban was not to protect domestic interests. Nevertheless, the effects of the PPMs for harvesting shrimp had an international characteristic. The AB noted that the turtles are not confined to US territorial waters but migrate around the world. Other PPMs confined to the territories of producers may only directly impact on the exporting countries. Measures conditioned on PPMs clearly have an extraterritorial implication. The AB took issue with the unilateral nature of the US measure, holding that the United States unjustifiably treated the countries where the conditions were different the same. The US ban therefore failed GATT Article XX. As to whether the extraterritorial nature of the US measure is problematic or not, however, the AB did not express itself. Subparagraph (e) does permit measures restricting imports made by prison labor in a foreign country, but Article XX is silent on the legitimacy of measures targeting more general PPMs. It is fair to say that the issue of PPMs remains open.

Commentators categorized measures with an extraterritorial focus into different groups. With the relationship between the policy objective and the products involved becomes more distant, the legitimacy of PPMs measures under the WTO becomes more doubtful. However, we do not have an agreed spectrum. Maybe, we can agree that embargos constitute the most extreme case where the policy objective is not related to the PPMs of the products at all,

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therefore, they raise the most serious concerns. For people who are more afraid that the world trading system would be undermined by PPMs measures, measures with extraterritorial effects are things to worried about in general. For example, Baghwati was shocked by the “concessions” the AB made in US – Shrimp regarding its deliberation under subparagraphs (b) and (g) and commented that the AB made law in controversial matters such as the legitimacy of measures conditioned on PPMs under “the political pressures brought by the rich-country environmental NGOs.”

In EC – Seal Products, the PPMs issue arose again since the EU seal scheme affects foreign seal products because of the processes and procedures producing them. The AB held that “the EU Seal Regime is designed to address seal hunting activities occurring ‘within and outside the Community’ and the seal welfare concerns of ‘citizens and consumers’ in EU member States”. Hence, the AB decided the European Union based its regulatory jurisdiction on protecting interests within the territories of its members and refused to rule on the issue of PPMs again. Therefore, no matter what scholars argue, WTO Members’ autonomy to make and implement policy objectives that have more extraterritorial effects is still restricted up until recently because of the uncertain status of PPMs measures under the WTO law.

1.3.4.3 Necessity: the key test in GATT Article XX subparagraphs

For a disputed measure to fall in the scope of important Article XX subparagraphs including (a), (b), and (d), the greatest hurdle is that the disputed measure has to be “necessary” to achieve its regulatory purpose. The key to the “necessity” test since the GATT era has been to determine whether there was a less trade restrictive alternative to the disputed measure that is also able to contribute to the realization of the regulatory purpose. In US – Section 337, it was first stated by the panel that a disputed measure is not necessary when there existed an alternative

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that was not GATT inconsistent and that could reasonably be expected to be employed.\textsuperscript{164} In most cases, the AB has been quite deferential to Members in terms of their characterization of their regulatory purposes, but less so in terms what means they chose to achieve their purposes. Therefore, the AB has been quite enthusiastic in searching for “less restrictive alternatives” that would render the means used by Members disqualified as exceptions under Article XX.\textsuperscript{165} The WTO “necessity” jurisprudence was criticized for a while for being too intrusive to the regulatory prerogatives of Members and too insensitive to the practical difficulties associated with the hypothetical alternative means identified by the WTO judiciary.\textsuperscript{166} But the “necessity” jurisprudence has gradually evolved in favor of the regulating Members.

At the most general level, the hypothetical application of the “necessity” test should include a juxtaposed “weighing and balancing” of both the dispute measure and the proposed alternative regarding the extents they can contribute to the regulatory purpose and their respective impacts on trade.\textsuperscript{167} In actual application, there was rarely a side-by-side and step-by-step contrast of the disputed measures and the proposed alternatives. They were mostly analyzed separately. However, as the AB stated: “[t]he weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment.”\textsuperscript{168}

Therefore, although there is no perfectly matched contrast, a holistic operation is still in place. The reason why the “weighing and balancing” is far from a standard operation is that the facts in different cases present different issues or the same issues in different framing and sometimes additional issues regarding the “weighing and balancing.” The variations of the analysis of “necessity” have increased the difficulty for people to appreciate the changes that have already taken place.

\textsuperscript{167} Michael Ming Du argued that, starting from \textit{Korea – Beef} up to \textit{Brazil – Retreaded Tyres}, the “weighing and balancing” test has been clearly formulated and replace the original “least restrictive measure” test. See Michael Ming Du, ‘Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?’ 13 (4) Journal of International Economic Law 1077-1103 (2010), p. 1092. However, the “weighing and balancing” is not a replacement of “least restrictive measure” test. Rather, it is a refinement.
When we look at the “necessity” analysis, the existence of the problems the disputed measure is supposed to address is logically the first issue, although it was usually treated as an issue separate from the issue of “necessity.” In *EC – Asbestos*, the AB clarified that a Member “may rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected opinion” to justify the existence of a health risk that its measure was to address, even though the scientific sources were different from the mainstream opinion. If the problems the disputed measures are supposed to address do not exist, the disputed measures are certainly not necessary under the relevant subparagraphs of Article XX. Therefore, by relaxing the burden of proof for the existence of the problems, the AB gave Members greater regulatory autonomy.

After confirming the problems the disputed measures are supposed to address do exist, the next issue is what is the appropriate level of protection/enforcement. In *EC – Asbestos*, the AB said clearly that “it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.” And it did endorse the zero-risk approach to setting the level of protection by the European Union. However, in *Korean – Beef*, the AB refused to recognize the validity of the preventive approach adopted by Korea in enforcing laws reducing origin misrepresentation of the beef although it reiterated that Members had the right to decide the level of enforcement of their laws and regulations. It appears that the AB has not been consistent when assessing the appropriate level of protection or enforcement Members set, but there may be a pattern. When a more important value is involved, like protection of human life from lung cancer in *EC – Asbestos*, the AB allows Members the greatest discretion, but when the value is not that important, like reduce misrepresentation to consumers in *Korea – Beef*, Members are allowed less discretion.

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169 For example, in *EC – Asbestos*, the AB distinguished the issue of the existence of the risk and the issue of “necessity”, but later the issue of the existence of the risk re-appeared when the AB was addressing issues of “necessity”. WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC - Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, paras. 155, 165.


The extent to which the disputed measure can contribute to the realization of the regulatory policy objective is also an important issue in the “weighing and balancing”. In *Korea – Beef*, the AB already clarified that the connection between the disputed measure and the regulatory objective it was supposed to achieve needed not to be “indispensable.” In *Brazil – Retreaded Tyres*, the AB further clarified that the connection only needed to be “material,” which was considered another step towards less strict requirements for a disputed measure to be determined as necessary.¹⁷⁶

The extent to which the disputed measure impacts on trade is hypothetically one of the most important issues in the “weighing and balancing” test. However, in some cases, take *EC – Asbestos* for example, it is not touched. In *EC – Asbestos*, the ban on Canadian Asbestos products had a serious negative impact on trade. If it was discussed in detail, it would create some difficulty in the “weighing and balancing” for the AB to support European Union’s ban. On the contrary, when the AB struck down Korea’s dual retail system regulation, it discussed the negative impacts of the Korean measure on beef imports, which certainly further justified its decision that Korea’s measure failed the requirements under Article XX (d).¹⁷⁷ This shows that the AB has used tricks to create interpretative flexibility to allow Members greater regulatory space in some circumstances.

When the examination focuses on the proposed alternative, the AB should also examine the extent the alternative can contribute to the realization of the regulatory goal at the appropriate level set by Members and the extent of its impact on trade. Usually, the impact of an alternative on trade will not be discussed because the proposed alternative is always less trade restrictive. Otherwise, the aggrieved party will not propose it as an alternative. The focus is usually on whether “a ‘reasonably available’ alternative… would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective…”¹⁷⁸ The contribution of the alternative to the regulatory goal has been discussed in some cases together

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with the issue whether the level of protection/enforcement set by the regulating Member is appropriate. For example, in *Korea – Beef*, the AB held that the traditional enforcement procedures were sufficient to achieve the regulatory goals after it replaced elimination with procedures *ex ante* as the appropriate level of enforcement.\(^{179}\)

The additional analysis concerning the examination of alternatives is about its availability in the context of the regulating Member’s political, economic and cultural context. Although resource constraints may not successfully serve as excuses for an alternative not to be reasonably available, there are some other subtle developments that render finding an alternative more difficult.\(^{180}\)

Overall, I would argue that the conditions in GATT Article XX subparagraphs have been relaxed in some aspects. However, the ultimate limit they impose on domestic regulatory measures cannot possibly be lifted. Disputed measures still have to be provisionally justified by policy objectives listed in the subparagraphs. Moreover, as more domestic regulatory measures are challenged for their internal inconsistencies, the subparagraphs, along with the necessity test, have become less important. What eventually determines the scope of domestic regulatory autonomy in most cases where domestic regulations have internal inconsistencies are concerned is the chapeau.

### 1.3.4.4 The chapeau of Article XX

The AB, in *US – Shrimp*, stressed that the analysis pursuant to the chapeau examines both the content (“detailed operating provisions”) and the application of the disputed measure,\(^{181}\) but it was only the application that was focused upon by the AB in the examination under the chapeau in that case.\(^{182}\) This eased the worry that the AB would, after *US – Gasoline*, put a “necessity” test into the chapeau regarding environmental measures that are supposed to be examined first under subparagraph (g).\(^{183}\) If the substance of environmental measures will not be

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183  Appleton thought it was possible to insert an “necessity” test in the chapeau of Article 20 after the *US – Gasoline*. See Arthur E. Appleton, ‘GATT Article XX’s chapeau: A Disguised ‘Necessity’ Test? The WTO Appellate Body’s
examined under the chapeau, there is little to be worried about even if there is a “necessity” test under the chapeau. However, this distinction could not be well maintained. It was argued that, depending on the level of details of the examination of the disputed measure needed under the chapeau, the AB may look at both the content and the application of the disputed measure under the chapeau. When the AB examines the content of the disputed measure under the chapeau again, it increases the likelihood of the disputed measure failing the chapeau no matter what the test is or whether the test is different from that in the subparagraph.

The development in Brazil – Retreaded Tyres further complicated the examination of disputed measures under the chapeau. Under the chapeau, it is supposed that there are three conditions disputed measures have to satisfy in order to pass the examination under the chapeau. However, the condition that requires the disputed measures not to constitute a “disguised restriction on international trade” has remained dormant in WTO jurisprudence. The remaining two conditions that require the disputed measure not to constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” are the real hurdles the disputed measures have to pass under the chapeau. In Brazil – Retreaded Tyres, the AB held that discrimination had to be justified with the assessment of rationales in the light of the purported policy objectives of the dispute measures. This is a rather strict requirement.

In Brazil – Retreaded Tyres, the fatal flaw of the regulation imposed by Brazil was that it contained exceptions and these exemptions could not be explained by the purported policy objective or even went against it. Follow this logic, then all regulatory measures containing exceptions would suffer the same fate as the disputed measure in Brazil – Retreaded Tyres because the rationales behind exceptions can hardly relate positively to the purported regulatory


objectives. No doubt that Brazil – Retreaded Tyres has been repeatedly criticized by commentators.\textsuperscript{188}

Therefore, the “curse” of Brazil – Retreaded Tyres needs to be broken if the chapeau wants to be truly useful to expand domestic regulatory autonomy. The cumbersome requirement in Brazil – Retreaded Tyres was somewhat relaxed in EC – Seal Products, however, some commentators did not take notice.\textsuperscript{189} Some others did take note. For example, Duran spoke most explicitly that the AB implied in EC – Seal Products that rationales not on the list as prescribed in the GATT Article XX subparagraphs could justify an inconsistent measure flawed with exemptions,\textsuperscript{190} but he still hoped the AB had made this more explicit.\textsuperscript{191} Still some others took the middle ground. For example, Bartels noted the new development but he held that the AB “harks back to the original test in Brazil – Retreaded Tyres.”\textsuperscript{192} It is true that the AB did not really depart from Brazil – Retreaded Tyres when it tried to spell out its interpretation of the GATT Article XX chapeau, but in its analysis, it undoubtedly updated the test assessing discrimination under the chapeau, which has been summarized as follows:

(i) whether rationales offered other than the immediate policy objectives of measures at issue are reconcilable with the immediate policy objectives; [if not,] (ii) whether the exceptions can realize the policies behind themselves while avoiding unnecessarily undermining the immediate policy objectives of the measures at issue; and (iii) whether the exceptions are applied even-handedly in the perspective of the rationales behind the exceptions other than the immediate policy objectives of measures at issue.\textsuperscript{193}

\textsuperscript{188} For the most recent criticism, see Gracia Marin Duran, ‘Measures with Multiple Competing Purposes after EC – Seal Products: Avoiding a Conflict between GATT Article XX-chapeau and Article 2.1 TBT Agreement’, 19 (2) Journal of International Economic Law 467-495 (2016), p. 470.


\textsuperscript{193} The three-step test has been first summarized in Henry Hailong Jia. The Legitimacy of Exceptions Containing
The detailed analysis of EC – Seal Products will be deferred to Chapter 2. I would simply argue that, according to this updated test, measures that have flaws similar to that in the Brazilian measure in Brazil – Retreaded Tyres will have a chance to pass the examination under the chapeau.

1.4 A necessary and promising solution

The GATT Agreement was drafted more than 70 years ago. Hudec thought it was inadequate to address the issue of balancing trade disciplines and domestic regulatory autonomy.\textsuperscript{194} It is true that the world trading system has concluded more and more agreements during its development along the way, particularly the side agreements amending and expanding the GATT Agreement. However, the policing of domestic regulations is still governed primarily by GATT Articles III and XX. Bound by the legal texts, the WTO judiciary has been more concerned with abuse of domestic regulatory autonomy than with its over-restraint. Proposals trying to free domestic regulatory autonomy from strict trade disciplines such as the two versions of the “aim and effects” test and the “linkage” and “unity of international law” arguments have been turned down by the AB to different extents.

However, the WTO has been faced with grave challenges since its inception. The anti-globalization movements of the disadvantaged social groups who do not benefit from globalization and trade liberalization have made the world trading system as their major target. The WTO has been heavily criticized for its negligence of environmental protection, labor standards, human rights, culture preservation, development etc. As the populist nationalism has gained traction in both Europe and the United States, which are among the most powerful Members of the WTO, the legitimacy crisis of the WTO has very well turned into a political crisis. Coupled with the rise of China as a major exporter that has definitely tipped the balance of trade benefits negotiated in the Uruguay Round, the political commitment of the United States, the No. 1 sponsor of the world trading system, to the WTO has further declined. In such a situation, the WTO has to respond, one way or another, to the challenges. As the political

function of the WTO has paralyzed, it is time for the judiciary to step up to address difficult issues such as the balance between domestic regulatory autonomy and trade disciplines.

To redraw the line between permissible and impermissible domestic regulations, the WTO judiciary may now embrace the proposals it has repeatedly declined. But it would disturb quite a number of important rules, whose interpretations have been firmly established in the jurisprudence. This is very harmful for the stability and predictability of the WTO law. Besides, it would also greatly undermine the authority of the WTO judiciary. Moreover, as more and more challenged measures violating the national treatment obligation are those having legitimate policy objectives but flawed with internal inconsistencies, it is prudent for the WTO judiciary not to follow the suggestions of Hudec and scholars who are like-minded to treat those measures more leniently under GATT Article III. Furthermore, border measures that implement national regulatory policies have blurred the line between quantitative trade restrictions and discrimination, readjusting the balance between domestic regulatory autonomy and trade disciplines within GATT Article III can do nothing for border measures with domestic regulatory policy goals.

Readjusting the balance between domestic regulatory autonomy and trade disciplines under the chapeau of the exception clause not only prevents disturbing existing relevant jurisprudence but also helps to further improve its internal consistency. For example, in US – Shrimp, the AB stated that the purported policy objective of the disputed measure had to be examined under the subparagraphs not under the chapeau in order to provide provisional justification for the disputed measure.\textsuperscript{195} If the purported policy objective is the key to justify a disputed measure again under the chapeau, as required by the AB in Brazil – Retreaded Tyres, either the chapeau or the subparagraph would be rendered redundant. The AB in EC – Seal Products seemed to detach the analysis of the chapeau from that of the subparagraphs, which not only enabled the discrimination under the chapeau to be able to be justified with policy rationales not limited by the list in the subparagraphs any more, but also drew a clearer functional distinction between the substantive clauses and the chapeau of the exception clause.

Therefore, I would argue that it is the AB’s decision in EC – Seal Products that may turn the GATT Article XX chapeau into the best vehicle to expand domestic regulatory autonomy

under the WTO, particularly in the GATT context. Compared with the other alternatives reviewed earlier, clarifying and developing the chapeau jurisprudence in the vein of *EC – Seal Products* not only saves the WTO judiciary from overruling itself and takes into consideration the developments of discriminative measures, but also works more harmoniously with the legal texts and existing jurisprudence, which will be discussed in detail in later chapters.

In the recent couple of years, the trade war and the blocking of AB member appointment are more immediate threats the WTO has been facing. Even intensified efforts of regional or bilateral trade arrangement by major trade powers and heavy use of trade remedies have seemed to be more serious concerns. But as Hudec correctly pointed out that the task of policing domestic regulations was essential for the WTO and any other federal system, readjusting the balance between domestic regulatory autonomy and trade disciplines is even more important in the long run. After *EC – Seal Products*, the AB has had very few opportunities to further clarify itself regarding its interpretation of the GATT Article XX chapeau in *EC – Seal Products*. When a couple of opportunities were presented to the AB, it refused to take advantage of them. It is possible that the AB could not concentrate on the issue of our concern during a turbulent time. But this inaction after *EC – Seal Products* has created confusion for both panels and scholars. Panels may still have to treat *Brazil – Retreaded Tyres* as authority and scholars may still fail to appreciate the fundamental change *EC – Seal Products* could bring to the issue of policing domestic regulations. I would hope the AB, after surviving the current crisis, would become more responsive to the dynamics of international trade relations and turn the GATT Article XX chapeau into a full-fledged instrument to more appropriately adjust the balance between domestic regulatory autonomy and trade disciplines. I will, in the following chapters, provide analysis that will help if the WTO judiciary decides to further clarify and develop its interpretation of the GATT Article XX chapeau in *EC – Seal Products*.

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CHAPTER 2: JURISPRUDENTIAL DEVELOPMENTS

Looking back at the WTO jurisprudential history, the development under the GATT XX chapeau has been slow and ambiguous, attracting less attention when compared with the more dramatic or contentious developments under GATT Article III and the GATT Article XX subparagraphs. It looks as if the GATT Article XX chapeau had not been considered the major candidate for expanding Members’ domestic regulatory autonomy before EC – Seal Products. EC – Seal Products seemed to start changing this. Unfortunately, the new development in EC – Seal Products has been ignored by some commentators\(^\text{197}\) while some others are not very sure about the change.\(^\text{198}\) Actually, the AB in EC – Seal Products began applying the chapeau in a way to defer further to the regulatory authority of WTO Members, not only bringing the chapeau abreast with developments under TBT Article 2.1 but also giving the chapeau great potential to turn into the most powerful tool to expand domestic regulatory autonomy. Therefore, it is necessary to review the details of how the AB applied the chapeau to the facts in EC – Seal Products carefully. A careful review will make it clear that domestic regulatory measures, which are otherwise in violation of substantive trade disciplines, could be justified by their policy rationales that are neither those listed in the GATT Article XX subparagraphs nor their purported policy objectives. The biggest concern Hudec had when he raised the issue of domestic regulatory autonomy seems able to be solved if EC – Seal Products is further clarified and followed.

But it would be difficult to take EC – Seal Products seriously if it is only an isolated case overwhelmed by a body of negative precedents, particularly when the AB’s new reading of the chapeau in EC – Seal Products was somewhat vague and its application did not finally justify the EU’s measure. However, if there are a series of cases opening to, supporting or incrementally


leading to the reinterpretation of the GATT Article XX chapeau in EC – Seal Products, not only
the foundations for establishing EC – Seal Products as an important case would be more solid,
but also proposed further jurisprudential developments in the vein of EC – Seal Products would
be more feasible. Cases after EC – Seal Products can also help us to see how the WTO judiciary
has accepted the new interpretation and have a better idea of the trajectory of the GATT Article
XX chapeau jurisprudence. Furthermore, the case law would shed light on what tests and
standards, which will be discussed in the next chapter, should be developed when expanding
WTO Members’ regulatory space under the GATT Article XX chapeau. Therefore, it is
necessary to review the history of the WTO jurisprudence regarding the GATT Article XX
chapeau, including EC – Seal Products and other relevant cases, before engaging in detailed
discussions of the interpretive details in light of the development in EC – Seal Products.

In a nutshell, before EC – Seal Products, policy rationales not on the list as prescribed
under the GATT Article XX subparagraphs had not been explicitly recognized in WTO case law
as justifications for disputed measures under the chapeau. Thus, although most disputed
measures relying on GATT Article XX for an affirmative defense do have purported policy
objectives falling under the subparagraphs, it is nearly impossible for disputed measures with
internal inconsistencies to survive the examination under the chapeau because the internal
inconsistencies are mostly caused by policy rationales other than their purported policy
objectives. Responding parties in certain cases had argued that disputed measures should be
justified by policy rationales beyond the list that is prescribed in the subparagraphs of GATT
Article XX, but the WTO judiciary had not accepted these arguments until EC – Seal Products.
In EC – Seal Products, it seemed the AB finally accepted that disputed measures could be
justified by policy rationales different from their purported policy objectives while these
rationales are usually not recognized under the subparagraphs of GATT Article XX. But the
caveat is that the AB was ambiguous about its new reading of the chapeau. Fortunately, it
examined some of the arguments based upon rationales other than the purported policy objective
and not recognized under the GATT Article XX subparagraphs under the chapeau in EC – Seal
Products, implying these rationales could be accepted as justifications in principle.
Unfortunately, all these rationales failed the examination on the merits. After EC – Seal
Products, the AB did not further clarify itself in EC – Seal Products regarding the GATT Article
XX chapeau. Therefore, it looks as if EC – Seal Products has not been buttressed so far. But the
rejections of rationales other than the purported policy objectives as justifications in many cases were based upon various reasons. As to whether there is possibility that the chapeau may allow disputed measures to be justified with these rationales, the WTO judiciary has rarely said no. On the contrary, it has left openings in some cases, which, along with EC – Seal Products, can pave the way for future developments of the chapeau.

2.1 Pre-WTO cases

US – Canadian Tuna was a GATT case in the early 1980s and the first case in which GATT Article XX was interpreted and applied. In this case, the United States banned importation of tuna and tuna products from Canada pursuant to its Fishery Conservation of Management Act of 1976. The purposes of the Fishery Conservation of Management Act of 1976 were “to ensure that certain stocks of fish were properly conserved and managed, to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of such additional agreements as necessary.” 199 However, the direct cause for the US ban was the seizure of American fishing boats by Canada, which prompted the United States to retaliate against Canada. 200

The United States resorted to GATT Article XX (g) to justify its violation of Article XI, but the panel finally found the US ban could not be justified because it was not “made effective in conjunction with restrictions on domestic production or consumption,” as required under Article XX (g). 201 However, contrary to the two-tier analytical structure of Article XX, the panel first analyzed the US ban under the chapeau before its analysis under subparagraph (g), and found “similar actions had been taken against imports from Costa Rica, Ecuador, Mexico, and Peru and then for similar reasons.” 202 Therefore, the US ban did not constitute any “arbitrary or unjustifiable” discrimination under the chapeau. The panel also found the US ban “had been

199 GATT Panel Report, United States — Prohibition of Imports of Tuna and Tuna Products from Canada (US – Canadian Tuna), L/5198 – 29S/91, adopted 22 February 1982, para. 4.5.
taken as a trade measures and publicly announced as such,” and was therefore not a “disguised restriction on international trade.” Therefore, the US ban passed the examination under the chapeau.

This case, for the first time, interpreted and applied the three conditions set in the GATT Article XX chapeau. The condition requiring the disputed measure not to constitute a “disguised restriction on international trade” seemed only to focus on whether the measure is made public or not, while the conditions requiring the disputed measure not to constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” were not discussed because there was no discrimination found in the first place. This case is not illuminating as to the issue whether a measure can be justified with its policy objectives not listed in the subparagraphs of GATT Article XX.

US – Spring Assemblies is another case adjudicated in the early 1980s, which also interpreted the GATT Article XX chapeau. But there was nothing new to report. The panel in this case simply reiterated US – Canadian Tuna regarding the interpretation of the GATT Article XX chapeau.

US – Section 337 was a later GATT case that discussed GATT Article XX in some detail. In that case, the respondent tried to justify its violation of Article III:4 with an argument focusing on the administrative difficulties of treating imports in the same way as domestic products, however, the panel avoided considering the argument under the chapeau and conducted almost all the analysis under one of the subparagraphs.

Overall, the reasoning under the GATT Article XX in pre-WTO case law was mostly brief and inconsistent. Panels contradicted each other even regarding the analytical framework of important texts. For example, the US – Canadian Tuna panel applied the chapeau first before it applied the subparagraph under GATT Article XX, as mentioned earlier. The US – Spring Assemblies panel even stated that “if Article XX(d) applied, then an examination of the question of the consistency of the exclusion order with the other GATT provisions [Article III:4] cited

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above would not be required."\textsuperscript{206} It is shocking that the panel applied the exception clause first before it examined the disputed measures under GATT Article III:4. In \textit{US – Section 337}, the panel avoided discussing the chapeau and literally treated the analysis under the chapeau as part of the analysis under the subparagraph.\textsuperscript{207} Most importantly, the pre-WTO case law did not engage in detailed discussion of GATT Article XX chapeau. Therefore, the pre-WTO case law was not very illuminating. However, on the other hand, it did not set precedents that opposed justifying regulatory measures with policy rationales beyond the list contained in the subparagraphs of GATT Article XX.

\textbf{2.2 WTO cases before Brazil – Retreaded Tyres}

\textit{US – Gasoline} was an interesting but confusing case, in which the AB employed a partial “necessity” test usually found under the subparagraphs of an exception clause. In this case, the US government introduced a program in order to “control toxic and other pollution caused by the combustion of gasoline.”\textsuperscript{208} The AB held that the US measure was provisionally justified under GATT Article XX (g).\textsuperscript{209}

However, in the US measure, while domestic refiners were allowed to have individualized baselines limiting pollutants, imported gasoline was subject to a single statutory baseline. It seemed that the discrimination could not be explained by the purported policy objective of the US measure. Domestic and imported gasoline were not different from an environmental perspective. Therefore there was an internal inconsistency in the US measure. The AB then examined the discrimination caused by the internal inconsistency under the chapeau of GATT Article XX. Under the chapeau, alternatives that were not discriminatory were discussed. The United States tried to dismiss the alternatives on the grounds of “the impracticability of verification and enforcement of [individual] foreign refiner baselines” because they required the

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US government to collect data from individual refiners scattered in different foreign countries.\textsuperscript{210} This resembled the arguments usually used by respondents when discussing whether a less trade restrictive alternative is reasonably available under the subparagraphs of an exception clause.

The AB rejected the US argument, but one of the two primary reasons was that the United States did not explore other adequate means that were less burdensome or costly for foreign refiners.\textsuperscript{211} In other words, the AB believed there were probably ways for the United States to verify and enforce individual foreign refiner baselines; therefore, the discriminatory treatment was not justified under the chapeau. Or to put it in still another way, the AB did not agree that the administrative difficulty to verify and enforce foreign individual baselines was serious enough to justify a uniform baseline for foreign refiners.\textsuperscript{212}

If the United States had done a better job drafting the relevant law or regulations without substantive changes, there would be a likelihood that the WTO judiciary would have ruled otherwise. On the one hand, the panel suggested, as agreed by the AB, that since the United States had been able to collect foreign data that it relied upon for other trade purposes, for example, for the anti-dumping purpose, the United States should be able to collect reliable foreign data in this case as well.\textsuperscript{213} However, on the other hand, the panel also admitted and the AB also agreed that Members could turn to other information if information supposed to be provided by foreign producers was not available or unverifiable.\textsuperscript{214} The use of actual foreign data was not mandatory. The problem was that the United States didn’t even attempt to collect data from foreign refiners and make use of it. If the United States provided the use of data collected from individual foreign refiners as an option in its law or regulations, it would be off the hook even as it still imposed a uniform baseline instead of individual baselines. It could argue that data from individual foreign refiners were not available or unverifiable for the imposition of individual baselines after it probed that route. This argument would not work when the United States did not provide an option in the law or regulations. If the United States provided such an

option, the WTO judiciary would probably not second guess its operational determination that administrative difficulty was so overwhelming that there were no alternatives but only to impose a uniform baseline upon foreign refiners.\(^{215}\)

The second reason why the AB rejected the administrative rationale proposed by the United States under the chapeau was that the costs of mitigating administrative problems faced by the US government were only borne by foreign gasoline refiners.\(^{216}\) That is to say, even if the US government was entitled to save administrative costs, there was no rationale to explain why only foreign refiners had to “incur the physical and financial costs and burdens” imposed by a statutory baseline.

Interestingly, it was observed that the analysis by the AB resembled that of the “necessity” test.\(^{217}\) Waincymer particularly said that the AB in *US – Gasoline* “superimposed the necessity test on Article XX (g)” by smuggling the necessity test into the chapeau.\(^{218}\) It is true that the analysis of the US omission of plausible alternatives under the GATT Article XX chapeau resembled that in the “less trade restrictive” test as part of the “necessity” test under some subparagraphs of Article XX.\(^{219}\) It was particularly relevant to the analysis of whether an alternative was “reasonably available.” However, it was conducted under the chapeau. Most importantly, it was conducted to assess the policy argument offered by the United States to justify discrimination caused by the internal inconsistency of its measure. Therefore Waincymer’s comment is not entirely accurate. First, the necessity test under the subparagraphs can examine alternatives that are less trade restrictive no matter whether the alternatives are discriminatory or not, but, as will be discussed in Chapter 3, the key test under the chapeau is about discrimination. Second, it is more important to note that the test employed by the AB in


US – Gasoline was only part of a typical necessity test. To be more specific, it was not the “weighing and balancing” of the importance of the value protected, the contribution the measure made to the achievement of the policy objective, or the trade restrictiveness of the measure, but it was rather the less trade restrictive alternative assessment, which was only part of the usual drill. It was not even the entire alternative assessment. It only focused on whether the alternatives were reasonably available or not.

For the part of the necessity test that focuses on the availability of an alternative that is not discriminatory, what is important is not the purported policy objective any more, but the administrative rationale. In US – Gasoline, the United States did not try to justify its discrimination with its environmental objective. Obviously, the discrimination was not consistent with its purported policy objective. In the perspective of its environmental objective, both domestic refiners and foreign refiners should be treated the same. Therefore, although the analysis under the chapeau in US – Gasoline was almost identical to part of the necessity test under the subparagraphs, what was at issue was actually not whether the purported policy objective of the US measure could explain and justify the discrimination.

However, the similarity between the analysis under the chapeau in US - Gasoline and the necessity test under the subparagraphs can definitely create some confusion. Since usually the necessity test is conducted to see whether the entire disputed measure with its violation of the substantive obligations is necessary to achieve one of the legitimate objectives listed in the subparagraphs of an exception clause, people may take it for granted that a “necessity” test under the chapeau would be relevant to the purported policy objective of a disputed measure as well. Even comments 20 years later still misread the “necessity” test under the chapeau in US – Gasoline as conducted against the purported policy objective of the US gasoline baseline rules.220 However, it is not necessarily the case. As just discussed, there are quite a number of components within a full-fledged “necessity” test. Not all of them are analyzed with the purported policy objective of a disputed measure in mind. Although administrative rationales do not really expand the list prescribed in the exception clause subparagraphs because they are already acceptable under the subparagraphs of the exception clause, they are still different from the purported policy objective of a disputed measure. The relevant analysis by the WTO

judiciary can shed light on how rationales other than the purported policy and not listed under the subparagraphs should be examined under the chapeau.

The next relevant case is *US – Shrimp*. In *US – Shrimp*, the United States originally conditioned the importation of shrimp on the installment of “turtle exclusion devises (TEDs)” on shrimp fishing vessels in order to conserve sea turtles.\(^\text{221}\) However, according to the rulings of the US Court of International Trade (CIT), shrimp caught by fishing vessels equipped with TEDs as prescribed by the US law were still prohibited from being imported into the United States as long as shrimp was caught by fishing vessels from countries not yet certified by the United States.\(^\text{222}\) To acquire the certificate, other countries needed to adopt essentially the same comprehensive regulatory program as the United States.\(^\text{223}\) In the application of the US measure, it seemed that all the countries were treated the same. They had to conform to the same requirements to get certified. However, discrimination was created among the trading partners of the United States—those who adopted essentially the same turtle conservation program as the United States were allowed to export shrimp to the United States while those who did not were prohibited from exporting shrimp to the United States even if their shrimp was caught with identical TEDs. This discrimination also suggested an internal inconsistency within the US measure. If turtle protection is the policy objective, why did the United States refuse to certify countries that did not have the required legislations regardless whether their fishing vessels were equipped with identical TEDs or not?\(^\text{224}\)

*US – Shrimp* had attracted great attention not only because it was a high-profile environmental case;\(^\text{225}\) but also because it triggered the debates about PPMs after the WTO was established. Jackson once said around 2000 that it was “one of the two most profound cases

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\(^{224}\) Before the CIT final rulings that the US government had to ban shrimp importation from countries that did not have shrimp harvesting regulations comparable to these in the United States, the US State Department conditioned shrimp importation on whether the shrimps were caught by fishing vessels equipped with TEDs. See Robert Howse, ‘The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate’, 27 (2) Columbia Journal of Environmental Law 491-521 (2002), p. 497.

among the 26 cases that have come through the WTO Appellate process so far.”\textsuperscript{226} The US measure was conditioned on PPMs, and thus had extraterritorial effects. However, the conditions were unilaterally set by the United States, which raised the fundamental issue of “the relationship of sovereignty to the international system in the area of domestic economic regulation.”\textsuperscript{227} Yes, the ban on shrimp was not particularly concerned with the shrimp but the harvesting techniques. However, the AB did not really rule on this point in \textit{US – Shrimp}.\textsuperscript{228} As to the unilateral nature of the US measure, the AB did not really make a big deal out of it. Panels in the GATT era had been very unfriendly towards unilateral measures under the chapeau, literally making these measures unjustifiable, but the AB in \textit{US – Shrimp} did not consider that the unilateral feature of the measure was determinant although it still took issue with it.\textsuperscript{229} It is certainly not correct to say these issues are not important. But the point is that, in \textit{US – Shrimp}, they were not the key issues that determined the fate of the US measure in terms of legal technicalities.

The US measure as a whole successfully passed the examination under one of the subparagraphs of GATT Article XX, but it had to face the chapeau next. The key question under the chapeau is whether the regulatory discrimination caused by the internal inconsistency of the measure could be explained by its purported policy objective recognized in the subparagraph. It is obvious that the internal inconsistency of the US measure could only be explained by some other policy rationales if the United States could offer them. The United States kept arguing that the discrimination could be explained by “a rationale legitimately connected with the policy of an Article XX exception,”\textsuperscript{230} and the discrimination was not arbitrary or unjustifiable because of “the policy goal of the Article XX exception being applied.”\textsuperscript{231} It did not offer any other rationale to justify its discriminatory measure. The AB held that “the policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article

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XX” instead of being relevant only under the sub-paragraphs of the exception provision.\textsuperscript{232} It seemed that the AB hinted that the United States should try to justify its discrimination under the chapeau by policy rationales different from the purported policy objective of its turtle protection scheme. Obviously, the AB tried to avoid mixing analysis under the GATT Article XX chapeau and the subparagraphs. If the policy objective of the disputed measure is used to provisionally justify a measure under the subparagraphs, it cannot be used again under the chapeau. Otherwise, the analysis in two places would overlap.

However, the AB did not have a chance to examine any other policy rationale under the chapeau at all because the United States did not offer such a rationale. The AB concluded that there was unjustifiable discrimination because the US measures were rigid without taking consideration of different situations in different countries.\textsuperscript{233} Usually, the AB would hold that a discrimination could be found if there was different treatment “between countries where the same conditions prevail.” In this case, the AB interpreted this requirement of non-discrimination between countries where the same conditions prevail double-negatively.\textsuperscript{234} That is to say, countries having different conditions should not be rigidly treated the same. A rigid uniform requirement on all relevant countries where the conditions were different constituted discrimination under the chapeau. Moreover, the different conditions of these countries were actually created with the help of the United States. The United States provided assistance to its Caribbean neighbors to make laws and regulations that were comparable to the relevant laws and regulations in the United States, it then refused to import from its Asian trade partners because they did not have the privilege to have the help from the United States to make and implement laws and regulations they were unfamiliar with although their fishing vessels might have equipped with decent TEDs.\textsuperscript{235} This makes sense, but may cause controversy because of lack of textual basis. In \textit{US – Shrimp 21.5}, the AB made it clear again that one of the decisive

considerations was whether the US measures were flexible instead of being rigid under different conditions in other countries.\textsuperscript{236}

Like \textit{US – Gasoline}, the measure concerned in \textit{US – Shrimp} contained internal inconsistencies that caused discrimination, but unlike \textit{US – Gasoline}, the United States, as respondent, did not argue that it had any policy rationale other than its purported policy objective to explain the discrimination. As a result, although \textit{US – Shrimp} seemed to have provided an opening for rationales other than those listed in the GATT Article XX subparagraphs and not the purported policy objective of the measure at issue when it said the purported policy objective of the disputed measure could not justify the measure under the chapeau, there was no analysis in that regard.

\textit{EC – Hormones} is primarily concerned with the calibration to different risk levels when different treatments of like products are to be justified. However, there might be an opening in the panel’s report for justifying discrimination with rationales other than the purported policy objective of the measure at issue. In \textit{EC – Hormones}, the European Union prohibited imported meat products treated with hormones for growth purposes.\textsuperscript{237} This prohibition was based on health concerns.\textsuperscript{238} The European Union was charged to have set too high a level of protection concerning the use of hormones for growth purposes while it did not set the same appropriate level of protection (ALOP) concerning the use of certain other hormones. Imported meat products were detrimentally impacted most by the prohibition and hence the European Union was charged of violating nondiscrimination/consistency obligation under SPS Article 2.3 and Article 5.5.\textsuperscript{239}

In this case, the panel held that the determination of “the absence of any plausible justification” for the significant difference in ALOPs in compatible situations is one important step of analysis in the assessment of whether arbitrary or unjustifiable discrimination constitutes

\textsuperscript{239} Since “when read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3”, it is only necessary to assess the measure at issue under SPS Article 5.5. See WTO Appellate Body Report, \textit{EC Measures Concerning Meat and Meat Products (EC – Hormones)}, WT/DS26 & 48/AB/R, adopted 16 January 1998, para 212.
a disguised restriction on international trade. Because the panel used the word “any” before “plausible justification,” this can be reasonably understood as an opening to justifying different ALOPs in compatible situations with rationales other than calibration to different risk levels and the purported policy objective of the SPS measure at issue. Once there is any plausible justification based on other reasonable rationales, the distinction in ALOPs does not constitute a disguised restriction on international trade, and the discrimination is justified with such rationales. The AB, however, did not discuss this point at all during appeal. Although the panel’s interpretation was not explicitly endorsed by the AB, it was adopted without the AB’s objection.

In EC – Hormones, although the relevant issue was discussed in the SPS context, it has a more general implications. Sanitary and phytosanitary measures challenged under the SPS are ones with policy objectives recognized under GATT Article XX (b), which is to protect human, animal or plant life or health. The discrimination/inconsistency in the EU measure, however, could not be explained by its purported policy objective, which is of course the sanitary and phytosanitary rationale. When the panel suggest “any plausible justification” could explain the discrimination/inconsistency under the SPS Agreement, it would certain create repercussions in GATT Article XX.

GATS Article XIV chapeau is almost identical to GATT Article XX chapeau. GATS Article XIV jurisprudence and GATT Article XX jurisprudence are very similar and inform each other. Concerning the chapeau of GATS Article XIV, there is one relevant case – US – Gambling. In US – Gambling, the United States prohibited remote supply of gambling and betting services. This was held by the WTO judiciary to have violated the US commitment in its GATS schedule. The United States tried to justify its violation based on the public morals exception under GATS Article XIV (a). The US ban was held to be necessary for the protection of public morals, and therefore was provisionally justified under GATS Article XIV (a). The panel found that the United States had not prosecuted certain domestic remote suppliers of gambling

services and a US statute had permitted remote betting on horseracing.\textsuperscript{244} Then, it concluded that “the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a consistent manner,” therefore “it does not apply its prohibition … in a manner that does not constitute ‘arbitrary and unjustifiable discrimination…’.”\textsuperscript{245} It seemed that the panel based its “arbitrary or unjustifiable discrimination” analysis on the internal consistency of the measure applied at issue. Whether there were rationales other than the purported policy objective of the measure at issue that could justify the discrimination caused by the internal inconsistencies was not considered by the panel at all.

On appeal, the United States contended that the panel’s analysis of “arbitrariness or unjustifiability” was inadequate because the analysis was only capable of revealing domestic services suppliers and foreign services suppliers were treated differently.\textsuperscript{246} The United States argued that the panel failed to analyze whether “differential treatment, or discrimination, is ‘arbitrary’ or ‘unjustifiable’.”\textsuperscript{247} The AB disagreed and said that it did not “read the panel to have ignored the requirement of ‘arbitrary’ or ‘unjustifiable’ discrimination.”\textsuperscript{248} Even if there was no detailed discussion of “arbitrariness or unjustifiability,” it was the fault of the United States. The AB stated clearly:

The United States based its defence under the chapeau of Article XIV on the assertion that the measures at issue prohibit the remote supply of gambling and betting services by any supplier, whether domestic or foreign. In other words, the United States sought to justify the Wire Act, the Travel Act, and the IGBA on the basis that there is no discrimination in the manner in which the three federal statutes are applied to the remote supply of gambling and betting services. The United States could have, but did not, put forward an additional argument that even

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if such discrimination exists, it does not rise to the level of ‘arbitrary’ or ‘unjustifiable’ discrimination.\textsuperscript{249}

Therefore, the AB held that the panel was not wrong, as a matter of law, to focus on the inconsistency in the US measure to rebut “the United State’s claim of no discrimination at all.” (emphasis original)\textsuperscript{250} Then, the reason that there seemed to be no detailed analysis of whether the internal inconsistency was “arbitrary or unjustifiable” was the fault of the United States. Since the United States bore the burden of proof in an affirmative defense under GATS Article XIV including its chapeau, and since it only offered arguments regarding the analysis about “discrimination,”\textsuperscript{251} its choice to not offer argument regarding the analysis whether the discrimination was arbitrary or unjustifiable would mean that the United States would automatically lose on that issue once it lost on the issue of discrimination. Accordingly, the AB held that the panel was correct to conclude that the United States failed to demonstrate its measure was not “arbitrary or unjustifiable discrimination” once the measure at issue was found to be discriminatory.\textsuperscript{252}

The AB finally reversed the panel’s finding, but not on the issue of “arbitrariness or unjustifiability.” It held the panel made a wrong finding of facts when conducting the analysis of whether there was discrimination or not. According to the AB, isolated instances of discriminatory enforcement such as those in this case could not be used as conclusive evidence for a finding of discrimination.\textsuperscript{253}

As to what kind of analysis the panel should conduct regarding the issue of whether discrimination is “arbitrary or unjustifiable,” the AB did not make any explicit statement. However, the AB hinted that the United States could “put forward an additional argument” to explain that the discrimination in its measure did “not rise to the level of ‘arbitrary’ or

\textsuperscript{252} The AB only agreed with the panel as long as the analytical framework it adopted, but it did not agree with the panel on the point whether the United States applied its measure in a discriminatory manner. Therefore, the AB reversed the panel’s findings of the existence of discriminatory application of its measure.
'unjustifiable’ discrimination.”\textsuperscript{254} It had been obvious in the AB’s analysis that the purported objective of the US measure, though it was recognized in subparagraph (a), could not explain the discrimination caused by the internal inconsistency. Therefore, the AB was possibly hinting that the United States could offer a policy argument that was different from its purported policy objective and not listed in the subparagraphs of GATS Article XIV either. Therefore, I would say the AB in \textit{US – Gambling} kept the opening for rationales other than the purported objective of the disputed measure and not listed in the subparagraphs of an exception clause to justify the measure at issue. However, a later case—\textit{Brazil – Retreaded Tyres}— soon narrowed the opening if not completely closing it.

\textbf{2.3 Brazil – Retreaded Tyres}

\textit{Brazil – Retreaded Tyres} was a case in which the WTO judiciary greatly restricted domestic regulatory autonomy. In \textit{Brazil – Retreaded Tyres}, Brazil imposed both a importation prohibition on retreaded tires and domestic regulations to forbid the marketing of imported retreaded tires and regulate disposal of them.\textsuperscript{255} The panel found Brazilian measures were in violation of GATT Article XI:1 and Article III:4.\textsuperscript{256} The panel then examined the measures under GATT Article XX. The panel held that the ban on imports was provisionally justified under GATT Article XX (b)\textsuperscript{257} while all other measures were not justified under GATT Article XX (b) or (d) or any other subparagraph.\textsuperscript{258} For the importation ban that was provisionally justified, there were two exemptions. Brazil allowed the importation of used tires (for domestic manufacturers to produce retreaded tires) under Brazilian court injunctions and importation of retreaded tires from the Southern Common Market (MERCOSUR) countries under a MERCOSUR tribunal ruling. These exemptions created discrimination between MERCOSUR

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countries and other foreign countries and between domestic retreaded tire producers and foreign tire producers. And the exemptions causing the discrimination were not consistent with the purported policy objective of the Brazilian measures. That is, they were not taken to protect life and health of human and animals.\(^{259}\) Permission to import used tires and retreaded tires from MERCOSUR countries had to be explained by some other rationales.

It is clear that obeying domestic court orders and honoring international tribunal ruling were the reasons for the discrimination. Actually, the panel did take a similar position. For example, the panel did imply that the MERCOSUR ruling provided a rationale to save the MERCOSUR exemption from being found arbitrary or unjustifiable.\(^{260}\) However, the panel did not focus on whether there were rationales explaining the discrimination. The panel held that these exemptions did not constitute means of arbitrary or unjustifiable discrimination because importation of used tires or retreaded tires were not in such a large quantity that Brazil’s health protection policy under GATT Article XX (b) was undermined.\(^{261}\) The AB observed that “the panel’s interpretation of the term ‘unjustifiable’ did not depend on the cause or rationale of the discrimination but, rather, was based on the assessment of the effects of the discrimination”\(^{262}\) In the panel’s eyes, the rationales behind the exemptions did not really matter in the analysis of “arbitrariness or unjustifiability.” What really mattered was whether the discrimination was serious enough in terms of its economic impacts on international competition. Davies agreed that in the panel’s analysis under the key element of “arbitrariness or unjustifiability” under the chapeau, “the panel developed its effects-based approach,” and this approach was the “centrally important characteristic of the panel’s approach,” although he pointed out that the panel seemed to have incorporated policy analysis in the element of “countries where the same conditions prevail.”\(^{263}\) The panel’s reasoning seemed to have its origin in US – Gambling. However, in US – Gambling, the de minimis effects consideration was taken when determining the existence of discrimination, but in Brazil –


Retreaded Tyres, the panel moved the de minimis effects consideration to the analysis of whether the discrimination was arbitrary or unjustifiable.

On appeal, the AB disagreed with the panel regarding how to conduct an analysis of “arbitrariness or unjustifiability.” First, the AB rejected the panel’s de minimis effects approach under the chapeau, emphasizing that “[t]he panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of ‘arbitrary or unjustifiable discrimination’ in previous cases.” Second, the AB held that “[a]nalyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination.”

The AB then held the assessment of rationales used to justify discrimination under the chapeau should be made in the light of the purported objective of the measure at issue, and laid down the key test under the chapeau in a more explicit manner:

there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner “between countries where the same conditions prevail,” and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.

Since Brazil tried to explain its discrimination with rationales that “bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective,” the AB held domestic court injunction and international tribunal ruling were not valid rationales. The rationales other than the purported policy objective offered by Brazil and not on the list as prescribed in the subparagraphs failed to justify discrimination under the chapeau.

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The key test articulated by the AB in *Brazil – Retreaded Tyres* is a direct statement concerning the issue this thesis is discussing. If a rationale other than the purported policy objective of the measure at issue bears a rational relationship to the purported policy objective as recognized under one of the subparagraphs of the exception clause, it is able to justify discrimination caused by the disputed measure. If a rationale other than the purported policy objective of the measure at issue bears no relationship to the purported policy objective of the measure or even goes against it, the rationale is not able to justify discrimination caused by the disputed measure. As this statement of a test was made in the analysis of the chapeau of GATT Article XX,\textsuperscript{270} whether a rationale other than the purported policy objective of the measure at issue can justify discrimination caused by exceptions to the measure at issue becomes the determination of “arbitrariness or unjustifiability” of the discrimination or “a disguised restriction on international trade” under GATT Article XX chapeau. If the rationale bears a relationship to the purported policy objective of the measure at issue, the measure at issue does not constitute a means of arbitrary or unjustifiable discrimination or does not constitute a disguised restriction on international trade. If the rationale bears no relationship to the purported policy objective of the measure at issue or even goes against it, the measure at issue constitutes a means of arbitrary or unjustifiable discrimination, or constitutes a disguised restriction on international trade.

Lydgate observed that the underlying hypothesis of the WTO jurisprudence regarding the arbitrary or unjustifiable discrimination in the chapeau of the exception clause seemed to be that “if a standard is not upheld uniformly to all the products being regulated, this throws into question the regulatory objective itself.”\textsuperscript{271} This observation makes a lot sense. In the light of this observation, it would be clear that measures containing exemptions can hardly pass the test under the chapeau. The exemptions and the rationales behind them would logically go against the purported objective of the disputed measure. Discrimination under the chapeau is actually required to be explained only by the purported policy objective.

But, do domestic regulatory measures really have to be perfect in light of their purported policy objectives? Is there really an underlying hypothesis as found by Lydgate? In previous


cases, some of which are reviewed here, the AB did not categorically reject rationales that were not really closely related to the purported policy objective of the disputed measure as explanations for discrimination caused by internal inconsistencies. Even if the underlying hypothesis found by Lydgate might have existed to some extent before Brazil – Retreaded Tyres, after Brazil – Retreaded Tyres, it only lasted for a while before EC – Seal Products.

2.4 After Brazil – Retreaded Tyres and before EC – Seal Products

After Brazil – Retreaded Tyres and before EC – Seal Products, Brazil – Retreaded Tyres was highly cited when the GATT Article XX chapeau was concerned. However, the opening narrowed by Brazil – Retreaded Tyres was gradually widened indirectly in some cases where GATT Article XX chapeau was not applicable.

In Thailand – Cigarettes (Philippines), the Philippines complained that, among other things, Thailand violated GATT Article X:3 (a) by appointing domestic cigarette company officials to government positions in charge of its cigarette importation law and regulations. GATT Article X:3 (a) requires that Members “shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings...” The panel decided to borrow from GATT Article XX chapeau jurisprudence to interpret GATT Article X:3 (a) because both of them deal with the manner in which relevant measures are administered or applied. In the panel’s view, GATT Article X:3 (a) imposed a reasonableness requirement on Thailand, which is identical to the requirements in the GATT Article XX chapeau. Then by citing Brazil – Retreaded Tyres, the panel declared that the test for both GATT Article XX chapeau and GATT Article 10:3 (a) was the examination of the cause or rationale for prima facie violations of certain obligations. The panel held that appointing dual function officials in Thailand – Cigarettes (Philippines) appeared to constitute an act of “inappropriate and/or not sensible administration” and Thailand should justify the appointment of dual function officials

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with “a particular rationale.” Thailand argued that there were “legitimate administrative objectives” behind its appointment of dual function officials. The panel was satisfied and emphasized that sovereign states had the discretion and authority with regard to government administrative matters. Since the Philippines did not appeal this issue, the AB did not have a chance to express itself.

Therefore, for the first time, this case explicitly identified a specific type of acceptable causes or rationales, which were “legitimate administrative objectives,” for explaining and justifying *prima facie* inappropriate administration of laws, regulations, decisions and rulings in violation of WTO obligations. As I understand, government administrative efficiency and convenience in this case were not the purported policy objective of the cigarette importation regime, nor were they recognized in the subparagraphs of GATT Article XX.

However, a few notes have to be made. First, the explicit identification was made only by the panel. The AB may not agree with the panel on this point. Second, “legitimate administrative objectives” are only acceptable to justify a *prima facie* GATT Article X:3 (a) violation in *Thailand – Cigarettes (Philippines)*. Although the panel held GATT Article XX chapeau jurisprudence is informative to GATT Article X:3 (a) interpretation, it is not necessarily true when we reverse the relationship of influence. Third, although the panel characterized obligations under both GATT X:3 (a) and GATT Article XX chapeau as a reasonableness requirement, GATT Article XX chapeau is about the reasonableness of discrimination in the application of disputed measures while GATT X:3 (a) is about more general application of disputed measures. Furthermore, since the panel’s ruling addressed issues arising out of GATT Article X:3 (a), its opinion on the interpretation of GATT Article XX chapeau was at best *obiter dicta*, even if reversed influence is acceptable. As a result, this case is not a very reliable footstep in the relevant jurisprudence development although it seemed to go in the right direction.

277 These “legitimate administrate objectives” are: (i) they "have expertise relevant to the management of a state-owned enterprise" importing tobacco and collecting the related taxes; (ii) they can "play a role in ensuring that TTM itself complies efficiently" with the Thai legislation; and (iii) they are making sure that TTM's activities are consistent with Thai public health policy (TTM Board includes an individual of the Ministry of Health). See WTO Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand – Cigarettes (Philippines))*, WT/DS371/R, adopted 15 July 2011, paras. 7.921, 7.923.
US – Clove Cigarettes can be counted as a more reliable case in our search for cases that allowed rationales other than the purported policy objective of the disputed measure to justify discrimination contained in the measure. In this case, the dispute arose out of a ban imposed by the United States on the manufacture and sale of cigarettes in the United States with “characterizing flavours” that appeal to youth. The ban, however, had an exemption. While all other flavoured cigarettes were banned, menthol cigarettes were allowed to continue to be manufactured and sold in the United States. The panel found “virtually all clove cigarettes” imported into the United States in the three years prior to the ban were from Indonesia. The United States submitted that menthol cigarettes accounted for about 26 percent of the total US cigarette market and that three domestic brands dominated the US market. Detrimental impacts on foreign clove cigarettes were obvious, which would certainly constitute violation of national treatment obligation under GATT Article III:4. However, in interpreting TBT Article 2.1, the AB held that the detrimental impact on competitive opportunities for imports did not necessarily result in “less favourable treatment,” and that some seemingly discriminatory technical regulations should be upheld if they “stem exclusively from legitimate regulatory distinctions.”

In the GATT Agreement, non-discrimination obligations and exceptions are written into different clauses. Determination of whether a measure is discriminatory is an economic exercise under GATT Article III separated from a policy analysis under Article XX. However, the TBT Agreement does not have an exception clause. This is the reason why the AB concluded that a policy consideration has to be added to TBT Article 2.1—the clause contains non-discrimination obligations although there is not a textual basis for a policy analysis. Interestingly, this insertion has little resemblance to the subparagraphs of the exception clause in the GATT Agreement. It is more like the chapeau of GATT Article XX.

280 WTO Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/R, adopted 24 April 2012, para. 2.4.
282 United States’ first written submission to the panel in US – Clove Cigarettes, paras 27, 29, quoted by WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para. 223.
The purported policy objective of the US measure was to discourage youth smoking by banning flavoured cigarettes. This rationale certainly could not explain the exemption of menthol cigarettes from the ban. The United States contended that the exemption stemmed from rationales other than the purported policy rationale of the regulation at issue.\footnote{TBT Article 2.2 contains an open-ended list of legitimate policy objectives.} To be specific, the exemption stemmed from the considerations of “the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes.”\footnote{WTO Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/R, adopted 24 April 2012, para. 7.289.} The panel held that these considerations were legitimate in principle but they were only excuses without factual evidence in this case.\footnote{WTO Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/R, adopted 24 April 2012, para 7.289.} On appeal, the AB emphasized that the purported policy objective of the US measure could not explain the discrimination caused by the exemption.\footnote{WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para. 225.} It reasoned that clove cigarettes and menthol cigarettes had the same characteristics (containing flavors that are attractive to young people) from the regulatory perspective and that menthol cigarettes should be treated the same as clove cigarettes if the United States really wanted to discourage youth smoking.\footnote{WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para. 225.} Thus, the US measure was not “even handed” in the purported policy perspective. Then, the AB analyzed the two rationales proposed by the United States. Like the panel, the AB did not deny that these two considerations were legitimate objectives in principle,\footnote{WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para. 225.} but the AB was not persuaded that the two considerations existed as a matter of fact,\footnote{WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para. 225.} which was the reason that the AB finally dismissed these two rationales. It is clear that the exemption and the rationales behind the exception were not related to or even went against the purported objective of the US ban on flavoured cigarettes. However, the AB did not base its rejection on the test articulated in Brazil – Retreaded Tyres.

If the AB was persuaded that the two rationales proposed by the United States were real, it is possible that the discrimination would be justified with the two rationales. Therefore, as a matter of law, it is logical to infer that rationales other than the purported policy objectives of the
measure at issue are allowed to justify discrimination in US – Clove Cigarettes. Although US – Clove Cigarettes was a TBT case, it could certainly have repercussions in the GATT Agreement, particularly in the GATT Article XX chapeau.

2.5 EC – Seal Products

As I have argued elsewhere, in EC – Seal Products, the panel and the AB took the position that measures containing exemptions are still justifiable on the basis that the exemptions meet certain requirements, although they differed in terms of how.291 This is fundamentally different from the test articulated and applied under the GATT Article XX chapeau by the AB in Brazil – Retreaded Tyres. In EC – Seal Products, the AB assessed rationales behind the exemptions of the EU measure offered by the European Union – the respondent – to justify discrimination under the chapeau, implying that rationales behind exemptions are able to justify disputed measures. Rationales behind exemptions are not constrained by the purported policy objective of the disputed measure. Therefore, when the purported policy objectives always have to be recognized by the subparagraphs of GATT Article XX, rationales behind the exemptions are not limited by the list prescribed in the subparagraphs. If they are allowed to justify domestic regulatory measures otherwise in violation of substantive trade disciplines, the regulatory autonomy enjoyed by Members under the WTO would be greatly expanded. It seemed that the panel and the AB had for the first time recognized the need to thus expand the regulatory autonomy of Members. However, some commentators still see EC – Seal Products as following Brazil – Retreaded Tyres.292

2.5.1 Key facts of EC – Seal Products

In EC – Seal Products, The European Union banned seal products on its market, but the EU ban had internal inconsistencies. Three exemptions were carved out, which were the Inuit or indigenous communities (IC) exemption that was to protect the “subsistence of Inuit and indigenous communities,” the marine resource management (MRM) exemption that was

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particularly for “controlling nuisance seals and seal culling” and the travelers exemption.\textsuperscript{293} Seal products falling into the three exemptions were not banned.\textsuperscript{294} The European Union asserted that its seal regime was aimed at addressing public moral concerns about the welfare of seals, which was that the public regarded the inhumane killing of seals to be morally unacceptable.\textsuperscript{295} But seal products falling into the three exemptions could still be sold on the EU market, even though they gave rise to the same moral concerns.\textsuperscript{296} The policy objective of protecting public morals could not explain the three exemptions, which created internal inconsistencies and discrimination even in the light of EU’ purported policy objective.

Julia Qin commented that this case was the first WTO case involving “conflicts between different nontrade values.”\textsuperscript{297} This is a very interesting observation. \textit{EC – Seal Products} is definitely not the first case where there are exemptions created by accommodating multiple objectives within a measure, but it is probably the first case where the rationales behind the exemptions were also based on well-recognized non-trade values. The rationales offered to explain the exemptions in the past cases were either non-existent or based on reasons like avoiding excessive administrative costs (\textit{US – Gasoline}) or court orders (\textit{Brazil – Retreaded Tyres}). Those rationales are not in themselves of a lesser importance from a practical perspective, but some of the rationales behind the exemptions in \textit{EC – Seal Products} seem to be “more” important non-trade values including protecting indigenous groups and maintaining ecological balance. These are substantive values that can hardly be rejected. This probably is the reason why this case was treated differently from previous cases, at least according to the panel’s ruling.

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2.5.2. panel’s analysis in the TBT context

The panel held that the EU measure was a technical regulation and therefore should be examined under the TBT Agreement. In the TBT context, the issue relevant to this thesis was whether the exemptions within the EU seal regime stemmed exclusively from “legitimate regulatory distinctions” under TBT Article 2.1. This is the last of the three issues under TBT Article 2.1. Concerning the first two issues, the panel found all seal products were “like products” and there was detrimental impact on the competitive opportunities of certain foreign seal products. To address the third issue, the panel proposed a three-step analytical framework in the TBT context:

[F]irst, is the distinction rationally connected to the objective of the EU Seal Regime; second, if not, is there any cause or rationale that can justify the distinction (i.e. “explain the existence of the distinction”) despite the absence of the connection to the objective of the Regime, taking into account the particular circumstances of the current dispute; and, third, is the distinction concerned, as reflected in the measure, “designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination” such that it lacks “even-handedness.”

The first step and the second step can provide alternative justifications. Each of them alone is able to justify the disputed measure. The second step is the key here. According to the second step, if the distinction caused by the exemptions can be explained by rationales other than the purported policy objective of the measure at issue, the measures containing these exemptions can be justified. In EC – Seal Products, the exemptions could not be explained by the objective of protecting public morals. Without the second step of analysis, the EU seal regime would not stand a chance of surviving. The third step serves to prevent the abuse of the second step. If rationales behind the exemptions are allowed to justify the distinction caused by the exemptions and ultimately the disputed measure, they have to meet certain conditions such as “even-handedness.”

When assessing the rationales behind the exceptions, the importance and wide recognition of the rationales, which constituted “the particular circumstances of the current dispute” in this case, were first established by the panel. The tests proposed by the panel in EC – Seal Products will accept rationales if they are very important or well accepted, treating the relationship between these rationales and the purported policy objective as only one factor of consideration. In application, none of the three exemptions passed the three-step analysis. The reason was not that the rationales behind the exemptions were not able to justify the EU measure containing distinctions caused by exemptions. At least two of the three exemptions passed the second step of analysis, however, the problem was that they failed the third step of analysis that requires “even-handedness” in the perspective of the rationales behind the exemptions.

In the panel’s view, EU – Seal Products was relevant to the issue of our concern in both the TBT context and the GATT context. But the AB reversed the panel’s finding that the EU seal regime was a technical regulation. As a result, the panel’s findings under the TBT Agreement were held to be “moot and of no legal effect.” Therefore the panel’s reasoning and findings under TBT Article 2.1 in this case has no legal effect. Nevertheless, the AB did hint that the panel’s ruling concerning the TBT Agreement followed the AB in US – Clove Cigarettes and subsequent TBT cases. As a result, the panel’s findings relevant to the issue of our concern in the TBT context will not be totally useless.

2.5.3. The analysis in the GATT context by the panel and the AB

In the GATT context, the panel ruled that the EU seal scheme violated the non-discrimination obligations under GATT Articles I:1 and III:4, which were different from these

under TBT Article 2.1. The AB agreed with the panel. As discussed earlier, the TBT non-discrimination clause contains an policy consideration, which, under the GATT Agreement, is conducted under the GATT exception clause instead of under GATT Articles I:1 and III:4. The EU seal regime was clearly discriminatory in the economic or competitive sense. The AB also agreed that the EU seal regime as a whole fell within the scope of GATT Article XX (a). When discussing whether the three exemptions were acceptable in the GATT context, the panel held that the key examination should take place under the GATT Article XX chapeau and the analysis should be essentially the same as that in TBT Article 2.1. The panel’s ruling concerning the GATT Article XX chapeau, however, was not supported by the AB.

The AB first refused to interpret the GATT Article XX chapeau by borrowing from the TBT Article 2.1 jurisprudence because it held the legal standards contained in them were different and their main functions and scopes were different. Then, the AB articulated the test under the chapeau. First, it should be determined whether there is discrimination and what type the discrimination is. Second, conditions in relevant countries should be compared to see whether they are the same or not. The AB further stated that “only ‘conditions’ that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau.” (emphasis original) This is a conceptually complex issue, but it did not cause much trouble in this case. The third step is the key step. The AB cited a number of

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cases to establish that the key to justifying exemptions under the chapeau was to find an acceptable rationale or cause.\textsuperscript{317} To illustrate the third step, the AB reviewed \textit{US – Gasoline} and \textit{US – Shrimp} in some detail to demonstrate how the AB examined various rationales that tried to justify discrimination found under the chapeau.\textsuperscript{318} However, the AB did not try to develop a typology of what rationales had been considered by the AB in previous cases. It only stressed, by citing \textit{Brazil – Retreaded Tyres}, that “one of the most important factors...is whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.”\textsuperscript{319} The AB then stopped further discussion of the third step of its test under the chapeau. It seemed that the AB followed \textit{Brazil – Retreaded Tyres} regarding the GATT Article XX chapeau.

Commentators have been mostly misled by the AB’s reiteration of the \textit{Brazil – Retreaded Tyres} test in \textit{EC – Seal Products}. However, when the AB started to examine the EU seal regime, it actually applied the test very differently from that in \textit{Brazil – Retreaded Tyres}. In \textit{EC – Seal Products}, it was only the discrimination caused by the IC exemption that was examined in detail under the chapeau.\textsuperscript{320} Regarding the IC exemption, the AB first found there was discrimination caused by it in the EU seal scheme, particularly discrimination between “seal products derived from IC hunts” and “commercial hunts”, and among “different indigenous communities.”\textsuperscript{321} The AB then found “the same animal welfare conditions prevail in all countries where seals are hunted,”\textsuperscript{322} therefore the IC exemption also caused discrimination in the perspective of moral

\textsuperscript{317} In early WTO cases, the AB did not clearly lay down the test of “arbitrariness or unjustifiability”, but in \textit{Brazil – Retreaded Tyres}, the AB focused on the cause or the rationale for the discrimination. The AB in \textit{EC – Seal Products} followed \textit{Brazil – Retreaded Tyres} by stating, “[a]s the Appellate Body stated in \textit{Brazil – Retreaded Tyres}, [...] the assessment of these factors ... [referring to factors considered by the AB in early WTO cases] was part of an analysis that was directed at the cause, or the rationale, of the discrimination”. WTO Appellate Body Report, \textit{European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)}, WT/DS400/AB/R, WT/DS401/AB/R, adopted June 18 2014, para. 5.305.


\textsuperscript{322} WTO Appellate Body Report, \textit{European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)}, WT/DS400/AB/R, WT/DS401/AB/R, adopted June 18 2014, para. 5.317. Comparison of conditions in relevant counties are a little more complicated than the AB’s analysis here.
protection. The AB finally engaged in its third step of analysis under the chapeau, which was the exercise of looking for rationales for the discrimination.

When looking for rationales for the discrimination between “seal products derived from IC hunts” and “commercial hunts,” the AB first followed Brazil – Retreaded Tyres, holding that “[t]he first relevant question before us is…how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to ‘commercial’ hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.” The AB particularly noted “that the different regulatory treatment of IC hunts, as compared to ‘commercial’ hunts, takes the form of a significant carve-out of the former from the measure’s ban on seal products.” It is clear that exemptions do not stand a chance under the Brazil – Retreaded Tyres test. This is where Bartels paid more attention and concluded that the AB followed Brazil – Retreaded Tyres. But the AB held that “the relationship of the discrimination to the [purported] objective of a measure is one of the most important factors, but not the sole test.” Bartels did take full notice of this statement and the consideration the AB took of the subsistence rationale that was not positively related to the purported policy objective of the EU seal scheme, and he made a very correct comment that “the Appellate Body considered the extent to which the measure actually supported subsistence hunting by Inuit communities…[t]his inquiry would have been precluded by the approach followed in Brazil – Retreaded Tyres.” Obviously Bartels realized the AB did consider a rationale irreconcilable with the purported policy objective of disputed measure instead of rejecting such a rationale categorically, but he still paid more attention to the AB’s conclusion that this rationale is irreconcilable with protection of morals.

The European Union argued that the discrimination could be explained by the reason that the Inuit and other indigenous communities hunted seals for their subsistence, which

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distinguished IC hunting from commercial hunting. The AB did not reject the EU rationale just because it was not a rationale related to its purported objective to protect public morals. Instead, the AB examined the subsistence rationale in great detail. However, after careful examination, the AB worried that some seal products, “while formally compliant with the [IC] exception, appear to be outside the scope of the exception.” The reasons for the AB’s worry include that the criteria of the IC exemption were not clear and there were broad discretion in the application of these criteria. Therefore, seal products derived from commercial hunting were able to enter the EU market by taking advantage of the poorly designed and implemented exemptions. In other words, the EU measure could not well distinguish seal products derived from IC hunting from seal products derived from commercial seal hunting. Therefore, the EU’s subsistence rationale failed not as a matter of law, but as a matter of fact.

As mentioned earlier, the AB noted there was discrimination between Inuit communities in different countries, particularly that the European Union “had not pursued cooperative arrangements to facilitate the access of Canadian Inuit to the IC exception” while it had facilitated the access of Greenlandic Inuit to the IC exception. This type of discrimination certainly could not survive the Brazil – Retreaded Tyres test as it could not be explained by the purported policy objective of moral protection, nor could it be explained by the subsistence rationale proposed by the European Union. If the European Union wanted to protect the subsistence of the Inuit, it should afford the protection to all Inuit no matter in which country they lived. Therefore, the subsistence rationale failed to explain both the discrimination between “seal products derived from IC hunts” and “commercial hunts” and the discrimination among “different indigenous communities.”

The AB finally held the EU seal regime “is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,

in particular with respect to the IC exemption.”

It then summed the reasoning for its analysis of “arbitrariness or unjustifiability”:

First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from “commercial” hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the “subsistence” and “partial use” criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as “commercial” hunts could potentially enter the EU market under the IC exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. Finally, we were not persuaded that the European Union has made “comparable efforts” to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.

In the detailed analysis of “arbitrariness or unjustifiability,” and in the summary, the AB did not seem to make it clear that the three steps of analysis constitute a new test of “arbitrariness or unjustifiability.” More importantly, it did not say that the examination of the purported policy objective in step one and the examination of the Inuit subsistence rationale in step two and also in step three provide alternative justifications for a disputed measure to be exonerated under the chapeau. The AB did not say that each of these two types of policy rationales alone could justify a disputed measure. It could be that the examination of the Inuit subsistence rationale was only to find whether the disputed measure has additional flaws in addition to its internal inconsistency in the purported policy objective found in the first step of analysis.

However, coupled with the AB’s statement that “the relationship of the discrimination to the [purported] objective of a measure is one of the most important factors, but not the sole test,” (emphasis added) the second step can be seen as providing an alternative justification

based on an alternative rationale for the disputed measure. In situations where the discrimination cannot be explained by the purported policy objective of the disputed measure, if it is emphasized that the consistency between the measure and the purported policy objective is “not the sole test,” it is only logical for an alternative rationale as examined in the following steps to provide independent justification for a discriminatory measure. Therefore, the analysis in EC – Seal Products, could be understood as an attempt of the AB to modify the Brazil – Retreaded Tyres test in the GATT Article XX chapeau context. Rationales other than the purported policy objective of the disputed measure seemed to be given a chance to justify discrimination alone under the GATT Article XX chapeau. This is the most logical understanding of the AB’s analysis of “arbitrariness or unjustifiability” in EC – Seal Products. This indicated a fundamental departure from Brazil – Retreaded Tyres.

2.6 After EC – Seal Products

After EC – Seal Products, panels in some cases seemed not to have taken EC – Seal Products very seriously in terms of the interpretation of the GATT Article XX chapeau. In US – Animals, the primary WTO instrument concerned was the SPS Agreement. After having reviewed a number of cases, the panel concluded that the reasoning under the GATT Article XX chapeau was applicable to SPS Article 2.3 and Article 5.5.337 Both SPS Article 2.3 and Article 5.5 include text similar to that in the GATT XX chapeau.338 When interpreting the key element of “arbitrary or unjustifiable discrimination” in SPS Article 2.3 and Article 5.5, the panel relied on Brazil – Retreaded Tyres without mentioning the latest development in EC – Seal Products.

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338 The title of SPS Article 2 is “Basic Rights and Obligations”, Article 2.3 reads: “Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.” The title of SPS Article 5 is “Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection”. Article 5.5 reads: “With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.”
The panel report was adopted without being appealed, therefore, the AB did not have a chance to express its opinion.

But not long after the US–Animals, the AB had such a chance. To date, US–Tuna II (Mexico) 21.5, is the only case after EC–Seal Products, in which the AB expressed explicitly its attitude towards the jurisprudential development under the GATT Article XX chapeau.

In the original US–Tuna II (Mexico), the United States imposed a “dolphin-safe” label scheme on tuna products imported into or marketed or sold in the United States. In essence, the United States conditioned eligibility for a “dolphin-safe” label on certain documentary evidence that varied according to five criteria, including the area where the tuna was caught and the fishing methods used.\(^{339}\) As a result, Mexican tuna products needed more burdensome documentary evidence to qualify for the label because Mexican fleet fished tuna “almost exclusively” in a particular area (the Eastern Tropical Pacific (ETP)) with a particular fishing method (setting on dolphins), while the documentary burdens on US tuna products were less because the US fleet fished in both the ETP\(^{340}\) and other areas (outside the ETP) with other fishing methods (other than setting on dolphins).\(^{341}\) The AB was not persuaded that the more burdensome documentary requirements under certain conditions were calibrated to the risks they were supposed to address and the discrimination contained in the US “dolphin-safe” scheme was not justified by a legitimate regulatory distinction.\(^{342}\)

The United States then modified its “dolphin-safe” scheme. The essence of its modifications was to add certain documentary and other requirements to more accurately calibrate to the risks posed by tuna fishing to dolphins outside the ETP under certain conditions.\(^{343}\) That is to say, the United States increased the levels of protection for dolphins outside the ETP according to its assessment of risks to dolphins while it did not lower the level of protections for dolphins under the threat of certain fishing methods in the ETP.\(^{344}\)

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\(^{340}\) WTO panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US–Tuna II (Mexico)), WT/DS381/R, adopted 13 June 2012, para. 7.316.

\(^{341}\) WTO panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US–Tuna II (Mexico)), WT/DS381/R, adopted 13 June 2012, para. 7.279.

\(^{342}\) WTO Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US–Tuna II (Mexico)), WT/DS381/R, adopted 13 June 2012, para. 7.279.

\(^{343}\) WTO Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US–Tuna II (Mexico)), WT/DS381/AB/R, adopted 13 June 2012, paras. 284, 297.

\(^{344}\) Emily B. Lydgate, ‘Is it Rational and Consistent? The Wto’s Surprising Role in Shaping Domestic Public Policy’, 91
claimed the new US “dolphin-safe” scheme was still in violation of non-discrimination obligations under both the TBT Agreement and the GATT Agreement.\(^{345}\) Therefore, an Article 21.5 proceeding was initiated.

In the Article 21.5 case, the AB supported the panel for relying on the GATT Article XX chapeau jurisprudence to interpret “treatment no less favorable,” particularly “whether detrimental treatment stems from a legitimate regulatory distinction,” under TBT Article 2.1.\(^{346}\) The AB further stated that the panel was correct to rely on the statement of the AB in *EC – Seal Products* that “[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination [under GATT Article XX chapeau] is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.”\(^{347}\) However, the AB acknowledged that the AB in *EC – Seal Products* also stated “other factors – beyond the question of whether the discrimination can be reconciled with the policy objective – could also be relevant to the analysis of whether the discrimination is arbitrary or unjustifiable.”\(^{348}\) But, the AB did not consider “other factors” in this case because the arguments offered by the United States were again about “calibration” to different levels of risks to dolphins.\(^{349}\) Therefore, we do not see the explicit reiteration of what the AB had stated when it actually examined the disputed measure in the light of the rationale unrelated to the purported policy objective of the disputed measure in *EC – Seal Products*, nor do we see an actual examination of policy rationales different from the purported policy objective of the disputed measure in this case. Under GATT Article XX chapeau, the AB only restated the importance of examining discrimination in the light of the purported policy objective of the disputed measure and also cautioned that other factors could be relevant as well.\(^{350}\)


Although the AB stressed in *US – Tuna II (Mexico)* 21.5, that discriminatory measures were justifiable not only when the discrimination could be explained by the purported policy objectives, the statement about “other factors” that can influence the consideration of whether the discrimination was justifiable has been ignored in later cases. In *Colombia – Textiles*, the panel considered the arbitrariness or unjustifiability of discrimination under the GATT Article XX chapeau entirely according to the test set forth in *Brazil – Retreaded Tyres*, stating “the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure.”\(^{351}\) The AB stated that since the disputed measure was not provisionally justified under the subparagraphs of GATT Article XX, it was not necessary to consider the measure under the chapeau. Therefore, it “express[ed] no view on the panel’s reasoning in that regard.”\(^ {352}\)

Overall, the WTO judiciary has been not very clear about the tentative development concerning the interpretation of GATT Article XX chapeau after *EC – Seal Products*. In the cases where the panels and the AB discussed the interpretation of GATT Article XX chapeau, there was no argument offered by respondents that the discrimination in their measures could be explained by rationales other than the purported objectives of the disputed measures and not listed in the subparagraphs of the exception clause. The fate of the new development in *EC – Seal Products* is to be determined in yet another case to come, when the right question is presented.


CHAPTER 3: RECONSTRUCTION OF THE EXCEPTION CLAUSE CHAPEAU

From the review of the cases, it has been clear that, under the GATT Agreement, assessing the legitimacy of trade measures violating substantive trade disciplines will depend on assessing the rationales behind the measures. *EC – Seal Products* implies that a disputed measure can be justified with rationales that are often not only different but also conflict with the purported policy objectives of the disputed measures that are usually recognized under the subparagraphs. This development effectively allows the circumvention of the closed-end list as prescribed in the GATT Article XX subparagraphs and greatly expands domestic regulatory autonomy. It is particularly important for disputed measures containing internal inconsistencies such as exemptions. So far, a couple of scholars acknowledged somewhat that the AB in *EC – Seal Products* refined its test under the chapeau and left openings for rationales beyond the list prescribed in GATT Article XX subparagraphs to justify disputed measures, particularly those measures with internal inconsistencies.353

However, even if rationales not on the list are able to justify disputed measures in principle, the detailed test is still unclear. On what conditions can a disputed measure be justified by rationales not on the list? Measures that violate substantive disciplines under the GATT Agreement may also have different characteristics that may require the test contained in the chapeau to be inclusive and flexible to provide meaningful examination of all sorts of measures. What elements does a test need to be able to perform this task? The *EC – Seal Products* case revealed some key components for testing measures in the perspective of the rationales other than their purported policy objectives. Although the AB summarized its analysis under the chapeau, particularly regarding “arbitrariness or unjustifiability,”354 it is far from a complete test appropriate for the examination of measures that cannot be justified by their purported policy objectives that are on the closed-end list prescribed in the subparagraphs of the exception clause. The actual examination by the AB of the rationales behind the EU’s exemptions were prompted

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by the particular facts of this case. When another case that needs to be justified by rationales other than its purported policy objective and not on the closed-end list presents a different set of facts, the examination and the actual components of the test may vary. The test implied in EC – Seal Products is at best incomplete. Fortunately, earlier cases, particularly the TBT cases, have also provided clues to construct a more comprehensive test. This chapter will try to synthesize EC – Seal Products and other cases to propose a reconstruction of the chapeau jurisprudence that can handle the examination of various cases that need (and need not) to be justified by rationales other than their purported policy objectives and more importantly not on the closed-end list.

3.1 Chapeau text and the overall analytical structure

Again, GATT Article XX chapeau provides:

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:

In the earliest WTO case, the AB clarified that the chapeau contains three conditions that a disputed measure provisionally justified under a subparagraph must meet under the chapeau, which are: (a) no “arbitrary discrimination between countries where the same conditions prevail”; (b) no “unjustifiable discrimination” with the same qualifier; or (c) no “disguised restriction” on international trade. To pass the examination of the chapeau, a measure must not fail any one of these three conditions. It makes no sense if a disputed measure can survive the chapeau when it constitutes a disguised restriction although it constitutes no arbitrary or unjustifiable discrimination, or when it constitutes an arbitrary or unjustifiable discrimination while it is not identified as a disguised restriction on trade.

The AB in *US – Gasoline* said the standards embodied in the three key phrases overlapped.

357 The AB particularly thought “that ‘disguised restriction,’ whatever it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade.”

358 It seems that the AB thought the third condition has a wider scope and encompasses the first two conditions. At least the AB said the considerations pertinent to the consideration of the first two conditions were also pertinent to the consideration under the third condition. In a pre-WTO case, a panel had ruled that a measure “should not be considered to be a disguised restriction on international trade, noting that the [respondent’s] prohibition of imports…had been taken as a trade measures and publicly announced as such.”

359 It would be too simplistic that a “disguised” restriction is equated with restrictive trade measures not announced, but the condition for making something public was certainly the first attempt by the adjudicators of the world trading system to distinguish the third condition from the first two under the chapeau.

However, after *US – Gasoline*, the AB has not tried to further clarify the third condition, and has not even cited the pre-WTO case anymore. In all the cases reviewed in the previous chapter, the disputed measure discriminates, at least in the sense as used under the chapeau. Therefore, the examination of these measures was conducted against the first two conditions, i.e. whether the discrimination is arbitrary or unjustifiable. Even in *US – Gasoline*, in which the AB first held the three conditions overlapped, the AB did not make any finding regarding the third condition.

360 According to the AB, considerations under the first two conditions are pertinent to the third condition, but it did not use them to draw a conclusion under the third condition. The AB simply refused to make determination regarding it. Thus, the third condition has not been applied in WTO cases. Therefore, we cannot observe how a disputed measure would be examined under the third condition. If the third condition is different from the first two or if it

has a wider scope than the first two, there is no clue in the WTO case law for us to say much about it. Whether a disputed measure can be justified with a rationale other than its purported policy objective and not on the closed-end list as prescribed in the GATT Article XX chapeau is therefore only discussed under the first two conditions in the light of the current jurisprudence.

Most disputed measures in WTO cases have not passed the tests under the first two conditions in chapeau. Therefore, it may not be necessary to examine those measures under the third condition. However, there are some cases, particularly disputes about compliance with adopted dispute settlement reports such as *US – Shrimp 21.5*, where the AB did find the revised measures of the respondents met the first two conditions. But the AB did not go on to examine the revised measures under the third condition. In *US – Shrimp 21.5*, the AB said “[i]t is clear from the language of the chapeau that these two standards [i.e. the first two conditions] operate to prevent a Member from applying a measure provisionally justified under a subparagraph of Article XX in a manner that would result in ‘arbitrary or unjustifiable discrimination’.” The AB, in its final conclusion, vaguely stated that the revised measure of the United States satisfied the “good faith” condition that is a generalization of the three conditions. But the review of two groups of efforts made by the United States to revise its measure was obviously done against the first two conditions. Interestingly, the panels and the AB in later cases simply ignore the apparent abandonment of the third condition under the chapeau.

Therefore, that the WTO judiciary has not really utilized the third condition is not because it is not necessary in all cases. At least in a 21.5 case, examining the disputed measure against the third condition was needed. Another explanation is needed to reconcile with the 21.5 case. Then, the statement of the AB in *US – Gasoline* that the three conditions overlapped may need to be reread more carefully. The AB in *US – Gasoline* stated:

> “Arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction” on international trade may, accordingly, be read side-by-side; they impart meaning to one another. … We consider that “disguised restriction”, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable

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discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to “arbitrary or unjustifiable discrimination”, may also be taken into account in determining the presence of a "disguised restriction" on international trade.365

It has to be admitted that the AB did not say that the three conditions completely overlapped and one or two of them were redundant. But after a more careful reading, I find that the AB did hint that a determination of an arbitrary or unjustifiable discrimination could not be really different from a determination of a disguised restriction on trade because they would take into consideration the same factors. Therefore, at least in some cases, when the WTO judiciary is confident that the considerations needed under the three conditions are not different given the specific facts and circumstances in these cases, they could just exercise discretion and only examine the disputed measures under one or two conditions. We can assume the same conclusion would be reached under the condition that is not employed.

This abandonment or the omission of the third condition may lead to an observation regarding what measures can be justified by rationales other than those listed in the GATT Article XX subparagraphs. Since the measures in WTO cases are all examined under the first two conditions in the chapeau, it may be inferred that they are all discriminatory or accused of being discriminatory. A commentator therefore even remarks that “[i]n general terms, the chapeau is an anti-discrimination provision.”366

As to the first two conditions, they are not treated differently in WTO cases. the panel in EC – Seal Products observed that the AB mixed the analyses of “arbitrary discrimination” and “unjustifiable discrimination” together in key cases concerning the chapeau, such as US – Gasoline, US – Shrimp (Article 21.5 – Malaysia), US – Gambling, and Brazil – Retreaded Tyres.367 In Brazil – Retreaded Tyres, the AB explicitly said that:

367 See WTO Panel Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products), WT/DS400/R, WT/DS401/R, adopted June 18 2014, para 7.645 & Footnote 987. The AB also said in EC – Seal Products that “to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, which “involves a
The chapeau's requirements are two-fold. First, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute ‘arbitrary or unjustifiable discrimination’ between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute “a disguised restriction on international trade.”

Clearly, “arbitrariness” and “unjustifiability” were not treated differently. Although the AB in US – Shrimp appeared to perform two separate analyses of “arbitrary discrimination” and “unjustifiable discrimination,” the analyses were actually not different. Therefore, the chapeau in fact only contains one condition, at least in application, which is that no “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” is permitted.

3.2 More general issues that are relevant to the expansion of domestic regulatory autonomy

There are a couple of structural issues under the chapeau which have a bearing on how to interpret the conditions set in the chapeau. Before I discuss the details of the condition that a disputed measure has to meet in order not to constitute an “arbitrary or unjustifiable discrimination between countries where the same condition prevail,” I would like to discuss these structural issues. In one of the most enlightening articles about the GATT Article XX chapeau written by Bartels recently, he identified two general issues that have overarching impacts not only on how to approach the interpretation of the Article XX chapeau but also the interpretation of the subparagraphs. These general issues regarding the chapeau are (a) the extent to which the chapeau is viewed as guarding against the abuse of the exception clause; and (b) whether the chapeau is only concerned with the “application” of the disputed measure. As Bartels correctly commented, these two general approaches to the chapeau have implications beyond the chapeau. They led to the two-tier analysis structure of GATT Article XX, in which a consideration of “both substantive and procedural requirements” under the measure at issue.” See WTO Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products), WT/DS400/AB/R, WT/DS401/AB/R, adopted June 18 2014, para. 5.302.


line of equilibrium between the right to regulate and trade disciplines can be marked with the subparagraphe responsible for providing comparatively easy access to the exceptions to a disputed measure and the chapeau responsible for preventing the abuse of the exceptions, and also in which the subparagraphe are concerned with the “contents” or the design and structure of the disputed measure and the chapeau is concerned with the application.371

Bartels correctly criticized the WTO judiciary for their early jurisprudential developments concerning these issues, basically saying the exception vis-a-vis abuse prevention and content vis-à-vis application distinctions are not reasonable but superficial. However, the unreasonableness of the jurisprudential developments concerning them is only one version of the story. Bartels did not try to tell another version in the light of the issues faced by the WTO judiciary and the structural and language constraints the WTO judiciary is under. I venture to argue that the seemingly unreasonable jurisprudential developments actually are not that unreasonable in light of the need to preserve (or expand) domestic regulatory autonomy under the structural and language constraints of GATT Article XX. The structural context, of course, includes the subparagraphe. Therefore, any critique of the chapeau jurisprudence has to take into consideration the subparagraphe. However, the discussion of the subparagraphe is limited to the extent where the purpose of discussing of the chapeau is well served. A more detailed treatment of the subparagraphe will be deferred to another chapter.

3.2.1 Prevention of the abuse of the exceptions

The AB in the case as early as US – Gasoline stated that “the purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of [what was later to become] Article [XX]’.” (brackets original)372 After mentioning the drafting history, the AB continued to elaborate that the objective of the chapeau was to ensure the disputed measure provisionally justified under subparagraphs is applied “reasonably,” and to maintain a balance between invoking “the exceptions of Article XX… as a matter of legal right” and “the legal duties of the party claiming the exception and the legal rights of the other

parties."\textsuperscript{373} When the AB began to examine the US baseline rules, it said that “[t]he fundamental theme [of the chapeau] is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.”\textsuperscript{374} This was the beginning in the WTO history of the idea that the chapeau was to prevent abuse of the exceptions to take hold.

The AB in \textit{US – Shrimp} reviewed the drafting history of the chapeau in some detail. Then it stated more articulately that:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of \textit{abus de droit}, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised \textit{bona fide}, that is to say, reasonably.” An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.\textsuperscript{375} Later cases that concern the chapeau almost always reiterate this idea and quote this passage.

Bartels’ major criticism is that the principle of good faith or abuse prevention is not only applicable under the chapeau but also applicable under the subparagraphs.\textsuperscript{376} Bartels’ point is reasonable. The subparagraphs also contain conditions that the disputed measure has to meet to pass the examination under the subparagraphs. Do these conditions not have the function of preventing the abuse of the exceptions? For what else is the use of the well-know “necessity” test in some of the subparagraphs? The stress by the AB that the chapeau serves as a balance vis-à-vis the subparagraphs does imply that the subparagraphs are primarily to revive measures failing GATT substantive obligations without worrying about being abused, which is not entirely true if we take into consideration the conditions contained in the subparagraphs.


However, the root of this unreasonableness was created by the AB in one of the subparagraphs in *US – Gasoline*. As reviewed in Chapter 1, the AB in *US – Gasoline* broke away from the GATT jurisprudence that required the subparagraphs to examine the discrimination caused by the disputed measure. In *US – Gasoline*, the AB refused to examine whether the discrimination against foreign refiners was justifiable under GATT Article XX subparagraph (g). Instead, it emphasized that the language used in Article XX was “measures” suggested it was the “measure” instead of the part of the measure which is not consistent with the substantive obligations that needed to be examined under subparagraph (g).\(^{377}\) Therefore, the conditions in subparagraph (g) are not very useful to examine measures that are discriminatory. The use of subparagraph (g) is primarily to provide an easy portal for discriminatory measures to access the exception while the chapeau has to take up the task as the gate-keeper. With this in mind, it seems not very unreasonable to stress the objective of the chapeau is to prevent abuse of exceptions.

Why did not the AB choose to examine the discrimination under subparagraph (g)? Avoiding examining discrimination under the subparagraph by manipulating the scope of the measure at issue is already confusing.\(^{378}\) And if it did, it need not to stress that chapeau serves as a safeguard against abuse of exceptions, which is unreasonable according to Bartels. There is no explanation offered by the AB. However, there might be two untold reasons. First, it would make the AB look bad in the eyes of the environmentalists if it equipped subparagraph (g) with sharp teeth to strike down the American measure purported to conserve clean air. Even if a discriminatory measure has to be struck down, do it under the chapeau instead of doing it upfront in the subparagraphs. It might be able to take some heat off by striking it down in the second round instead of in the first round. Second, if discrimination is examined under the subparagraphs, the tests would be too strict. The language in the subparagraphs does not seem to leave room for rationales other than the purported policy objectives while discrimination caused by internal inconsistencies necessarily needs to be explained by these rationales, which made it even further less likely for the AB to examine discrimination under the subparagraphs.

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\(^{378}\) In William J. Davey & Keith E. Makus, ‘*Thailand – Cigarettes (Philippines): A More Serious Role for the ‘Less Favourable Treatment’ Standard of Article III:4*,’ 12 (2) World Trade Review 163-193 (2013), p.183, the authors commented that “[i]t makes no sense to ask if a general law falls within the exceptions of Article XX”.

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It is also clear from the *US – Gasoline* and some later cases that, as observed by one commentator, the major abuse the chapeau guards against is discrimination since the AB avoided examining discrimination under the subparagraphs.\(^{379}\) As discussed earlier, although there are three conditions under the chapeau, only the condition of no “arbitrary or unjustifiable discrimination” has been applied, which also supports the idea that the chapeau guards against abuse of exceptions by providing a serious examination of discrimination contained in the disputed measure.

I would further argue that it is exactly the choice of the AB to examine discrimination under the chapeau that makes it possible to justify a disputed measure under the GATT Article XX chapeau with rationales that are not its purported policy objective nor any policy objective listed in the subparagraphs. As already discussed in Chapter 2, the AB did not reject in principle the US arguments that there were some reasons other than its purported environmental objective to explain the discrimination. If these arguments were presented under subparagraph (g), it would have been rejected as a matter of law. Of course, *EC – Seal products* is even a better example to illustrate this point. If the discrimination created by the exemptions contained in the EU seal scheme was examined under subparagraph (a), the European Union would have not been able to present rationales such as the subsistence of the Inuit as justifications. After all, the discrimination has to be “necessary to protect public morals” under subparagraph (a).

There is another repercussion of the emphasis of the AB on the objective of the chapeau in early cases, which is the worry that the AB would replace the conditions based upon actual treaty languages under the chapeau with a presumed general objective.\(^{380}\) However, this worry is not justified. In the very first case that went through the WTO appellate procedure-*US – Gasoline*-the AB applied the condition of no “arbitrary or unjustifiable discrimination”, which has textual basis under the chapeau, instead of the general abuse-prevention principle to the facts.\(^{381}\) Also in *US – Shrimp*, where the AB reviewed the drafting history at length to establish


the general objective of the chapeau, it still applied the condition of no “arbitrary or unjustifiable discrimination” to the facts.382

If the WTO judiciary had decided to ignore the languages in the chapeau, the abstract general objective might have given it more flexibility, which might have helped to expand the domestic regulatory autonomy of Members. However, on the other hand, it might turn out to be a disguised curse on Members’ regulatory autonomy. The objective of the chapeau established by the AB is to guard against the abuse of the exceptions. If unfettered by the language that spell the conditions under the chapeau, this objective may be interpreted and applied more rigorously and may very well create a more hostile environment for domestic regulatory measures under the chapeau.

3.2.2 Focus on application

Also in US – Gasoline, the AB gave the chapeau another structural feature. The chapeau requires that measures are not “applied in a manner” which would fail the three conditions listed. The AB therefore stated that “[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.”383 The implications of the statement are two-fold. First, there is a distinction between the “contents” of a measure and the “application” of the measure. Second, the “contents” of a disputed measure should be examined under the subparagraphs while the “manner” of application should be examined under the chapeau.

Yoshiko Naiki explained that there were distinctions between mandatory legislation and discretionary legislation in international law and the WTO law. In general international law, if a piece of domestic legislation is not applied, generally it cannot be challenged even if its contents may violate international law. In the WTO law, if a piece of domestic legislation of a Member mandates an action that conflicts with trade disciplines contained in the WTO, that Member can be sued and may lose in dispute settlement; but if a piece of domestic legislation leaves discretionary space for domestic authorities to implement the legislation in more than one way, the possibility that the actual application of the legislation may violate the WTO law does not

warrant a challenge to the legislation by other Members while the actual application can definitely be challenged in specific cases.\textsuperscript{384} I find the distinction between mandatory legislation and discretionary legislation can support the distinction between the contents of a measure and its application. For discretionary legislation, we can see it as containing no specific contents that may fail the chapeau, but its application may.

If the distinction between mandatory legislation and discretionary legislation does not convince you that the distinction between the contents of a measure and its application is valid, \textit{US – Gambling} provides a good example to illustrate a clearer distinction between the contents and the application of a measure. In \textit{US – Gambling}, the panel found that the US laws prohibited remote gambling services provided both by foreign suppliers and domestic suppliers, but it also found, among other things, that some domestic illegal supply of remote gambling services was not prosecuted by the authorities.\textsuperscript{385} In this case, as in other cases of law enforcement, domestic authorities may act contrary to the content of the laws. The distinction between (lousy) law implementation and the law is obvious.

In WTO law, the distinction between the contents of a measure and its application has some positive implications for domestic regulatory autonomy. For discretionary legislation that may potentially violate trade disciplines, it not only can pass the examination of contents easily, but also can pass the examination of application if the implementing authorities constrain themselves. The panel in \textit{US – Section 301} found the US law “mandates the USTR in certain cases to make a unilateral determination on whether US rights have been denied…However, the statutory language…neither mandates the USTR to make a determination of inconsistency nor precludes him or her from making such a determination.” (emphasis original)\textsuperscript{386} Therefore, the relevant US law is discretionary. The US government, through a Statement of Administrative Action, promised “to ‘base any section 301 determination that there has been a violation or denial of US rights…on the panel or Appellate Body findings adopted by the DSB’,” which was taken by the panel as a guarantee to preclude the US government from implementing its law in a

way violating the relevant DSU clause.\textsuperscript{387} \textit{US – Section 301} was a case concerning the obligation of Members not to take unilateral measures to deal with disputes governed by the WTO dispute settlement mechanism, however, it can provide an example to illustrate the WTO judiciary could defer further to national autonomy by distinguishing the contents and the application of national laws. In the vein of \textit{US – Section 301}, the separate examination of the contents and the application could be very friendly also in other context, such as under the GATT Article XX chapeau.

However, Bartels argued that the distinction between the contents of a measure and its application was “spurious.”\textsuperscript{388} He saw the logical flaw of the distinction was that “‘measure’ could not really be divided into an abstract element that is not ‘applied’ and a concrete element that is ‘applied’” according to the distinction.\textsuperscript{389} Moreover, this distinction can be problematic for the examination of discriminatory measures. As argued earlier, the AB has generally refused to examine discrimination in a disputed measure under the subparagraphs. If the discrimination is created by the “contents” of the measure, it cannot be examined under the chapeau either because the chapeau only focuses on the application. In theory, this will greatly expand the domestic regulatory autonomy of WTO Members. Such measures are not subject to rigorous examination at all under GATT Article XX. However, the AB will not get away with it. Shielding discrimination from an earnest examination under GATT Article XX would be devastating to the world trading system. It is of course a violation of the good faith principle contained in the chapeau.

Fortunately, the AB soon clarified that the chapeau could examine not only the application of the disputed measure but also its contents. The AB in \textit{US – Shrimp} stated:

We note, preliminarily, that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually


applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our
view, project both substantive and procedural requirements.\textsuperscript{390}

Clearly, the “detailed operating provisions of the measure” as opposed to a “measure, otherwise
fair and just on its face, are actually applied an arbitrary or unjustifiable manner” does not refer
to the application of a measure. They are the contents of the measure. Although the AB still
refers to detailed operating provisions of a measure as the application of the measure instead of
the general contents of it, thus managing to maintain the distinction between the contents and the
application of a measure under the chapeau, it has not been successful.

The AB continued to expand the scope of examination under the chapeau to include the
contents of a disputed measure. For example, in \textit{EC – Seal Products}, the AB stated:

By its terms, the chapeau of Article XX is concerned with the “manner” in which a
measure that falls under one of the subparagraphs of Article XX is “applied”. Although this suggests that the focus of the inquiry is on the manner in which the
measure is applied, the Appellate Body has noted that whether a measure is applied
in a particular manner “can most often be discerned from the design, the architecture,
and the revealing structure of a measure”. It is thus relevant to consider the design,
architecture, and revealing structure of a measure in order to establish whether the
measure, in its actual or expected application, constitutes a means of arbitrary or
unjustifiable discrimination between countries where the same conditions prevail.
This involves a consideration of “both substantive and procedural requirements”
under the measure at issue.\textsuperscript{391}

Therefore, it is reasonable to say that the discrimination created by both the contents of a
disputed measure or its application can be challenged and examined under the chapeau. But it is
not a undue constraint on the domestic regulatory space. Actually, it serves to truly safeguard the
balance between the right to regulate and trade disciplines when appropriate conditions are
applied. Do not forget that examining a discriminatory measure does not mean that measure
would eventually fail the examination. Whether the chapeau can help expand domestic
regulatory autonomy or not depends on what the conditions, tests or standards employed in the

\textsuperscript{390} WTO Appellate Body Report, \textit{United States – Import Prohibition of Certain and Shrimp Products (US - Shrimp),}

\textsuperscript{391} WTO Appellate Body Report, \textit{European Communities – Measures Prohibiting the Importation and Marketing of
examination are. More importantly, only when we can examine discrimination in both the contents and the application of a measure, can we have a chance to fully exonerate it with its rationales that are not its purported policy objective or one of the recognized objectives listed in the subparagraphs. Trying to keep discriminatory measures alive by avoiding examination of its contents is not the right way to expand domestic regulatory autonomy.

3.3 The key test

After discussing the general issues, it is time to focus on the operative condition contained in the chapeau, which is that a measure must not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” As discussed earlier, the subparagraphs only maintain relaxed conditions for a disputed measure that is discriminatory. Therefore, the condition in the chapeau take the major responsibility to more rigorously examine such a measure. The tests and standards the condition employs will ultimately determine whether a disputed measure can be justified under GATT Article XX. The fact that the chapeau does not maintain a list of legitimate policy objective provides a necessary precondition for a disputed measure to be justified by a rationale not listed in the subparagraphs.

3.3.1 Overview

In its early cases, the AB did not try to articulate the specific elements or steps of analysis in the “arbitrary or unjustifiable discrimination” condition. In US – Gasoline, immediately after it made a brief comment on the relationship between the three conditions it identified under the chapeau, the AB began to discuss the two alternatives that could remedy the discrimination in the Baseline Rules. Then it concluded that the United States did not probe the possibility of taking alternatives and the United States failed to offer good explanations for its omissions, therefore, the discrimination was arbitrary and unjustifiable. Although the AB, in the same case, criticized the panel for failing to observe treaty interpretative rules codified in the Vienna Convention and neglecting the text of subparagraph (g), it did not engage in a textual analysis.

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of “arbitrary or unjustifiable discrimination” under the chapeau. The important condition under the chapeau was not refined. It was more like a black box. It took in the facts and spilled out the results, but we do not how the condition really worked in detail.

Soon, the AB made the condition of no “arbitrary or unjustifiable discrimination” more formal and sophisticated. It stated in *US - Shrimp*:

First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary or unjustifiable* in character. We will examine this element of arbitrariness or unjustifiability in detail below. Third, this discrimination must occur *between countries where the same conditions prevail.* (emphasis original)

Obviously, the condition of no “arbitrary or unjustifiable discrimination” was read together with terms adjacent to it and then was divided into three elements. This three-element reading of the key condition under the chapeau has been followed since then. However, the order of the three elements changed over time, which also changed the order of analysis in application of the elements. The “discrimination” element and the “the same conditions” element usually come first, then the “arbitrariness or unjustifiability” element comes last. And since the chapeau is basically an anti-discrimination provision, the “discrimination” element logically becomes the first element of analysis.

However, can the condition of no “arbitrary or unjustifiable discrimination” be divided into three comparatively independent elements? Bartels expressed some serious doubts.

Another commentator also said the analysis under the chapeau was circular, suggesting that the analysis under one element depends on or overlaps with analysis under the other elements.

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Their doubts make a lot sense, but I will discuss them later when I discuss the three elements respectively. It is sufficient to say here that the analysis under the element of “condition” and the analysis under the element of “arbitrariness or unjustifiability” both depend on analysis in the same policy perspectives, which makes people doubt the independence of the two analyses. It also needs to be noted that the analysis under the element of “discrimination” has a similar relationship with the analysis under the element of “arbitrariness or unjustifiability”, which will also be discussed later. Bartels suspected that the analyses regarding different elements were conducted in the perspective of the purported policy objective of the disputed measure. However, it is much more complicated.

Nevertheless, the division of the three elements has been maintained in WTO law, not only when the panels and the AB interpret the chapeau but so when they apply the chapeau to facts. Among the three elements, the “arbitrariness or unjustifiability” element is the most important. The analysis under the “arbitrariness or unjustifiability” therefore is key in the chapeau to decide the scope of domestic regulatory autonomy.

3.3.2 discrimination

A determination of whether a disputed measure “would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” logically starts with the determination of the existence of discrimination caused by the disputed measure. However, although the WTO judiciary did discuss the relationship between discrimination under the chapeau and that under the substantive clauses of the WTO Agreements, I fail to find that they define “discrimination” under the chapeau clearly and apply the definition to the facts. The existence of discrimination in most cases has just been assumed.

In US – Gasoline, the AB was not concerned with the definition of discrimination under the chapeau. Although both the chapeau and Article III:4 are clauses about discrimination, the AB thought that the two clauses had two related but completely different tasks to perform. The AB stated that:

The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified.\textsuperscript{401}

To the AB, while Article III:4 is about the existence of discrimination in the competitive/economic sense that is inconsistent with the substantive obligations provided by this very clause, the chapeau is about “the further and separate question” of “whether that inconsistency [i.e. discrimination]” is “nevertheless justified.” Since the chapeau is not concerned with the issue whether discrimination exists or not, that issue should be already decided before it engages in deciding a different issue whether the discrimination can be justified or not.

However, in \textit{US – Shrimp}, the AB said that “[a]s we stated in \textit{United States – Gasoline}, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.”\textsuperscript{402} Then, the AB directly quoted the sentence “[t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred” from its report in \textit{US – Gasoline} to support its claim that the AB in \textit{US - Gasoline} distinguished discrimination under the chapeau and discrimination under GATT clauses that contain substantive non-discrimination obligations.\textsuperscript{403} This is an obvious misreading. The AB in \textit{US – Gasoline} only said that the legal standards were different under the chapeau vis-à-vis under the clauses such as Articles III.

However, it is one thing that the AB wrongly cited \textit{US – Gasoline} to support the distinction between the chapeau and certain GATT clauses regarding the determination of discrimination, but it is another thing to say that the AB was wrong in \textit{US – Shrimp} to make that distinction. Bartels commented that the AB’s reasoning was hard to follow and discrimination in


two different contexts was hard to appreciate. But he failed to appreciate the important
difference in the two cases. In US – Gasoline, the measure concerned was a typical domestic
regulation that fell under GATT Article III:4. However, in US – Shrimp, the measure concerned
was an import ban imposed at the border that only fell under GATT Article XI. GATT Article XI
is to eliminate “prohibition or restrictions other than duties, taxes or other charges…on the
importation of any product” into the territory of a WTO Member. Measures falling under GATT
Article XI are also called border measures as tariffs and customs rules because they are usually
taken “on” the importation of foreign products. A border measure directly impacts on imports
only and could not possibly violate the national treatment obligation provided by Article III. And
the US ban in US – Shrimp did not violate most favored nation treatment obligation as provided
by Article I either. Thus US – Shrimp does not involve a violation of the conventional non-
discrimination obligations as provided in GATT Articles I and III. In US – Gasoline, the
discrimination was first found under Article III:4 and then needed to be justified under the
chapeau of Article XX (as the AB refused to examine the discrimination under the
subparagraph). In US – Shrimp, discrimination falling under Article III or Article I did not exist.
The discrimination that did exist was not identified in the first place before the import ban
needed to be justified under Article XX. Therefore the AB in US – Shrimp had to identify the
discrimination under the chapeau of Article XX, and discrimination found under the chapeau
could not possibly be the same discrimination found in Article III or Article I in that case.

Therefore, the distinction made by the AB in US – Shrimp looks not that unreasonable. In
cases where competitive discrimination has been already found to exist according to the
substantive non-discrimination clauses, there seems to be no need to find discrimination under
the chapeau. Discrimination under the chapeau should be identical to discrimination found in the
substantive clauses. What is needed is to find out whether the discrimination can be justified or
not, just as required by the AB in US – Gasoline. However, in cases where a search for
discrimination has not been conducted before the exception clause is invoked, it is still necessary
to determine whether there is discrimination under the chapeau.

However, the AB was only technically correct to make such a distinction. When
disregarding the legal technicalities, discrimination in the competitive sense between imports and

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404 Lorand Bartels, ‘The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A
domestic like products can be created by quantitative measures imposed at the border. Actually, subparagraph (g) of Article XX, which requires that “such measures are made effective in conjunction with restrictions on domestic production or consumption,” is particularly needed to examine border measures that may potentially discriminate against imports.\textsuperscript{405} Subparagraph (g) is an anomaly among the subparagraphs. The other subparagraphs do not care about discrimination. However, the same logic applies in the chapeau. The chapeau needs to identify discrimination against imports created by border measures. In \textit{US – Shrimp}, if the United States substituted its import ban on shrimps with domestic regulations, just like the measures taken in cases such as \textit{US – Clove Cigarettes} or \textit{EC – Seal Products}, we would have identical discrimination under both Article III and the chapeau of Article XX. Therefore, discrimination under the chapeau is basically competitive discrimination found in the substantive non-discrimination clauses, or should be found if we convert border measures into domestic regulations in some cases.

The AB in \textit{EC – Seal Products} tried to connect the discrimination under the chapeau back to the discrimination under the clauses that contain non-discrimination obligations by stating that the statement made by the AB in \textit{US – Shrimp} “does not mean, however, that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994.”\textsuperscript{406} Bartels correctly commented that the AB clearly implied that “an identical distinction test can be used in both contexts [under the chapeau and under the clauses containing substantive non-discrimination obligations].”\textsuperscript{407} The AB in \textit{EC – Seal Products} did not overrule \textit{US – Shrimp} outright, but it in effect deviated from \textit{US – Shrimp} and regressed toward \textit{US – Gasoline}. The

\textsuperscript{405} Paragraph (g): relating to the conservation of exhaustible natural resources if such measures are made effective \textit{in conjunction with restrictions on domestic production or consumption} (emphasis added). However, if a disputed measure needs to be provisionally justified under subparagraph (g), the de facto discrimination between imports and domestic products will have to be examined under that subparagraph, which will create a division of labor between the chapeau and this subparagraph in terms of the examination of discrimination different from that between the chapeau and some other subparagraphs as illustrated by \textit{US – Gasoline}. I’ll defer the discussion of this potential discrepancy in a further chapter.


AB in *EC – Seal Products* further cited the AB report in *US – Gasoline* to support its leaning towards *US – Gasoline*.\(^{408}\)

However, the AB still had reservations in *EC – Seal Products* when it tried to connect discrimination under the chapeau and discrimination under clauses containing non-discrimination obligations. It still cited the AB in *US – Shrimp* to claim that “the nature and quality of this discrimination [under the chapeau] is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994.”\(^{409}\) To understand why the AB in *EC – Seal products* only switched the precedent it would follow from *US – Shrimp* to *US – Gasoline* halfheartedly, we need to discuss *EC – Seal Products* in greater detail.

In *EC – Seal Products*, the discrimination in the competitive sense was between Greenland seal products on the one hand and Canadian and Norwegian seal products on the other hand (violation of the most favored nation treatment obligation),\(^{410}\) and between EU domestic seal products and imported seal products from Canada and Norway (violation of the national treatment obligation).\(^{411}\) Under the chapeau, the AB first tried to explain the discrimination with the purported policy objective of the EU seal scheme, which was to protect public morals.\(^{412}\) If the purported policy objective could not explain away the discrimination in the competitive sense, the discrimination not only remained in the competitive sense but also is rediscovered now in the policy sense. That was what happened in *EC – Seal Products*. Therefore, discrimination under the relevant substantive clauses is the same as that under the chapeau when looked at from the competitive perspective, but at the same time they are different since discrimination under the chapeau may also exist in the policy sense.

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\(^{408}\) WTO Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/AB/R, WT/DS401/AB/R, adopted June 18 2014, footnote 1504, in which the AB stated that “[I]n *US – Gasoline*, the Appellate Body concluded that the baseline establishment rules, which the panel in that dispute had found to be discriminatory under Article III:4 of the GATT 1994, also resulted in ‘unjustifiable discrimination’”.


However, the transformation of the discrimination under the chapeau did not stop here in *EC – Seal Products*. The AB next tried to explain the discrimination with the rationales behind the exemptions, particularly with the subsistence rationale behind the IC exemption. However, because the EU seal scheme was not really able to distinguish IC seal products from commercial seal products and the IC exemption was not designed or implemented even-handedly, the discrimination could not be explained by the additional policy rationales offered by the European Union. Then the discrimination had acquired the third facet, which was in the sense of additional policy rationales.

Did the discrimination really change in *EC – Seal Products* during the analysis? No, it did not. As the AB said, the discrimination under the chapeau was still caused by the same circumstances that caused discrimination under Article III or Article I.\(^\text{413}\) The difference is only regarding perspective. The change of perspective was actually caused by the analysis under the last element of the key condition under the chapeau, which focuses on assessing policy objectives or rationales offered to explain the discrimination under the chapeau. When a number of the objectives or rationales are examined in the analysis of the last element, there is possible discrimination in as many policy perspectives. That is also why I said the element of “discrimination” is not completely independent of the element of “arbitrariness or unjustifiability.”

### 3.3.3 countries where the same conditions prevail

It is easy to understand why it is needed to compare the conditions between countries affected by a disputed measure, including the country taking the measure. If the conditions are not the same, it is natural the countries involved get different treatment. But if the conditions are the same, they are expected to be treated in the same way.

First of all, the conditions referred to under the chapeau are not the competitive or economic conditions the “like product” test cares about under Article III or Article I. The competitive or economic conditions are only relevant to whether there is discrimination in the competitive sense. To justify competitive discrimination with non-economic policies under the exception clause, we should compare the conditions in the perspective of the policies invoked to

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determine whether like products are different when they are in different conditions in the perspective of the invoked policies. If like products are in the same conditions in the perspective of a legitimate policy, they should be treated the same by the policy and the invoked policy cannot justify discriminatory treatment. If like products are in different conditions in the perspective of the legitimate policy, they should be treated differently by the policy and the competitive/economic discrimination is justified if it is caused or related to the different treatment by the policy. The AB in EC – Seal Products stated clearly that “‘conditions’ relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau.”  

The AB in EC – Seal Products also added that “the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which ‘conditions’ prevailing in different countries are relevant.”  

This is misleading. Under the chapeau, we should only be concerned with discrimination in the policy perspective. The WTO judiciary should focus on assessing policy explanations for the discrimination. A better way to compare the “conditions” was proposed by Bartels, which is to look at the risks that a disputed measure meant to address in its policy. For example, if the conditions in different areas pose different levels of danger to turtles, shrimp in these areas should be treated differently to save the turtles although the shrimp is still “like.” In most cases, the conditions are largely shaped by the characteristics of the products that may not be important in the “like products” standard but are important in the policy sense when we take Bartels’ approach. For example, meat products containing hormones or not may constitute different conditions according to the risks they pose to human health while they may still be like products in the competitive sense.

Bartels’ view has been supported by the observations of other commentators. Gaines once said that “[t]he only principled basis on which to select the relevant conditions for comparison is that they should have something to do with the declared objectives of the

Davies argued that “prevailing conditions between countries” should be “compared with reference to the likeness of the products manufactured in these countries,” but the “likeness” of the products should be determined in the non-protectionist policy sense.

Generally speaking, if it is established that the involved countries have the same conditions in the perspective of its purported policy, any discrimination in the sense of that policy cannot be explained by that policy. Therefore, the process of determining the conditions between involved countries is mixed together with the determination of whether a discrimination in the policy perspective exists and the determination of whether that policy perspective can explain the discrimination or not, which is also the analysis of whether the discrimination is “arbitrary or unjustifiable.”

Usually, different treatment is apt to constitute discrimination. However, in US – Shrimp, an interesting question was raised, which is whether the identical treatment of products can turn into discrimination. The AB stated:

[W]e understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country… However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.(emphasis original)

This statement of the AB makes sense. However, there is no textual basis to determine whether discrimination is arbitrary or unjustifiable in different conditions instead of in the same conditions. A commentator suggested that, in US – Shrimp, the relevant countries were actually in the same conditions, but the US facilitative actions (to help some foreign countries to

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meet its turtle conservation rules) changed the conditions in some foreign countries, therefore, these facilitative actions constituted discrimination between countries where the same conditions prevailed. Bartels argued that facilitative actions taken towards certain foreign countries in this case was not in violation of any substantive WTO obligation and therefore taking issue with them would compel complaints to take the route of non-violation claims, which were rare and would create difficulties for the chapeau jurisprudence. He proposed to discount the changes of the conditions in relevant countries that were attributable to the US facilitative actions and then make the comparison to see whether they were the same. Anyway, no matter which approach is taken, the point is that there is a way to work around the constraints of the text to address discrimination between countries where the conditions are different.

Let’s get back to the more common approach to the comparison of conditions. In EC – Seal Products, the AB assessed the “conditions” in involved countries when the European Union tried to justify the discrimination created by the Inuit exemption in its seal scheme. The AB concluded that the conditions prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand, were the same because “the same animal welfare concerns…arise from seal hunting in general [mostly commercial hunting] also exist in IC hunts.” Obviously, the comparison of the conditions was conducted in the perspective the purported policy objective of the EU seal scheme, which was to protect public morals. The European Union resorted to the public moral exception as provided in GATT Article XX (a) to justify the exemptions contained in its seal scheme in the first place. It was acknowledged by the AB that the EU seal scheme as a whole was provisionally justified under subparagraph (a) because it was necessary to protect public morals. Now the AB examined the discrimination created by the Inuit exemption under the chapeau. But the discrimination between seal products that were in the same condition giving

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rise to the same animal welfare concerns could not be explained by its purported policy of public morals protection. That is to say: “the European Union has failed to demonstrate...how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to ‘commercial’ hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.”

Then the AB said “the relationship of the discrimination to the objective of a measure is one of the most important factors, but not the sole test.” Therefore, “in this connection,” the AB began to examine the EU’s alternative argument “that only seal products derived from hunts conducted by Inuit communities for subsistence purposes can benefit from the exception.” (emphasis added) However, in the AB’s analysis that followed, the elements of “condition” were not discussed any more. Logically, two countries being in the same condition in the perspective of the purported policy objective of a disputed measure does not necessarily mean they are still in the same condition in the perspective of an alternative policy objective of the disputed measure. For example, in EC – Seal Products, commercial seal products and Inuit seal products both gave rise to “animal welfare concerns,” therefore countries exporting commercial seal products and Inuit seal products respectively were in the same condition. However, commercial seal products did not concern the subsistence of the Inuit while Inuit seal products were important for the subsistence of the Inuit, therefore countries exporting commercial seal products and Inuit seal products respectively should be in different conditions when AB assessed the discrimination in the perspective of the Inuit subsistence rationale. Unfortunately, the need to re-compare the conditions in countries involved in a dispute has not been recognized by the WTO judiciary yet.

Anyway, what is important is that the comparison of conditions is not static. Instead, it is dynamic, changing in tune to the change of policy objectives or rationales that are assessed to see whether discrimination can be explained or not. And since the discrimination under the chapeau can have multiple facets, there may be a corresponding relationship between the conditions and the discrimination under the chapeau. Therefore, it is also fair to say that the comparison of the

conditions in countries involved is not really independent of the determination whether the discrimination is arbitrary or unjustifiable or the determination of discrimination under the chapeau. As said earlier, when discrimination exists between countries where the same condition prevail in the perspective of a certain policy objective, that policy objective is unable to explain the discrimination and hence the discrimination must be arbitrary or unjustifiable. When discrimination exists between countries where different conditions prevail in the perspective of a certain policy objective, that policy objective has already explained the discrimination and hence the discrimination becomes justifiable or not arbitrary. Conversely, when a determination of whether a discrimination is arbitrary or unjustifiable, even if no comparison of the conditions in countries involved is conducted explicitly, it is already conducted implicitly. Therefore, the comparison of the conditions is actually not important as long as a thorough determination of whether the discrimination is arbitrary or unjustifiable is conducted. I now turn to the discussion of that element.

3.3.4 Arbitrariness or unjustifiability

To assess whether discrimination is “arbitrary or unjustifiable,” the pre-WTO jurisprudence offers little clue. The early WTO jurisprudence is not very helpful either. The AB said once in *US – Shrimp* that “[t]he policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX” and “[t]he legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure, are examined under Article XX (g).” It seems the AB anticipated that rationales other than the purported policy objective of a disputed measure and not on the closed-end list as prescribed in the exception clause subparagraphs should be able to justify the discrimination and eventually the disputed measure if certain conditions were met under the chapeau. However, this approach to justifying discrimination under the chapeau was soon abandoned and an opposite approach was taken.

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In *Brazil – Retreaded Tyres*, the AB stated that the analysis of whether discrimination is arbitrary or unjustifiable under the chapeau “should focus on the cause of the discrimination, or the rationale put forward to explain its existence.”\(^{434}\) However, *Brazil – Retreaded Tyres* has become a very restrictive precedent by establishing a clear test, which is that “one of the most important factors…is whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.”\(^{435}\)

Fortunately, in *EC – Seal Products*, as revealed from the actual analysis by the AB although not from the articulation of the test, the straightjacket *Brazil – Retreaded Tyres* imposed on the choice of rationales seemed to be lifted. Rationales that are not related to the purported policy objective, or even go against it, can be relied upon to explain discrimination under the chapeau. Since rationales not related to the purported policy objective of a disputed measure are usually not on the list of legitimate objectives as prescribed in the subparagraphs of the exception clause, domestic regulatory autonomy is greatly expanded.

When the analysis regarding “arbitrariness or unjustifiability” in *EC – Seal Products* is more formally recognized as establishing a new test, it will in essence become an exercise of using alternative policy rationales to explain discrimination identified under the chapeau. To extract a test capable of examining alternative policy objectives from *EC – Seal Products*, we need to look again at the summary of its analysis of “arbitrariness or unjustifiability”:

First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from “commercial” hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the “subsistence” and “partial use” criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as “commercial” hunts could potentially enter the EU market under the IC exception. We did not consider that

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the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. Finally, we were not persuaded that the European Union has made “comparable efforts” to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.  

Although the AB earlier in EC – Seal Products only articulated the test to determine whether discrimination is “arbitrary or unjustifiable” between countries where the same conditions prevail by following Brazil – Retreaded Tyres, this summary of its application of the test reveals that the actual test it employed is different from that in Brazil – Retreaded Tyres. Particularly, read together with the AB’s statement that “the relationship of the discrimination to the [purported] objective of a measure is one of the most important factors, but not the sole test,” the summary can be seen as a new test. Now, the new test is restated with a few more tweaks and explanations: (i) whether discrimination can be explained by rationales reconcilable with the purported policy objective of the disputed measure, which, as will be argued in the next paragraph, actually required that discrimination should primarily be explained by the purported policy objective of a disputed measure; if not, (ii) whether it can be explained by the rationale behind the exemption (and flexibilities) that actually give rise to internal inconsistencies within the disputed measure and hence discrimination, particularly whether the exemption (and flexibilities) is consistent with the rationale behind it (i.e. protecting IC subsistence) without unintended consequences (allowing seal products derived from commercial hunting to access the EU market); and (iii) whether the exemption (and flexibilities) is designed or implemented even-handedly in the perspectives of the rationale behind the exemption.  

The first step is the reiteration of the Brazil – Retreaded Tyres test, which is quite strict. However, what is the requirement in the first step of analysis is a little ambiguous, which has not been clearly discussed in the literature yet. The AB said once in Brazil – Retreaded Tyres that “there is arbitrary or unjustifiable discrimination… when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a

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paragraph of Article XX, or would go against that objective.” Therefore there is no problem if the Brazil – Retreaded Tyres test is seen as a “rationale connection requirement” that assesses whether the alternative rationale is related to the purported policy objective or not. However, this understanding is not well supported by the above quoted summary in EC – Seal Products, or by the reiteration of the test by the AB in EC – Seal Products, which emphasized that the test focused on “whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.” Regarding the determination of “arbitrariness or unjustifiability” of discrimination under the chapeau, the AB also said that “the relationship of the discrimination to the [purported] objective of a measure is one of the most important factors.” Therefore, the first step can also be a requirement to examine whether discrimination can be explained by the purported policy objective of a disputed measure. Also the AB has repeatedly emphasized that the key to determining “arbitrariness or unjustifiability” was to see whether the rationale or cause offered could explain the discrimination, which supports treating the Brazil – Retreaded Tyres test as one assessing whether discrimination can be explained by the purported policy objective of a disputed measure.

Nonetheless, the two different understandings are not contradictory. If a respondent offers to explain discrimination with rationales unrelated to the purported policy objective of its measure, the discrimination that needs to be explained certainly cannot be explained by the purported policy objective. Therefore, the “rationale connection requirement” is actually a proxy test of the first step. The proxy test performs the function of a door keeper. If the offered rationale is positively connected to the purported policy objective, it is let into the door. If not, it will be kept out. However, this proxy does not work well in all situations when the respondent tries to explain the discrimination under the chapeau with an alternative rationale. It works when it turns down those rationales that are not positively connected to the purported policy objective,

but it cannot further examine the rationale that has been allowed to enter the door. It is not enough to know a rationale is positively connected to the purported policy objective. An independent examination of the connection between the rationale and the discrimination it tries to explain still needs to be conducted. At least we need to see whether the discrimination under the chapeau contributes to the policy goal the rationale offered wants to achieve. If we see that the first step is an “rationale connection requirement,” we will have to accept that an additional step to examine whether the purported policy objective can explain discrimination coexists with the “rationale connection requirement.” The “rationale connection requirement” seems to further complicate the already messy chapeau jurisprudence.

Fortunately, the “rationale connection requirement” has been implicitly ditched by the AB in **EC – Seal Products**. Therefore, I would propose to understand the first step as a requirement to explain the discrimination under the chapeau with the purported policy objective of the disputed measure. But, how should the WTO judiciary go about determining whether a purported policy objective can explain the discrimination? I’m not sure there is much jurisprudence in this regard. Usually, the relevant reasoning is quite brief because it is so obvious that the purported objective cannot explain the discrimination in most cases. The AB said once in **US – Shrimp** that “[t]he policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX.” It was exactly referring to situations where disputed measures were discriminatory because they had internal inconsistencies in the perspective of their purported policy objectives. Therefore, the first step of analysis in most cases where disputed measures have internal inconsistencies is only nominal.

We do not really have a chance to observe what test has been employed to examine whether the purported policy objective can explain discrimination. If the first step does need to be seriously conducted, it would be analogous to the second step. Both the first step and the second step assess whether policy objectives or rationales can explain the discrimination. The difference is

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443 Duran clearly identified two sub-steps within the first step of analysis of “arbitrariness or unjustifiability”. The first sub-step is the rational connection requirement while the second sub-step is “the assessment of whether discrimination is unjustifiable”, which “should be made in the light of the objective that provided the basis for the measure’s provisional justification under a given subparagraph of Article XX GATT”. See Gracia Marin Duran, ‘Measures with Multiple Competing Purposes after EC – Seal Products: Avoiding a Conflict between GATT Article XX-chapeau and Article 2.1 TBT Agreement’, 19 (2) Journal of International Economic Law 467-495 (2016), p. 475.

that the purported policy objective is assessed in the first step while the policy rationale behind the exemption (and flexibilities) is assessed in the second step.

When most scholars read *EC – Seal Products*, they seemed to stop examining the AB’s detailed analysis of “arbitrariness or unjustifiability” after they saw the first step was not different from a typical analysis following *Brazil – Retreaded Tyres*. Upon the first step, some commentators paid a little too much attention. However, the most interesting step in this analytical framework is the second step.

The second step of the test is an examination of the alternative rationale assessing whether it can explain discrimination or not. In *EC – Seal Products*, the Inuit subsistence rationale was proposed and examined to see whether it could explain the discrimination. As discussed in Chapter 2, this second step offers an alternative justification for the disputed measure. In general, it means rationales other than the purported policy objective of a disputed measure alone can justify that measure. The general condition is that alternative rationales have to be able to account for the discrimination. In *EC – Seal Products*, it means that the exemption has to be consistent with the rationale proposed to explain the exemption so as to guard against pure excuses. In cases where the disputed measure does not have exemptions but has some flexibilities such as setting different levels of attainment of the purported policy objective for different products, the policy rationale proposed should be able to account for the flexibilities and discrimination caused by the flexibilities. In *EC – Seal Products*, if the IC exemption was designed and applied in a way consistent to its IC protection rationale, it would be fine and would not drag down the entire EU seal regime with it even if it was inconsistent with the purported policy objective of the overall EU seal regime. However, the problem in *EC – Seal Products* was that the IC exemption itself could be abused, and therefore was not entirely consistent with the IC protection rationale. That is to say, the IC rationale could not fully explain the exemption carved out in the name of IC protection because some seal products could enter the EU market according to the operative rules of the IC exemption although they were not derived from IC hunting. Thus the Inuit subsistence rationale did not pass the second step of analysis not as a matter of principle but as a matter of fact.

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445 For example, Bartels saw the AB implied that some other factors beyond policy rationales related to the purported policy objective of the disputed measure should be looked at, but he finally concluded that the AB eventually followed *Brazil – Retreaded Tyres* after the AB concluded the EU seal scheme failed the first step of analysis here. See Lorand Bartels, ‘The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction’, 109 (1) American Journal of International Law 95-125 (2015), p.117.
As argued earlier, in a fair share of the cases concerning the exception clause, the disputed measures are discriminatory because of they have internal inconsistencies even in the perspective of their purported policy objectives. In such cases, the purported policy objectives are not able to explain discrimination caused by internal inconsistencies of the disputed measures. Step one would certainly fail to find that the disputed measures are justified with their purported policy objectives. Then, step two provides the key test that has the potential to give measures containing discrimination caused by internal inconsistencies a chance to survive.

The third step of analysis was also a safeguard against abuse of alternative rationales, but it is different from the second step. It requires “even-handedness” regarding the design and application of the exemptions, which was also the third step of analysis in the panel’s analytical framework in the TBT context in EC – Seal Products. In EC – Seal Products, the AB was concerned that the IC exemption was not even-handed regarding seal products derived from IC hunting in different countries.\textsuperscript{446} Since the IC exemption was accessible to the Inuit in Greenland, but not so to the Inuit in Canada,\textsuperscript{447} the IC exemption also failed the third step. As the alternative rationale failed the second step and/or the third step of the analysis, it could not explain the discrimination caused by the exemption and ultimately failed to justify the EU seal scheme in EC – Seal Products.\textsuperscript{448}

The detailed test employed within steps two and three will be discussed together. Bartels argued that, regarding “whether discrimination…was justified on the ground of protecting indigenous interests” in EC – Seal Products, “the question would have been whether any alternative measures reasonably available to the European Union would have achieved its objectives of protecting indigenous interests in a less discriminatory manner.”\textsuperscript{449} Bartels’ observation is very interesting. In his view, the AB in EC – Seal Products again employed the necessity test in the form of the less trade restrictive alternative test under the chapeau. But different from US – Gasoline, what was at issue in EC – Seal Products was clearly whether the

discrimination was necessary in light of the IC rationale, which was not the administrative rationale as in US – Gasoline but a rationale with values that are of a more substantive nature.

However, in EC – Seal Products, the relevant discussion did not really revolve around less discriminatory alternatives while in US – Gasoline, less discriminatory, which also happened to be less restrictive, alternatives were indeed the focus of discussion under the chapeau. In EC – Seal Products, the relevant discussion was more like analysis of the contribution the disputed measure made to the achievement of the alternative rationales such as the protection of the IC. The bulk of the relevant discussion by the AB was about how the EU seal scheme or certain characteristics of the EU seal scheme would fail to protect the IC (failure to distinguish commercial hunts form IC hunts) or IC in certain countries (failure to be even-handed). It was not about the availability of possible alternatives as in US – Gasoline. Of course, the contribution analysis and the alternative analysis are integral part of the “weighing and balancing” exercise when determining whether a disputed measure is necessary to achieve a policy objective. They may mutually influence each other. When failures of the disputed measure are identified in the contribution analysis, they could make it easier to find an alternative that are not only less discriminatory or restrictive but also able to achieve the policy objective.

No matter whether the AB focused on the contribution analysis or the alternative analysis, we can see that the essence of the “arbitrariness or unjustifiability” assessment is some sort of “necessity” analysis. The EC – Seal Products does not provide a comprehensive necessity test regarding the second and third steps of analysis, but I would propose a comprehensive “necessity” test is needed and the “necessity” jurisprudence under the subparagraphs of the exception clause can be very useful. There is one caveat though. The typical “necessity” test has been mostly used to examine the trade-restrictive facet of a disputed measure under the subparagraphs of the exception clause. When borrowed to examine the discriminatory facet of a disputed measure under the chapeau, the test may need some tweaks. Again, a full-fledged necessity test may not be triggered every time when assessing whether an alternative rationale can explain discrimination under the chapeau. Specific facts in different cases may only need to be analyzed by part of the full test. Therefore, we need to wait for more cases where the WTO judiciary analyzes the same issues in different factual contexts to have a bigger picture.
In overview, the AB’s analytical framework is not really different from that borrowed by the panel from the TBT Article 2.1 jurisprudence.\(^{450}\) Concerning the issue of finding a rationale to explain the discrimination (“distinction” in the TBT context) caused by the disputed measure, the panel said:

[F]irst, is the distinction rationally connected to the objective of the EU Seal Regime; second, if not, is there any cause or rationale that can justify the distinction (i.e. “explain the existence of the distinction”) despite the absence of the connection to the objective of the Regime, taking into account the particular circumstances of the current dispute; and, third, is the distinction concerned, as reflected in the measure, “designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination” such that it lacks “even-handedness.”\(^ {451}\) Duran once proposed that the analysis of discrimination and its justification should be the same in both the GATT context and the TBT context.\(^ {452}\) Actually, Durán’s hope is already reality when the AB’s analysis under the chapeau in \textit{EC – Seal Products} is read more carefully. We can see both the panel and the AB recognized that measures containing internal inconsistencies caused by exemptions were still acceptable when certain conditions were met. Rationales different from the purported policy objective of a disputed measure and not on the list as prescribed in the subparagraphs of the exception clause alone can justify that measure. It seems the real difference between the AB and the panel is that the AB did not agree to borrow from the TBT jurisprudence for fear of the repercussions of the TBT jurisprudence in GATT Article III:4.

\(^{450}\) I have to disagree with Julia Y. Qin on this point. Qin argued that the AB did not follow through its latest position that independent IC rationale might justify the IC Exemption under the chapeau. The evidence for her argument is that the AB found the IC exemption unacceptable because it could not be reconciled with the immediate objective. But as seen in the analytical framework, the immediate objective and the IC rationale are alternative justification. The finding regarding the immediate objective was not fatal to the IC exemption. The AB’s conclusion that the IC exemption was not acceptable was not solely based on the fact that the IC exemption was not reconcilable with the immediate objective. As Qin admitted, it was also because the IC exemption failed the examination in the perspective of the IC rationale. For Qin’s arguments, see Julia Y. Qin, ‘Accommodating Divergent Policy Objectives under WTO Law: Reflections on \textit{EC – Seal Products}’, 108 American Journal of International Law Unbound 308-314 (2014).


3.4 An illustrative hypothetical case

Then what would a measure that can successfully pass the new tests of the chapeau be like? Of course, measures without internal inconsistencies definitely have a much better chance. Their purported policy objectives can provide justification for discrimination they may have created under the chapeau. For example, Let us assume that all alcoholic beverages are like products. WTO Member Gepan bans all alcoholic beverages that contain 40% alcohol content and above. According to Gepan, the ban aims to protect public morals. People in Gepan think drinking alcoholic beverages that contain 40% or more alcohol content is not morally acceptable. And according to reliable statistics, alcoholics who cause public discomfort usually drink alcoholic beverages that contain 40% or more alcohol content. The Federation of Ulopa, another WTO Member, initiates a WTO dispute settlement procedure and challenges the ban. The panel finds that Gepan discriminates against alcoholic beverages that contain 40% or more alcohol content from the Federation of Ulopa as compared with domestic like alcoholic beverages that contain alcohol content less than 40%, and violates the NT obligation under GATT Article III:4.

However, the panel agrees that alcoholic beverages that contain 40% or more alcohol content pose a genuine threat to public morals in Gepan while alcoholic beverages contain alcohol content less than 40% does not. It then finds that the ban is necessary to protect public morals under GATT Article XX (a). Under the chapeau of GATT Article XX, it re-discovers the discrimination it finds under Article III:4, which exists between countries where the same conditions prevail. It also finds that the public morals policy objective, which is the purported policy objective of the ban, can perfectly account for the discrimination. The panel therefore finds that the ban is not arbitrary or unjustifiable, which is the first step of analysis of arbitrariness or unjustifiability in the analytical framework I propose. When the ban is found not to be arbitrary or unjustifiable, it is not necessary for it to be examined under the second and third steps. It is finally justified.

Now, let us further assume that the ban imposed by Gepan has an exemption. A kind of spirit contains 53% alcohol content only produced in Gepan. This spirit has a unique color and

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453 As mentioned earlier, finding that a policy rationale can explain discrimination in the second step of the analysis of arbitrariness and unjustifiability can be as complicated as the necessity analysis under the paragraphs of the exception clause, but I will not elaborate the analysis here. The discussions of the necessity analysis in the literature review part of chapter 1 and in chapter 5 can help understand the analysis that may be conducted in the second step of the analysis of arbitrariness and unjustifiability.
flavor. More importantly, it is the only kind of spirit people drink on occasions of ancestor worship and holiday celebration. It is an essential part of the ritual on these occasions. The Federation of Ulopa adds another complaint in the WTO dispute settlement procedure, claiming that the exemption creates discrimination against alcoholic beverages that contain 40% or more alcohol content from the Federation of Ulopa as compared with the special spirit produced in Gehan instead of alcoholic beverages containing alcohol content less than 40%, and violates the NT obligation under GATT Article III:4. Or since the original complaint has little chance of winning, The Federation of Ulopa may only raise the new complaint. Under GATT Article III:4, the panel finds that foreign produced alcoholic beverages containing 40% or more alcohol content and the special spirit produced in Gepan are like products. The panel also finds that under GATT Article III:4 foreign produced alcoholic beverages containing 40% or more alcohol content are treated less favorable than the special spirit produced in Gepan and hence discriminated against.

Gepan tries to justify its measure under GATT Article XX. First, Gepan’s measure has to go through the examination of at least one of the subparagraphs of the exception clause. The Federation of Ulopa argues that the panel should only examine the exemption carved out of Gepan’s ban. But, the panel examines the entire ban with the exemption as imposed by Gepan because it holds the exception clause requires it to examine the entire measure. It finds that Gepan’s ban is necessary to protect public morals when the ban is examined in its entirety although it has an exemption. Therefore, Gepan’s measure passes the examination under GATT Article XX (a) and is hence provisionally justified.

Next, Gepan’s measure has to go through the examination under the chapeau of the exception clause. According to the new analytical framework I propose, the panel first finds that there is discrimination between countries where the same conditions prevail. Alcoholic beverages from foreign countries containing 40% or more alcohol content are discriminated against first in a competitive sense. Then from the public morals protection perspective, alcoholic beverages from foreign countries containing 40% or more alcohol content are discriminated against as well since the special spirit produced in Gepan poses the same public morals threat as those foreign like products banned. In the perspective of the purported policy objective of Gepan’s measure, there is an internal inconsistency caused by the exemption. Then comes the key examination that is to see whether the discrimination is arbitrary or unjustifiable.
The first step is to see whether the purported policy objective already examined under subparagraph (a), which is to protect public morals, can explain the discrimination. However, to achieve its public morals policy objective, Gepan should have banned the special spirit along with all other alcoholic beverages that contain 40% or more alcohol content. Obviously, the purported policy objective cannot explain the discrimination caused by the exemption.

If Brazil – Retreaded Tyres is followed, this would be the end of the case and Gepan’s measure would definitely fail under the chapeau. However, according to my proposal based on EC – Seal Products, the panel should go on to determine whether there is any other policy rationale able to explain the discrimination. Gepan argues that the discrimination caused by the exemption can be explained by a cultural consideration, which is different from the purported policy objective of Gepan’s measure or even goes against it, and which is not on the list of acceptable policy objectives as provided in the subparagraphs of the exception clause. The special spirit produced in Gepan is part of its culture, particularly important for ancestor worship and traditional holiday celebration. The panel finds the cultural rationale is bona fide. Then under the second step of the analysis of arbitrariness and unjustifiability, the panel finds the discrimination between the special spirit produced in Gepan and all other alcoholic beverages that contain 40% or more alcohol content stems exclusively from the cultural rationale proposed by Gepan. Therefore, Gepan’s measure passes the second step of examination. Under the third step, the panel further finds that Gepan’s measure, particularly its exemption, is even-handed in the perspective of its cultural policy rationale. There is no other spirit that is important for ancestor worship and holiday celebration. It is not possible for Gepan to implement its exemption not even-handedly. Therefore, Gepan’s measure, with its exemption, does not create discrimination that is arbitrary or unjustifiable. Thus, Gepan’s measure is finally justified under the exception clause.

Most cases where disputed measures containing internal inconsistencies, including Brazil – Retreaded Tyres, US – Clove Cigarettes, and EC – Seal Products, are as complicated as our hypothetical case so far. But our hypothetical case can get more complicated and my proposal is still able to handle it. Let us further assume that another WTO Member, Corea, also produces identical spirit as the special spirit produced in Gepan. Corea is close to Gepan geographically and had been colonialized by Gepan for half a century. The spirit produced in Corea is identical to the special spirit produced in Gepan in terms of color, flavor, and other qualities. And people
in Gepan had accepted the special spirit produced in Corea in ancestor worship and holiday celebration during the colonial time and they still do today. However, the special spirit produced in Corea is also banned in Gepan’s market.

Corea decides to join the dispute settlement initiated by the Federation of Ulopa. It may bring three complaints. It may complain about the discrimination against its alcoholic beverages that contain 40% or more alcohol content as compared with like alcoholic beverages that contain alcohol content less than 40%. It may complain about the discrimination against its alcoholic beverages that contain 40% or more alcohol content as compared with the special spirit produced in Gepan. It may also complain about the discrimination against the special spirit produced in Corea as compared with the special spirit produced in Gepan. We have known how the first two complaints would be handled by my proposal. Let us assume that Corea only brings the third complaint here.

The panel finds under GATT Artice III:4 that special spirit produced in Corea and that produced in Gepan are like products. The ban covers the special spirit produced in Corea, which is not exempted as the special spirit produced in Gepan. The panel therefore finds under GATT Article III:4 that the special spirit produced in Corea is treated less favorably and hence discriminated against.

Then, Gepan tries to justify its measure under the exception clause. Now, there are more twists in Gepan’s measure. First, there is an exemption of the special spirit carved out of the ban on alcoholic beverages containing 40% or more alcohol content. Second, the special spirit produced in Corea is excluded from the coverage of the exemption. Corea argues that the discrimination is directly caused by the exclusion of its special spirit from the exemption of special spirit instead of the general ban or the exemption. It asks the panel to examine the particular exclusion of its special spirit from the exemption of special spirit. Again, the panel insists that the exception clause is supposed to examine the entire measure taken by Gepan. Therefore, the panel find that Gepan’s measure is necessary to protect public morals and therefore is provisionally justified under GATT Article XX (a).

Under the chapeau, discrimination between countries where the same conditions prevail is rediscovered by the panel. Actually, discrimination found under the chapeau is more complicated. There can be three counts of discrimination in the competitive sense: (1) the discrimination against alcoholic beverages that contain 40% or more alcohol content produced in
Corea as compared with like alcoholic beverages that contain alcohol content less than 40% produced in Gepan; (2) the discrimination against its alcoholic beverages that contain 40% or more alcohol content produced in Corea as compared with the special spirit produced in Gepan; and (3) the discrimination against the special spirit produced in Corea as compared with the special spirit produced in Gepan. Since Corea only brings the complaint concerning the third count of discrimination, the panel only needs to find one count of discrimination in the competitive sense under the chapeau. This discrimination remains when viewed form the perspective of the public morals policy objective. The special spirit produced in both Gepan and Corea poses the same public morals issue. This discrimination persists when we look at it from the perspective of the cultural policy rationale. Since the special spirit produced in Corea is identical to that produced in Gepan in terms of its qualities and the perception by people in Gepan.

Then, the panel has to determine whether the discrimination is arbitrary or unjustifiable. In step one, the panel finds the discrimination cannot be explained by the public morals policy objective. This is already clear in our analysis the discrimination found under the chapeau. Then the panel goes to step two and finds that the cultural policy rationale fails to explain the discrimination either. Again, this is already clear in our analysis the discrimination found under the chapeau. Gepan argues that the exclusion of the special spirit from the exemption is because of public safety concerns. The special spirit produced in both Gepan and Corea is used in worship rituals that memorize people who conquered and occupied Corea during the colonial time. A radical group in Corea think it is a humiliation if the special spirit produced in Corea is used in rituals memorizing the invaders. They have threatened terrorist attacks in Gepan and some members have been caught preparing for attacks in Gepan. The government of Gepan believes the radical group would stop targeting Gepan once the special spirit produced in Corea is banned in Gepan’s market. The panel finds that the public safety rationale is bona fide, and it explains why the special spirit produced in Corea is excluded from the exemption of the ban. Here, we should note that the public safety rationale is different from the purported policy objective of Gepan’s measure, nor is it on the list as prescribed in the subparagraphs of the exception clause. The panel further finds that the exclusion is implemented even-handedly under the third step of analysis of arbitrariness and unjustifiability. This is obvious since no other
countries produce the special spirit. Thus, Gepan’s measure is finally justified under the exception clause once again.

Cases in the third scenario would be rare. So far, the cases containing internal inconsistencies that pose the great challenge to the current jurisprudence regarding the balance between trade disciplines and domestic regulatory autonomy resemble our hypothetical case in the second scenario. Nevertheless, the third scenario helps to further illustrates how my proposal would work. We have seen three levels of distinctions, which amount to discrimination under GATT Article III:4, in the three scenarios with one nested in another. Hypothetically, there could be infinitely more finer distinctions created within the distinctions already existing. No matter how many fine distinctions are made, be them relatively minor internal inconsistencies or complete exemptions, they would all be justifiable. Domestic regulatory measures would thus enjoy utmost freedom for flexibilities. The condition is that they have to offer credible policy rationales to account for the distinctions made at all the levels, all the way down the finest distinction they make.

There is one more thing. As we can see the policy rationales that regulating authorities offer to explain the discrimination created by their measures in the second step of the analysis of arbitrariness and unjustifiability need not to be on the list as prescribed in the subparagraphs, is there a boundary for them? Are all sorts of policy rationales acceptable to provide explanation to discrimination under the chapeau? This is the issue I will discuss in the next chapter.
CHAPTER 4: SCOPE OF ACCEPTABLE POLICY RATIONALES

The greatest advantage of advocating for the new development in interpreting the chapeau of the exception clause is the circumvention of the closed-end list of acceptable policy objectives. Domestic regulatory measures in violation of substantive trade disciplines, particularly the NT treatment as provided in GATT Article III, are able to be justified under the exception clause with more variety of policy rationales. This chapter is going to probe the expanded scope of acceptable policy rationales. This chapter is not concerned with the criteria for how a WTO Member can successfully invoke an acceptable rationale to justify its measure otherwise in violation of trade disciplines. It focuses on the possible scope of acceptable policy rationales, the invocation of which may or may not pass the criteria under the chapeau in particular cases.

There are no clear boundaries for the scope of acceptable rationales provided in the text of the chapeau. The textual basis is short and simple, containing little useful information to delineate the scope of acceptable policy rationales. The proposed test in its tentative form as discussed in the previous chapter does not shed much light on the scope of acceptable policy rationales either. Therefore, I will have to resort to discussion of standard of review under the WTO, which is the most relevant jurisprudential theory about policing WTO Members’ domestic regulations, and the jurisprudence in different but relevant contexts to find out what would be included and excluded.

4.1 Standard of Review

The issue of standard of review is more noticed in the trade remedy cases, but it actually permeates the WTO jurisprudence. Standard of review under the WTO is concerned with the degree to which the WTO, particularly the WTO judiciary, should second-guess a decision of a national government agency concerning economic and non-economic regulations.\textsuperscript{454} In a sense, the issue of policing WTO Members’ domestic regulations is all about standard of review under

the WTO. In the jurisprudence relevant to GATT Articles III and XX, some key articles of the SPS Agreement and the TBT Agreement, standard of review has been an central issue.455

Reviewing whether national governments’ domestic policies are acceptable seems to be an extreme case of standard of review. Standard of review in a certain legal system dictates different degree of deference a court accords to the executive branch or the administrative agencies regarding various matters. In an international legal system, that deference has another dimension, which is an international institution needs defer, to different degrees, to the decisions made by national governments. Therefore, standard of review under the WTO is not only concerned with the issue of the separation of power, accountability, professional expertise, optimal use of resources,456 but also sovereignty, anti-globalization movements, and efforts to re-embed liberalism into non-economic social institutions.457 Obviously, standard of review bears on these very politically sensitive issues. Reviewing whether national governments’ domestic policies are acceptable or not in principle is probably most susceptible to triggering the great tensions inherent in these issues. It involves the restriction of sovereignty from an international judiciary regarding the choices of values and interests domestic governments can make. One commentator observed that the WTO had exercised considerate amount of power when examining the means Members take to achieve their policy objectives, but had almost never second-guessed their policy objectives in terms of their appropriateness or acceptability under the WTO.458 Compared with choices of implementing means, the choice of policies is more political.459 It is said that one important function of standard of review set in a particular legal system is to establish “no go” areas for the judiciary, requiring them not to second-guess the decisions already made by the regulators.460 It looks that the acceptability of WTO Members’ domestic policy objectives is within one of the “no go” areas.

Against the backdrop of the anti-globalization movement, national governments are more intolerant to the intrusion upon their power by the WTO. The once receding sovereignty issue becomes once again salient now. More importantly, the anti-globalization movement has been more pronounced in developed countries that are most powerful in the world trading system. Administrations in these democratic countries, whose legitimacy and survival depends on elections and votes, have to cater to the demands of domestic groups who have not benefited much in globalization. When the political support and commitment of these countries, such as the United States and major European countries, to the WTO recede, the survival of the WTO would be at risk. The right-wing political powers have apparently gained traction in these countries in recent years. They are more inclined to use domestic regulations to address social issues or even use explicit market protective measures in the hope of boosting domestic production and employment, or simply to gain support from their hard-core constituents. The restriction of their discretion to do so would draw strong opposition. In such a situation, standard of review under the WTO would definitely shift towards greater domestic regulatory autonomy, particularly regarding the issue whether a domestic policy objective is acceptable or not. Particularly, national government should be given the discretion to adopt policies even if they are not explicitly endorsed in the closed-end list as prescribed in the subparagraphs of the exception clauses. No wonder that some scholars thought international tribunals should stay away from the issue of whether domestic policy objectives are legitimate or not.461

However, will the WTO judiciary accord complete deference to domestic regulators concerning the legitimacy of their policy objectives after the closed-end list is circumvented? Is this issue completely in a “no go” area? Scholars have made an analogy of standard of review under the WTO to that in the US administrative law, arguing the WTO judiciary should accord complete deference to domestic regulatory authorities in certain areas.462 Although they did not name the scope of acceptable policy objectives as falling into one of the areas, it is probably one of the issues they would have in mind. According to the classical *Chevron* case, if the Congress had “directly spoken to the precise question at issue”, and if “the intent is clear”, then “that is the


end of the matter”; and “if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency’s answer is based on a permissible construction of the statute.” If it is permissible, then courts should accord complete deference to it. Article 17.6 of the Anti-Dumping Agreement clearly resembles the *Chevron* doctrine. It looks like there is at least one clear example that the WTO has accorded complete deference to national regulators in the *Chevron* sense. However, Article 17.6 of the Anti-Dumping (AD) Agreement is the only text that is analogous to the *Chevron* doctrine in the WTO covered agreements. More importantly, it may not be easy for the *Chevron* doctrine to be applied in the general WTO context.

For the sake of argument, let us assume that the *Chevron* deference, a doctrine in American domestic law, is applicable in general WTO law, we should first ask whether WTO law is silent or ambiguous on the scope of acceptable policy objectives of domestic regulations, then can we decide whether the WTO judiciary should accord complete deference to national regulators. The chapeau of GATT Article XX is silent on what domestic policy objectives are acceptable, but it is not true that GATT Article XX is silent on that point. The subparagraphs reflect that the WTO has spoken on that point. Although I am trying to argue interpretive innovation under the chapeau should be encouraged in order to circumvent the closed-end list as prescribed in the subparagraphs, it does not mean the subparagraphs can be totally ignored. Then, the next question is whether GATT Article XX is ambiguous on the scope of acceptable regulatory policy objectives. In law, we can always find holes and ambiguities. Let us simply assume there is ambiguity. We will return to the ambiguity of certain subparagraphs regarding the acceptable policy objectives listed later. But the focus here is whether the ambiguity is intended. Or is it generally a common problem of drafting? The answer is probably the latter.

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464 Article 17.6 of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) reads:

In examining the matter referred to in paragraph 5:
(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.
The list of acceptable policy objectives in the subparagraphs cannot be said to reflect an intention of delegation.

Then, even if the WTO is ready to accord *Chevron* deference to national regulators regarding certain issues, there are still other constraints on domestic regulations. There are at least two obvious examples. First, the WTO judiciary still has to decide whether national regulators’ decision of what acceptable policy objectives are is permissible.\(^{465}\) Second, *Mead*, which was a later U.S. Supreme Court Case, held agency decisions enjoying *Chevron* deference would not be upheld by the court if they were procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.\(^{466}\)

Furthermore, the WTO jurisprudence need not necessarily borrow from US domestic law. The WTO has developed a legal system that can be quite different from domestic laws. The principle concerning standard of review explicitly provided by the WTO is “objective” determination of matters of law and facts.\(^{467}\) This principle was regarded as “a departure from the international law default rule of auto-interpretation” of treaties.\(^{468}\) In *EC – Hormones*, the AB said the applicable “objective” standard of review in WTO disputed settlement was “neither *de novo* review as such, nor ‘total deference’.\(^{469}\) Article 11 of the DSU articulates a general standard of review for all disputes unless otherwise provided in specific WTO treaty clauses. Therefore, standard of review under the WTO is generally thought not to be total deference by the WTO judiciary. Besides, the standard of review as provided in Article 17.6 of the AD Agreement is only applicable to anti-dumping disputes.\(^{470}\) When the WTO was established, a Ministerial Decision was adopted to require WTO Members to review the standard of review provided in Article 17.6 of the AD Agreement after three years “with a view to considering the

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\(^{466}\) *Mead*, 533 U.S. 218 (2001), pp. 219-220.

\(^{467}\) See Article 11 of the DSU.


question of whether it is capable of general application”.

However, such a review has not been conducted yet.

Ehlermann and Lockhart examined WTO case law and found that there was no uniform standard of review as the WTO judiciary had conducted “objective” review of Members’ domestic regulations regarding both legal and factual matters. What standards of review are adopted in WTO dispute settlement depends on the nature of issues and what specific legal texts are involved. When the WTO judiciary reviews a purely legal issue, it “conducts an original or de novo interpretation of the WTO agreement, using the rules of interpretation of the Vienna Convention,” whereas when the WTO judiciary reviews a factual issue, the standards of review it adopts spread across the spectrum from high deference in trade remedy disputes to little deference in disputes concerning national measures that do not have a formal investigative process at the national level. What regulatory policies are acceptable in the chapeau of the exception clause would not be an issue of facts. If through judiciary interpretation, a standard is created under the chapeau, it would be a legal standard and the WTO judiciary would not defer completely to its Members with regard to it.

Overall, although the scope of acceptable policy objectives of domestic regulations is a very sensitive issue, the WTO has not relinquished its power to define it. When the WTO judiciary takes the step to get rid of the confinement on the scope imposed by the subparagraphs of the exception clause, it is difficult to imagine it would go to the extreme opposite end to completely defer to national regulators. Given its conservativeness when dealing with issues such as the characterization of policy objectives and the appropriate levels of Protection/enforcement (ALOPs), it is probable that it will defer, to a greater extent, to national regulators regarding what policy objectives they can try to achieve, but reserve the right to draw a line when very controversial cases, in which international trade order is seriously threatened, arise.

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4.2 Legitimacy as a general standard

When standard of review in WTO law would not bar the WTO from determining what regulatory policies are acceptable, it is therefore meaningful to discuss the expanded scope of acceptable policy rationales under the WTO. The alternative to a closed-end list is a general standard for acceptable policy rationales. If the general standard is not very strict, the scope of the acceptable policy objectives can be larger than that limited by a closed-end list. If such a general standard exists, the immediate question would be how to construe it. Obviously, the exception clause chapeau does not provide a textual basis for developing such a standard, nor does the existing jurisprudence of the chapeau offer any clue. Therefore, I will look for jurisprudential clues offered by different but relevant texts in various WTO agreements.

4.2.1 TBT Article 2.2

In a few contexts under the WTO, whether the policy objective is legitimate seems to have been used as a general standard for the purpose to determine whether a disputed measure can be justified when it is inconsistent with trade disciplines. For example, under TBT Article 2.2, domestic technical measures can restrict trade if they are necessary to fulfil a “legitimate” objective. TBT Article 2.4 also has a “legitimate” objective requirement regarding when WTO Members can deviate from international standards as they set their own technical standards. But, TBT Article 2.2 is more analogous to the exception clause and draws most attention.\(^474\) It reads:

> “2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or

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the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.”

It appears, under TBT Article 2.2, whether a policy objective can justify the disputed technical measure depends on, besides other conditions, whether it is legitimate or not. Although TBT Article 2.2 contains a list of legitimate policy objectives, the legitimacy requirement in the text provides a more general standard for the scope of acceptable policy objectives. TBT Article 2.2 is different from the GATT exception clause in text, structure, and coverage of measures, but the legitimacy standard may be introduced into the chapeau of the exception clause.

As mentioned earlier, deciding the legitimacy of domestic policies, particularly when domestic policies are targeting domestic non-economic issues, would be a grievous intrusion of sovereignty. In the necessity jurisprudence under the exception clause, the WTO judiciary may accord great although not complete deference to WTO Members. It allows domestic regulatory authorities to connect their measures to recognized policy objectives quite freely.475 For example, in EC – Seal Products, the EU seal scheme is actually more targeted on seal protection, but the EU declared its overall policy objective is to protect the public morals of its people, which was not questioned by the WTO judiciary. The WTO judiciary also accords great discretion as to the ALOP of a measure.476 It appears, regarding these sensitive issues, the WTO judiciary is very conservative. Under TBT Article 2.2, the WTO judiciary have to ask and answer the question whether a policy objective that the disputed measure is after is legitimate or not, which is more sensitive than the issues the WTO judiciary has dealt with under the subparagraphs of the exception clause. After all, the legitimacy of domestic policies has been decided by the list provided by the subparagraphs.

Interestingly, although it looks like the WTO judiciary may become more intrusive into domestic regulatory autonomy because it now may have to decide whether a domestic policy objective is legitimate or not, it actually would expand domestic regulatory space since legitimate policy objectives a domestic regulatory authority can have are not limited by an closed-end list any more. More importantly, the WTO judiciary cannot completely defer to its

Members regarding these issues. For example, the WTO judiciary has tried to differentiate acceptable policy objectives according to the “importance” of the values they protected as an implicit part of the exercise of determining whether the disputed measure is necessary to facilitate the policy objectives recognized in a few subparagraphs of the exception clause. Under TBT Article 2.2, the WTO judiciary has said that the legitimacy issue would not be completely left to Members. The AB said clearly in EC – Sardines that “there must be an examination and a determination on the legitimacy of the objectives of a measure.”

Zleptnig found the EC – Sardines panel borrowed from Canada – Pharmaceuticals Patents to define what a legitimate policy would be. In Canada – Pharmaceuticals Patents, the panel elaborated the concept of “legitimate interests” under TRIPs Article 30 that provides an exception to patent protection, stating a legitimate interest is “a normative claim calling for protection of interests that are ‘justifiable’ in the sense that they are supported by relevant public policies or other social norms.” Although the “legitimate interest” Canada – Pharmaceuticals Patents was concerned with was the interest of a private nature, the EC – Sardines panel nevertheless cited the Canada – Pharmaceuticals Patents panel to define legitimacy under TBT Article 2.4. The EC – Sardines panel further held that legitimacy under Article 2.4 should be interpreted in the context of Article 2.2, which implies that the interpretation of legitimacy under the two articles should be similar. However, since the parties agreed that the policy objectives offered by European Union, the respondent, were legitimate, the panel did not further clarify the legitimacy standard. Thus what “public policies” and “social norms” should be used to determine the legitimacy of domestic policy objectives are still unknown.

When having an opportunity to directly interpret TBT Article 2.2, the AB in US – Tuna II (Mexico) articulated a two-step process to assess whether the policy objectives of the disputed technical regulations are legitimate or not. The first step is to discern the objective of the

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disputed technical regulations while the second step is to determine its legitimacy. Discerning the objectives of the disputed technical regulations requires a consideration of “the texts of the statues, legislative history, and other evidence regarding the structure and operation of the measure.” The AB suggested that, to determine the legitimacy of the objective, the third sentence of TBT Article 2.2, the sixth and seventh recitals of the preamble of the TBT Agreement, and objectives recognized in the provisions of other covered Agreements could provide guidance for or inform the determination of the legitimacy of the objectives of the disputed technical regulations. However, the AB still avoid directly defining “legitimacy” in *US – Tuna II (Mexico)* and later TBT cases.

In summation, what we now know is that there is a standard for the legitimacy of domestic policies, but the WTO judiciary has refrained from elaborating on it and applying it. This reflects the philosophy the WTO judiciary may hold. When faced with politically sensitive issues, it accords great deference to WTO Members while it does not give up its power to set a standard although it knows that it is wise not to exercise that power unless pressured hard.

4.2.2 TBT Article 2.1

TBT Article 2.1 only provides non-discrimination obligations. However, because there is no general exception clause in the TBT Agreement, the WTO judiciary has had to create an exception within TBT Article 2.1 to provide a counter-balance to trade disciplines. Therefore, the AB held that seemingly discriminatory technical regulations should be upheld under TBT Article 2.1 if they “stem exclusively from legitimate regulatory distinctions.” It seems if a responding WTO Member wants to justify its discriminatory measure in a dispute, its measure must have a legitimate policy objective.

In *US – Clove Cigarettes*, the United States banned the manufacture and sale of cigarettes in the United States with “characterizing flavours” that appeal to youth. However, while all

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other flavoured cigarettes were banned, menthol cigarettes were exempted from the ban. A discrimination against imports seemed to exist. The United States argued that the discrimination stemmed from the policy considerations of “the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes.” The panel did not deny that these policy considerations were legitimate in principle, but it dismissed the US argument on the ground that these policy considerations were only excuses without factual evidence in this case. On appeal, the AB did not deny that the two policy considerations were legitimate either, but like the panel, the AB dismissed the two considerations on a factual basis. It is clear the two rationales proposed by the United States are legitimate. However, the WTO judiciary did not provide the details about how it reached the conclusion under TBT Article 2.1. Maybe, the WTO judiciary did not feel it would be worth the trouble of spelling out a legitimacy standard and conducting a full analysis under it since these two policy rationales offered by the United States were in fact only excuses without firm factual bases.

In the following TBT cases including US—Tuna II (Mexico) and US—COOL heard by the WTO judiciary, the responding parties did not raise policy rationales other than those listed in the exception clause to justify discriminatory measures. The policy objectives listed in the exception clause are legitimate without question. Therefore, the WTO judiciary has not had another chance to discuss the legitimacy standard under TBT Article 2.1.

4.2.3 GATT Article III and the subparagraphs of the exception clause

Legitimacy has been used by scholars and the WTO judiciary to refer to characteristics of measures that pursue acceptable policy objectives in some other contexts as well. Policy objectives listed in the subparagraphs of the exception clause have been referred to as legitimate policy objectives or purposes. The “aim and effects” test under GATT Article III also involves

493 Robert E. Hudec, ‘Scope for GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects”
the issue of legitimate policy objectives. However, different from TBT Article 2.2, both the subparagraphs of the exception clause and GATT Article III do not have the language to provide a legitimacy standard for policy objectives.

Of course, lacking a textual basis does not seem to be a fatal problem. TBT Article 2.1 still can host a legitimacy standard through interpretive creation. However, the subparagraphs of the exception clause and GATT Article III face more serious problems if they need to provide a general legitimacy standard. The subparagraphs of the exception clause rely on the list instead of a general standard to determine whether a policy objective is legitimate or not. That list looks exhaustive and has been interpreted as exhaustive. Therefore, any mentioning of legitimacy regarding the policy objectives of the disputed measure is actually another way to say these policy objectives fall under one or more of the subparagraphs of the exception clause.

The difficulty to provide a general legitimacy standard faced by GATT Article III is at least equally serious. The brief-lived GATT “aim and effects” jurisprudence and relevant academic discussions do require the aim of the disputed domestic regulatory measure to be legitimate. However, the “aim and effects” test under GATT Article III has been rejected by the WTO judiciary. Any elaboration of a general legitimacy standard under GATT Article III would not carry any authority under the WTO. Furthermore, the “aim and effects” jurisprudence and relevant discussions focus on the negative side of the legitimacy standard. GATT Article III:1, as the introduction to Article III, requires that domestic regulatory measures “should not be applied to imported or domestic products so as to afford protection to domestic production.” The concern of the “aim and effects” test therefore is to determine whether there is a protective purpose of the disputed measure. Hudec analyzed the US – Malt Beverages case, where the “aim and effects” test was first introduced, believing the panel focused on whether there was a bona fide regulatory purpose instead of a protective purpose. But as to whether a regulatory objective can be regarded as legitimate when it is found bona fide, there is little clue in the jurisprudence and relevant academic discussions.

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4.3 Expansive interpretation

The general legitimacy standard can be supplemented by an expanded list of important policy rationales, which serves an illustrative purpose. In beginning to look for the expanded scope of acceptable policy rationales, it would be particularly useful to start the probe from the already recognized policy objectives and enlarge the scope through expansive interpretation. The obvious important regulatory policy objectives accepted under the WTO are those already listed in the subparagraphs of the exception clause. If the WTO judiciary is ready to further develop the interpretation and application of the chapeau of the exception clause in *EC – Seal Products*, it can certainly take advantage of an expansive interpretation of the subparagraphs of the exception clause.\(^{496}\) Again, given the language of the subparagraphs and relevant jurisprudence, it is difficult for this approach to completely circumvent the list as prescribed in the subparagraphs of the exception clause. It is only of complementary use and can provide illustration of acceptable policy rationales within a larger scope.

4.3.1 Enforcement exception

The subparagraph that has the greatest potential to expand the scope of acceptable domestic policy objectives is GATT Article XX (d) (and its GATS equivalent – Article XIV (c)). The exception provided by GATT Article XX (d) is usually called the enforcement exception. Traditionally, there are two elements of analysis in GATT Article XX (d). That is, to invoke the enforcement exception requires a disputed measure to “secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement” and the measure must be “necessary” to secure such compliance.\(^{497}\) In *Mexico – Soft Drinks*, the element of “laws and regulations” was separated and became independent, which dealt with the issue whether an international agreement to which a WTO Member is a party is a law or regulation under GATT Article XX (d), the element of “laws and regulations” was separated and became independent.\(^{498}\)


The element of “secur[ing] compliance with laws and regulations which are not inconsistent with the provisions of this Agreement” is more of interest here. It seems that measures falling under GATT Article XX (d) do not need to have a specific policy objective, which is very different from measures falling under other subparagraphs. As long as the domestic laws and regulations a disputed measure is trying to enforce do not violate WTO obligations, the measure can be justified even if it violates these obligations. Since there is no requirement, and hence no limitation, on the scope of policy objectives the enforced laws and regulations have, the measure enforcing them seem to be free of limitation as well regarding the policy objectives it may have.

This line of reasoning does look reasonable. However, there is a very fine complication. In WTO case law, it is not regarded as securing compliance with laws and regulations not inconsistent with the GATT Agreement if a disputed measure is to achieve a substantive domestic policy objective. In a pre-WTO case, the panel held that a measure was deemed to “secure compliance with” laws and regulations not inconsistent with the GATT Agreement only when it was effective to “enforce obligations” of these laws and regulations instead of to ensure the broad achievement of a policy objective.499 This statement was affirmed by the panel in US–Gasoline500 after the WTO was established and the Gasoline panel’s ruling on this point was not appealed.

It is unfortunate that the distinction between enforcement of the specific obligations and general attainment of a policy objective has not been seriously discussed by the AB and the panels in relevant cases. In fact, the AB did not even discuss this issue at all. We can only speculate why the panels in a couple of cases made such a distinction. One probable reason is that the panels wanted to limit the reach of the enforcement exception. If measures trying to “enforce” any general domestic policy objective fall under GATT Article XX (d), WTO Members can design “hollow” laws and regulations and put operative obligations that may be inconsistent with their GATT obligations into separate enforcement regulations. This way, those “hollow” laws and regulations remain consistent with the GATT Agreement because they can be only like a statement of acceptable policy objectives while the violation of the GATT Agreement

in the operative regulations can be justified if the operative regulations meet other requirements under GATT Article XX (d). As the case law requires disputed measures, if they need to be justified under GATT Article XX (d), to enforce specific obligations in the laws and regulations not inconsistent with the GATT Agreement, those laws and regulations must contain operative contents that are not inconsistent with substantive GATT clauses. When the enforced laws and regulations have to be detailed to a certain extent, it would be difficult to design substantive operative clauses that are GATT consistent while having the implementing regulations inconsistent with the GATT Agreement. It is more likely that while the implementing regulations are inconsistent with the GATT Agreement, the substantive operative clauses are GATT inconsistent in a similar manner. Thus, by requiring the laws and regulations to contain specific obligations that need to be enforced, quite a lot of disputed measures may not successfully invoke GATT Article XX (d) because the laws and regulations they are trying to enforce may not be GATT consistent and those laws and regulations themselves may be challenged at the same time.

That is to say, if we can argue that it needs both substantive obligations and implementing regulations to attain a domestic policy objective, there are two possible ways to legislate. The first way is to have a “hollow” law or regulation that is basically a statement of the policy objective while making a separate implementing regulations that have both the substantive obligations and implementing rules and procedures that are secondary regarding the attainment of the policy objective. The second way is to have a law or regulation that contains the substantive obligations with operative details of the policy objective while leave the implementing rules and procedures to a separate regulation. If the first way is recognized by the WTO judiciary, Members would easily manipulate GATT Article XX (d) and be able to successfully get away with violation of the GATT Agreement. If only the second way is recognized, GATT Article XX (d) would not be very helpful for them to get away with violation of the GATT Agreement.

It seems that the second way has been taken by the WTO judiciary. Measures falling under GATT Article XX (d) should be value-free in a sense. Thus, it is technically incorrect to say that GATT Article XX (d) permits disputed measures falling under its purview to have policy objectives not limited by the closed-end list as prescribed in the subparagraphs of the exception clause.
GATT Article XX (d) has received less attention than some other high-profile subparagraphs such as (b) and (g) probably because it does not directly protect more recognized non-economic values.\textsuperscript{501} In Korea – Beef, the Korean dual retail system was held not necessary to enforce its Unfair Competition Act.\textsuperscript{502} While it is required the adjudicators to “take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect” in the necessity analysis,\textsuperscript{503} it was suspected that the necessity analysis would be more strict than that under some other subparagraphs where substantive values are protected and the Korean measure in Korea – Beef was thus not justified under GATT Article XX (d).\textsuperscript{504}

Nevertheless, the distinction between enforcement of the specific obligations and general attainment of a policy objective is also an important restriction that makes GATT Article XX (d) less utilized by WTO Members. Laws and regulations that need implementing regulations inconsistent with the GATT Agreement may themselves contain substantive obligations that are GATT inconsistent. Such implementing regulations, along with the laws and regulations they are supposed to enforce, then need to be examined under the other subparagraphs of the exception clause. Thus, the use of GATT Article XX (d) is greatly limited in practice.

However, the distinction between enforcement of the specific obligations and general attainment of policy objectives does not mean that GATT Article XX (d) directly limits the scope of acceptable domestic policy objectives. Although GATT Article XX (d) lists a few domestic policy objectives that the laws and regulations may try to achieve, it is directly concerned with the effective enforcement of specific obligations in laws and regulations aiming at these policy objectives. It does not base the examination under GATT Article XX (d) on achieving any substantive policy objective. Moreover, GATT Article XX (d) states that the domestic laws and regulations not inconsistent with the GATT Agreement include those trying to achieve domestic policy objectives on the list provided by subparagraph (d). The list of domestic policy objectives in GATT Article XX (d) is only illustrative.

More importantly, although the laws and regulations referred to under GATT Article XX (d) are not measures falling under it, the scope of the laws and regulations allowed to be enforced by measures falling under GATT Article XX (d) is not limited. This is definitely helpful to expand the scope of acceptable policy rationales under the chapeau.

The only constraint on the scope of acceptable policy objectives of the laws and regulations under GATT Article XX (d) is probably the requirement that the laws and regulations disputed measures enforcement should not be GATT inconsistent. Comparing with the “aim and effects” test under GATT Article III, this requirement of GATT consistency may concern both the objectives and the effects of domestic laws and regulations. When it is concerned with the policy objectives of domestic laws and regulations, the GATT consistency requirement imposes a constraint on the scope of acceptable policy objectives.

This constraint on the scope of acceptable policy objectives is obviously a negative one. It only requires domestic laws and regulations do not have intent to violate the GATT Agreement. In the “aim and effects” test, it was argued that a disputed measure would pass the “aim” test if has a *bona fide* regulatory purpose instead of a discriminatory intent. If the same logic is followed, a law or regulation would be GATT consistent as long as it has a *bona fide* regulatory purpose instead of a trade restrictive or discriminative intent under GATT Article XX (d). Thus, it can be argued that subparagraph (d) does not really set any limit on the scope of acceptable policy objectives.

4.3.2 Public morals as a mediator of other policy objectives

The next subparagraph that has potential to expand the acceptable domestic policy objectives is GATT Article XX (a) (and its GATS equivalent – Article XIV (a)), which provides the public morals exception. Public morals concerns may arise regarding three groups of products: (1) products offensive to the prevailing religion or culture in a country, including “alcohol, pork and pork products in some Islamic states…”; (2) “immoral products,” including “pornography, drugs or human organs…”; (3) “National Socialist propaganda.” Historically, “opium, pornography, liquor, slaves, firearms, blasphemous articles, products linked to animal

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cruelty, prize fight films, and abortion-inducing drugs” were all recognized in trade treaties to be products giving rise to public morals concern. A current survey of the relevant legal rules in some countries reveals the scope of products that give rise to moral concerns does not change much. These products are diverse, but they do not seem to constitute an endless list.

In US – Gambling, the first WTO case involving the public morals exception, the panel relied on dictionary meanings and defined “public morals” as “standards of right and wrong conduct maintained by or on behalf of a community or nation” in the GATS context. It was followed by the panel in China – Publications and Audiovisual Products in the GATT context. This definition may be conducive to expansive interpretation since “any form of human behavior could be declared as morally right or wrong” or “any law passed by a representative government prohibiting any behavior could be considered a social judgment about right and wrong, thus falling within a broad textual definition of public morals.” Measures trying to achieve some other substantive policy objectives can be seen through a moral lens and claim the achievement of other policy objectives has moral implications. Thus, measures aiming at a variety of policy objectives that are not listed in the subparagraphs of the exception clause may take advantage of the exception clause through the mediation of the public morals exception.

Also in US – Gambling, the panel noted that “the content of these concepts [‘public morals and public order’] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.” The panel in EC – Seal Products confirmed the panel in US – Gambling, more clearly stating that “[m]embers should be given some scope to define and apply for themselves the concepts of ‘public morals’ in their respective territories, according to their own systems and scales of values.”

514 WTO Panel Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal
statements show that there is less consensus as to the content of “public morals,”"515 but they can
also further support that the scope of public morals is quite wide and flexible.516 Both these
statements and the definition of “public morals” were not questioned by the AB. It seems the
WTO judiciary is willing to greatly defer to Members regarding the scope of public morals.

However, there is voice against allowing WTO Members to freely characterize the policy
objectives of their measures as public morals rationales. For example, in EC – Seal products,
Iceland, in its third-party submission, stated that the public morals exception "is bound to be
based on more subjective and less tangible arguments" and that they were not to be equated with
“broad political and public support for a measure.”517 Japan stated more explicitly in the same
case that “while Members have the right to determine whether a specific objective forms part of
‘public morals’ on the basis of their own prevailing social, cultural, ethical and religious values,
… Members are not free to label any policy objective as forming part of public morality.”518

More generally, when determining the policy objective of a disputed measure, what the
WTO judiciary should do in the opinion of the AB is as follows:

It “should take into account the Member’s articulation of the objective or the
objectives it pursues through its measure, but it is not bound by that Member’s
characterizations of such objective(s). Indeed, the panel must take account of all
evidence put before it in this regard, including ‘the texts of statutes, legislative
history, and other evidence regarding the structure and operation’ of the measure at
issue.”519

Thus, WTO Members cannot really freely characterize the policy objectives of their measures as
public morals promotion or protection if the true intent is to achieve some other policy objectives
that are a little detached from moral concerns.

\[\text{Products (EC – Seal Products), WT/DS400/R, WT/DS401/R, adopted June 18 2014, para. 7.409.}\]
\[\text{517 Iceland's third-party submission, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products), paras. 14, 16.}\]
\[\text{518 Japan's third-party submission, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products), para. 11.}\]
The WTO has not pressed for a universal public morals consensus, but it does require the real concerns of its Members cannot be too remote from the established moral grounds. What is meant here is that even if a WTO Member claims an issue involves public morals while it is not regarded as an moral issue by other Members, it is still possible that the WTO defer to its determination as long as it can demonstrate it is a moral issue according to the prevailing social, cultural, ethical and religious values within its territory. On the other hand, if circumstances concerning its disputed measure lead to the conclusion that the measure is trying to achieve another objective instead of public morals protection, this measure would not fall under the public morals exception.

GATS Article XIV (a) provides not only the public morals exception but also a public order exception. There is no clue in the drafting history as to why GATS Article XIV (a) was drafted differently from GATT Article XX (a).\textsuperscript{520} The concept of “public order” was also first interpreted by the WTO judiciary in \textit{US – Gambling}. The panel in \textit{US – Gambling} also relied on dictionary meaning to define “public order” as “refer[ing] to the preservation of the fundamental interests of a society, as reflected in public policy and law” and “[t]hese fundamental interests can relate, \textit{inter alia}, to standards of law, security, and morality.”\textsuperscript{521} The panel further implied that the concept of “public order” and “public morals” both “refer to the fundamental interests and values maintained by a society” and therefore overlap to a large extent.\textsuperscript{522}

Therefore, WTO Members should enjoy the same discretion when determining the scope of “public order” as that when determining the scope of “public morals”. The panel in \textit{US – Gambling} commented on the general characteristics of “public order” and “public morals” together without any differentiation.\textsuperscript{523} At the same time, the caution against abusing the public morals exception voiced by Iceland and Japan in \textit{EC – Seal Products} should also apply to the public order exception.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{520} Stefan Zleptnig, \textit{Non‐Economic Objectives in WTO Law}. Leiden, the Netherlands: Martinus Nijhoff Publishers, 2010, p. 143.
\end{enumerate}
\end{footnotesize}
4.3.3 The other exceptions

GATT Article XX (b) and (g) are the two subparagraphs most frequently invoked to justify measures violating trade disciplines. The exceptions provided in these two subparagraphs are often called the health and safety exception and the conservation exception. While GATS Article XIV (b) is identical to GATT Article XX (b), there is no subparagraph in GATS Article XIV equivalent to GATT Article XX (g). Since GATT Article XX (b) and (g) are very specific, they do not really have potential to expand to recognize more domestic policy objectives. Although there has accumulated a large body of jurisprudence concerning these two exceptions, it is mostly concerned with various other issues under these two subparagraphs.

The only possible expansion the health and safety exception and the conservation exception can make is to cover the full range of environmental policy objectives. The texts of GATT Article XX (b) and (g) do not explicitly recognize general environmental policy objectives. These two exceptions, if interpreted literally, may only cover some environmental policy objectives. However, some commentators observed that these two exceptions had already been interpreted expansively to include environmental policy objectives quite comprehensively, even before the establishment of the WTO.524

Interestingly, although the policy objectives the two exceptions cover are quite narrow, they nevertheless overlap with each other. For example, in the very first case heard by the WTO AB—US — Gasoline, the US measure was held to fall under both GATT Article XX (b) and (g). The panel in US — Gasoline held that “a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal or plant life or health mentioned in Article XX (b).” 525 The panel also held that “a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX (g).” 526 The panel’s opinion on Article XX (b) was not appealed while its opinion on Article XX (g) was appealed but was confirmed by the AB.527

The rest of the exceptions in GATT Article XX (and GATS Article XIV) have rarely been invoked in dispute settlement. Among them, GATT Article XX (e) and (f) have some potential to expand the scope of acceptable domestic policy objectives. But the remaining subparagraphs are outdated, dealing with measures with objectives that are not really relevant any more. These outdated exceptions include (c) that is concerned with measures “relating to the importation or exportation of gold or silver”; (h) that is concerned with measures based on “obligation under any intergovernmental commodity agreement”; (i) that is concerned with measures “involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry” on exceptional occasions; and (j) that is concerned with measures “essential to the acquisition or distribution of products in general or local short supply.”

GATT Article XX (e) provides the prison labor exception. Some commentators probed the possibility of expanding the prison labor exception to cover measures with labor standards or human rights objectives, but the conclusion is that it should be done through legislation instead of interpretation. The wording of the GATT Article XX (e) is quite specific, there is little room to read it to cover trade concerning labor standards beyond that concerning prison labor. Moreover, a labor exception may help developed countries to target PPMs in developing countries, therefore it is strongly opposed by developing countries. I will come back later on the labor issue.

GATT Article XX (f) provides that measures that are “imposed for the protection of national treasures of artistic, historic or archaeological value” are permitted even if they have violated trade disciplines. This subparagraph seems to be able to provide a basis for a more broad cultural exception, but the United States, the current hegemon, may not be happy. Plus, the wording of the GATT Article XX (f) is also quite specific. I will return to a possible cultural exception later.

4.4 What to include? Some high-profile borderline policy objectives and some trendy miscellaneous rationales

In theory, it is important to have a general standard or learn the boundaries of the expansive interpretation. In reality, people may only care about whether certain domestic policy objectives would be accepted by the WTO as justifications for trade discipline violation. In fact, some policy objectives are more of a concern than others with respect to their acceptability as justifications for violation of trade disciplines. The most high-profile regulatory policy objectives that have dominated trade negotiations, dispute settlement, and academic debates include environmental protection, culture protection, labor standards, and human rights. For measures having internal inconsistencies, these high-profile policy objectives may be useful for their justification. But in recent WTO cases, policy rationales offered to justify discrimination caused by the internal inconsistencies within disputed measures often do not concern these high-profile policy objectives but some miscellaneous policy rationales difficult to categorize, some of which seem to have been accepted by the WTO judiciary.

4.4.1 Some high-profile policy objectives

Some of the high-profile policy objectives have been briefly discussed earlier. However, their discussions were basically based on the texts of the exception clause subparagraphs. I will further discuss them in a broader context, which may reveal their acceptability as justification for trade disciplines violation differently.

4.4.1.1 Environmental policy objectives

As mentioned earlier, environmental policy objectives have been recognized comprehensively by the judiciary before and after the WTO was established. However, since there is no textual basis in the exception clause, there are definitely worries that the coverage by GATT Article XX (b) and (g), and GATS Article XIV (b) is not complete.

These worries can be eased if we take into consideration the broader context. First and foremost, the preamble of the WTO Agreement explicitly recognizes the importance of environmental protection and preservation. In the very beginning, the preamble states:

“The Parties to this Agreement,
Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development…”

The WTO Agreement provides the constitutional foundations for the WTO. Its preamble certainly informs the entire body of the WTO agreements. It should also be noted that while the GATT preamble only cares about “developing the full use of resources of the world”, the addition of environmental objectives in the WTO preamble indicates the beginning of a reform of the world trading system regarding environmental issues. The explicit mentioning of environmental protection and sustainable development in the preamble can be used as a context to further expansively interpret relevant subparagraphs of the exception clause and the WTO judiciary did rely on it to deliver environmental friendly opinions in cases such as *US – Shrimp*.

The Ministerial Declaration on Trade and Environment (1994) is legally non-binding, but it is an important political pledge of WTO Members to take the relationship between trade and environment seriously. It particularly states that “there should not be, nor need be, and policy contradiction” between the trade regime and the protection of environment. This demonstrates the political commitment of the WTO Members to respect environmental policy objectives. The final results of the Uruguay Round also includes the Decision on Trade in Services and the Environment (1994) and the Decision on Trade and Environment. These two Decisions contain more elaborative treatment of the relationship between trade and environment. Although they emphasize on guarding against trade restriction, their respect to environmental policy objectives is also obvious. Environmental issues have continued to be an important agenda for the WTO,

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particularly before and around the time when the Doha Round was launched. The WTO has kept reiterating the importance of the relationship between trade and environment in various formats. Particularly, the Committee on Trade and Environment (CTE) was also established along with the WTO. Its mandate is to “identify the relationship between trade measures and environmental measures” and to “make recommendations on whether modifications of existing rules of WTO law are required.”\(^{532}\) The work conducted by the CTE has not helped to produce anything that is legally binding, but it has certainly kept the discussion of environmental issues going in the world trading system.

After the establishment of the WTO, legal instruments with operative clauses under the umbrella of the world trading system began to directly address the relationship between trade and environment. Charnovitz made a catalog, which includes the Agreement on Agriculture, the SPS Agreement, the TBT Agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on Subsidies and Countervailing measures (the particular clause involved has lapsed though).\(^{533}\)

The WTO judiciary certainly feels the trend. Although it has not officially turned GATT Article XX (b) and (g) or GATS Article XIV (b) into a broad environmental exception, its rulings have obviously turned in favor of environmental policy objectives. The most well-known example is the “evolutionary” interpretation the AB employed in *US – Shrimp*. In *US – Shrimp*, the AB interpreted “exhaustible natural resources” in GATT Article XX (g) in accordance with the current multilateral environmental agreements and expanded the scope of “exhaustible natural resources” from minerals to endangered living species.\(^{534}\) Another illustrative example is that the AB tends to grant greater discretion to WTO Members under GATT Article XX (b) when they determine the level of protection afforded to human health and life. For example, in *EC – Asbestos*, the AB said that “it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”\(^{535}\) Compared with the AB’s attitude towards Korea’s anti-fraud measure under GATT Article XX (d), the total

\(^{532}\) The Decision on Trade and Environment.
deference to WTO Members under GATT Article XX (b) regarding the ALOP also indicates the WTO judiciary treats environmental policy objectives more respectfully.

Nevertheless, the WTO judiciary has not categorically recognize the acceptability of environmental policy objectives. The environmentally friendly rulings by the WTO judiciary are not about the acceptability of general environmental policy objectives. However, when the WTO judiciary is presented with the opportunity to explicitly recognize certain environmental policy objectives that are not typical ones covered by GATT Article XX (b) and (g) or GATS Article XIV (b), there is no reason that it could not continue to follow the trend.

4.4.1.2 Protection of culture

The protection of culture was also generally supported by the majority of WTO Members except the United States and a few other countries, although they may not be able to agree on a definition of culture. It seems the issue of the protection of culture was a struggle primarily fought by Europe against the US entertainment industry in the beginning. Proud of its once cultural glory, Europe has been especially vigilant of the invasion of American popular culture. Later, many countries have joined European countries, trying to preserve their cultures in a wider scope.

Before the GATT Agreement was first negotiated more than 70 years ago, Hollywood movies were already such a big concern for European countries that they set restrictions. Given the particular restrictions on movies, the world trading system was originally only concerned about “screen quota”, which was written into GATT Article IV. Although the term “culture industry” had been coined already, the rules concerning movies were not written under the name of culture.

The conflict over movie trade between the United States and European countries lingered on. During the Uruguay Round, the conflict extended beyond movies. The relevant discussions

538 For one authoritative definition of culture or delineation of the scope of culture in the economic development context, which is more relevant for trade law, see the report of the UN World Commission on Culture and Development entitled Our Creative Diversity: Report of the World Commission on Culture and Development, UNESCO, Paris, 1995.
began to use the culture languages and culture became the synonym of audiovisual products.\textsuperscript{540} In the Uruguay Round, Canada and the European Communities proposed to add a separate cultural justification in the exception clause under GATS Article XIV.\textsuperscript{541} However, the United States obviously had the upper hand in the Uruguay Round and the cultural exception was not included in the GATS general exception clause.

Besides GATT Article IV that is only about screen quota, the GATT general exception clause does contain a justification that looks relevant to measures based on cultural policies. GATT Article XX (f) can justify measures that are “imposed for the protection of national treasures of artistic, historic or archaeological value”. There is no definition of national treasures of artistic, historic or archaeological value in WTO law. Goods of artistic value may include a large variety of art products, including most typical art works such as pictorial, graphic and sculptural works and products of modern entertainment industry.\textsuperscript{542} Domestic regulatory measures concerning these art works may fall under GATT Article XX (f).

However, it has been argued that GATT Article XX (f) could not cover contemporary cultural products, particularly those produced by the entertainment industry.\textsuperscript{543} This argument implies that this subparagraph is of little practical use in today’s international trade. It is true that not all art works can become national treasures. Instead, only a small fraction can probably qualify as national treasures. Moreover, even if GATT Article XX (f) can cover more measures having cultural policy objectives, some more effective measures WTO Members prefer are measures affecting trade in services.\textsuperscript{544} When measures are governed by the GATS Agreement, it is not possible to invoke GATT Article XX (f) and the GATS Agreement does not provide an equivalent to GATT Article XX (f) in its general exception clause. The fact that not many Members made specific commitments or substantial commitments in services sectors related to

\textsuperscript{544} One of the most effective and favorite way to implement cultural policies is restrictive or discriminative regulation of distribution. i.e. Canada – Measures Affecting Film Distribution Services, WT/DS117; also see China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products), WT/DS363.
culture seems to make a cultural exception under the GATS Agreement unnecessary, but things may change in the future when negotiations concerning services make progress. It is true that WTO Members are allowed to keep exemptions to MFN obligations under the GATS Agreement. However, the exemptions annexed to the GATS Agreement are only temporary.

As intellectual property rights (IPRs) are pertinent to “cultural” products and services, including entertainment products and services, the TRIPS Agreement may be relevant to measures based on cultural policies. Interestingly, under the TRIPS Agreement, it can be argued that both rules rigorously protecting intellectual property rights and the rules allowing flexibilities are relevant to the attainment of certain cultural policy objectives. For example, we can argue that the rules protecting copyrights are important for the creation of original works of literature and arts, which is essential to cultural prosperity. We can also argue that restrictions on copyrights are important for people to take advantage of copyrighted works in a lot of situations such as where general education and follow-on creation are conducted, which is also essential to cultural prosperity. Therefore, the relationship between trade in products and services with IPRs protection is complicated.

Overall, compared with environmental protection, the protection of culture does not have the endorsement of the United States. When the interests of the United States conflict with those of other WTO Members, it would be difficult for the WTO judiciary to decide.

4.4.1.3 Protection of labor standards

The protection of labor standards under the WTO is certainly more controversial. The issue of PPMs is more pronounced regarding labor protection through measures affecting trade. Along with the protection of human rights, measures protecting labor standards are more like trade sanctions targeting practices in foreign territories instead of domestic regulatory measures aiming to directly protect domestic interests. More importantly, different countries have different ideas about appropriate labor standards. Particularly, developing countries disagree greatly with developed countries regarding labor standards, especially conditions of

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546 As explained in Chapter 1, PPMs refer to production and process methods of products, upon which WTO Members may condition their trade measures or domestic regulatory measures. PPMs are often unrelated with product characteristics and hence may not have impacts within the territories of importing counties. Therefore, measures based on PPMs may cause controversial extraterritorial issues.
work with respect to minimum wages, hours of work, and occupational safety and health, and many more issues.

Apparently, developed and developing countries could not agree on labor issues in the WTO. The only labor justification for violating substantive trade disciplines is provided by GATT Article XX (e) which is only concerned with measures affecting “products of prison labor”. It can be argued that measures based on labor policy objectives can invoke GATT Article XX (a) or (b) for protecting public morals or human health. However, if the WTO judiciary expands GATT Article XX (a) or (b) to cover measures having labor policy objectives, it would draw strong opposition from developing countries.

As a matter of fact, developed countries and developing countries are so divided regarding the labor issues that they could not even agree on whether to talk about labor issues in the WTO. At the very first Ministerial Conference preparing for the launch of the first round of trade negotiation under the WTO, developed countries tried to put labor issues on the WTO’s agenda but failed due to the strong opposition from developing countries.

Workers, especially unionized workers, and civil societies in developed countries have kept pressuring their governments for stronger international labor protection. The trade implications of labor standards has been the major argument developed countries rely upon to bring labor issues into the WTO. It is not hard to understand that labor standards are linked with costs of production. Higher labor standards may result in a cost disadvantage in international competition and job losses. It is not conceivable to have a universal labor law, but developed countries still want to target PPMs in developing countries to narrow the gap of labor standards between developed and developing countries so that the governments of developed countries can please their relevant domestic constituents who suffer from international competition. Undoubtedly, this motive of developed countries grew stronger and stronger as some developing countries such as China became more and more successful in international trade.

There is another major reason for developed countries to insist on dealing with labor issues under the WTO. Labor issues have been taken care of under its proper international institution – the International Labor Organization. But, the international labor law, as most areas of international law, is not enforceable on its own, either because they lack operative rules or

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548 See Singapore Ministerial Declaration (1996), WT/MIN(96)/DEC.
because there is no effective enforcement mechanism. Different from the slow development of international labor law, the development of the international trade law built up momentum in the 1990s with the establishment of the WTO as its apex. The WTO is not only the highest achievement in international trade law, but also a remarkable phenomenon in general international law. As an international organization of more than 160 parties, it has very comprehensive and detailed rules, which are backed up by a compulsory and effective dispute settlement mechanism. It was the dispute settlement mechanism--the “crown jewel” of the world trading system--that attracted the labor issues to the WTO. If incorporated into the WTO, labor standards would become enforceable through the WTO dispute settlement mechanism, which would be appealing to labor rights advocates. Moreover, the WTO covers substantial sectors of international trade, enabling every Member to find something interesting in the overall package it offers. Developed countries therefore can use concessions in certain areas of trade, which are of interest to developing countries, to lure developing countries to raise their labor standards.

Developing countries therefore strongly oppose introducing labor issues into the WTO for fear that the WTO would be used to enforce labor standards. The developed countries kept trying to bring labor standards into the WTO, but at Doha Ministerial Conference in 2001, the first round trade negotiation was officially launched without taking labor issues onboard.\textsuperscript{549} Against such a background, it is clear that the WTO judiciary will be caught up in a very difficult situation if the labor issues are brought up under the WTO.

4.4.1.4 Protection of Human Rights

Human rights can be quite broadly defined. Labor rights can also be counted as human rights.\textsuperscript{550} Some of the discussions regarding the protection of labor standards are useful here where they are applicable. Particularly the discussions regarding making use of certain subparagraphs of the exception clauses of the GATT Agreement and the GATS Agreement are useful for the protection and promotion of human rights. In fact, if a broad view of human rights is taken, people are free to characterize the general exception clause of the GATT Agreement or the GATS Agreement as the human rights exception clause, claiming that it provides protection

\textsuperscript{549} See Doha Ministerial Declaration (2001), WT/MIN(01)/DEC/1.
to “the right to life, the right to a clean environment, the right to food and to health, the right to self-determination over the use of natural resources, the right to development and freedom from slavery…” Therefore, we can certainly find supports for human rights sanctions under the WTO.

However, the protection of human rights is more controversial than the protection of labor standards. Besides being mostly “externally focused” and targeting PPMs, which is also true with labor standards, trade measures protecting human rights are also “non-trade-related”. PPMs have already created great controversies under the WTO because measures targeting PPMs usually exert extraterritorial jurisdiction. Nevertheless, the protection of labor standards targeting PPMs is usually implemented through restricting trade in products that have labor implications. That is to say, products affected by measures aiming at labor protection are usually produced with PPMs violating labor standards. However, this is not true with human rights sanctions.

Human rights sanctions may target products or services that do not give rise to human rights concerns. Cleveland divided human rights sanctions into three groups according to the connection between targeted products and human rights violation. If the connection is direct and targeted products originated from activities violating human rights, the trade sanctions are called “tailored sanctions”; if the connection is indirect and targeted products may have an arguably logical relationship with human rights violation, the trade sanctions are called “semi-tailored sanctions”; if there is no connection between targeted products and human rights violation, the trade sanctions are called “general sanctions.” Among the three types, general sanctions are many. Dealing with human rights issues that do not have trade implications under the WTO would raise serious institutional questions such as the appropriate subject matters a trade regime

553 In labor clauses of trade or investment agreements, it is usually required that parties should enforce their labor laws when trade and investment are affected. Therefore, if products are not produced through PPMs violating labor standards as provided in applicable laws, they should not be involved in measures protecting or promoting labor standards. See, for example, TPP Articles 19.4 and 19.5.1, which requires parties “not to fail to effectively enforce their labour laws in a sustained or recurring pattern that would affect trade or investment between the TPP Parties.”
should cover, particularly when human sanctions are unilateral. A trade regime may only tolerate human rights sanctions to the extent where they are tailored, just like the treatment of measures that protect or promote labor standards.556

Human rights sanction issues are further complicated by fundamental difference between developed countries and developing countries regarding the priority of different types of human rights or the appropriate ways to enforce different types of human rights. For developed democratic countries, civil and political rights are “fundamental, universal, individual, absolute and negative…and enforceable”, while social, economic, and cultural rights are more likely to be positive, requiring the state to provide services, collective, conditional, indeterminate, programmatic, and not suitable for enforcement.557 Civil and political rights are originated in natural law concepts and more compatible with orthodox ideas of democracy while social, economic, and cultural rights are newer generation of human rights and have a socialist heritage.558 As the developed countries have the capability to impose economic sanctions, human rights sanctions are most likely taken to protect or promote civil and political rights in developing and non-democratic countries. Such human rights sanctions would certainly be seen as support to political opposition in the targeted countries and as interference with their domestic affairs and direct threats to the ruling elites. It is therefore difficult to imagine the WTO, either its political body or its judiciary branch, would get themselves involved in efforts enforcing civil and political rights in foreign countries.

Fortunately, since the downfall of the Soviet Union and the disappearance of the communist bloc, developed democracies have been willing to take the “engagement” approach to bring about favorable changes in some of the totalitarian countries. They hope that through integrating some totalitarian countries into the world economy, the peoples in these countries would be able to demand more human rights after their economic conditions improve. However, things may turn out differently and “where repression and neo-liberal policies were combined”, “injustice and instability” may have been intensified.559 It can be imagined that when the

“engagement” approach is forsaken by major democratic powers, particularly the United States, human rights sanctions will become a serious challenge to the WTO.

4.4.2 Miscellaneous policy rationales

In some recent cases, certain miscellaneous policy rationales have been proposed by WTO Members as justification for discrimination caused by internal inconsistencies of their measures. It can be argued that some of these rationales are related to the policy objectives on the list as provided by the subparagraphs of the exception clause or the high-profile policies we have just discussed, but Members invoking them in dispute settlement did not try to argue that way. They simply table these policy rationales without wrapping them up.

In US – Clove Cigarettes, the purported policy objective of the US measure was to discourage youth smoking by banning flavoured cigarettes. However, menthol cigarettes that are primarily produced by American producers were exempted from the ban,560 which created an internal inconsistency within the US measure and hence discrimination against foreign flavoured cigarettes, particularly clove cigarettes. The United States argued that the internal inconsistency could be explained. The policy rationales it offered to explain the internal inconsistency were to avoid “the potential impact on the health care system” and to avoid “the potential development of a black market and smuggling of menthol cigarettes.”561 The panel agreed that these rationales were legitimate in principle.562 On appeal, the AB did not reject the two rationales as illegitimate either.563 Nevertheless, the AB did finally dismiss these two rationales, but on the ground the two rationales were only excuses given the specific facts of the case.564

In EC – Seal Products, the European Union banned seal products on its market, but the EU seal measure had internal inconsistencies. The internal inconsistencies were caused by three exemptions, which were the Inuit or indigenous communities (IC) exemption based on the rationale of protecting the “subsistence of Inuit and indigenous communities”, the marine

560 WTO Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/R, adopted 24 April 2012, para. 2.4.
resource management (MRM) exemption based on the rationale of “controlling nuisance seals and seal culling”, and the travelers exemption based on the rationale of facilitating day-to-day life of international travelers.\textsuperscript{565} The parties did not question the legitimacy of these rationales. Therefore, the panel and the AB did not say anything about their acceptability.

Under the chapeau where their acceptability is important, the travelers exemption and the MRM exemption were not really at issue. Only the IC exemption was examined to determine whether it can explain the discrimination between seal products derived from IC hunting and those derived from commercial hunting. The examination is only necessary when the IC rationale is legitimate under the chapeau. Therefore, the examination of the IC exemption implied that its legitimacy was already recognized.

From the two cases, we can see that the policy rationales may be acceptable under the chapeau of the exception clause are diverse. Given that they are not the purported policy objectives of the disputed measures but some other policy rationales that may conflict with the purported policy objectives, cases like the two may reveal a trend of today’s domestic regulatory measures, which is that domestic regulatory measures are becoming more complex and flexible. The hypothetical case described at the end of Chapter 3 presents an even more complex scenario. When trying to achieve their principal policy objective, domestic regulations try to take care of various values and interests that are negatively impacted. Measures of this kind reflects that when domestic authorities try to take actions to address domestic non-economic issues, they try to devise and implement more tailored instruments. More surgical measures are an improvement over measures with a sweeping impact irrespective of values or interests that are different from those that the principal policy objective of the measures try to protect. It is able to avoid sacrificing some other values and interests while trying to shield certain values or interests from the fierce international economic competition.

It has to be admitted that some of the miscellaneous policy rationales discussed in previous cases can be framed as some of the policy objectives listed in the subparagraphs of the exception clause, particularly when an expansive approach is taken towards the interpretation of the subparagraphs. The rationales offered by the United States in \textit{US – Clove Cigarettes} to justify the internal inconsistencies of its measure can be seen as policy objectives recognized in GATT

Article XX (b) and (d). More specifically, to avoid negative impact on the health care system can
be seen as necessary to protect human life and health, and to prevent the emergence of a black
market and smuggling of menthol cigarettes can be seen as necessary to enforce relevant US
laws and regulations. Similar arguments can be made regarding policy rationales proposed to
justify the exemptions in the EU seal scheme in EC – Seal Products. Indeed, it is not easy to
come up with policy rationales that are clearly not related with those listed in the subparagraphs
of the exception clause. The hypothetical case in Chapter 3 is not at all typical.

Nevertheless, the respondents in these two real cases did not argue that way. Also, it
would be difficult to different extents for them to dress up some rationales as those provided in
the subparagraphs of the exception clause. For example, the argument that protecting the health
care system has a health objective may not be accepted by the WTO judiciary because previous
cases were all involved with a specific and direct health risk while flooding the emergency room
by smokers is, in a sense, a remote and indirect threat to human health. For another example, it
might be tempting to argue that the IC subsistence rationale in EC – Seal Products involves
moral issues, but it would be difficult to actually establish that people in European Union
member countries know about Inuit people and their way of living.

If domestic regulatory measures are going to keep becoming more complex and flexible,
they would be able to accommodate values and interests as refined as possible. Again, the
hypothetical case in Chapter 3 is an example. These refined values or interests tended to be
neglected by crude measures in the past, but with more complex and flexible measures, they
would be taken care of. I would not say that these values or interests are less important from any
perspective, but I would say they would be quite different from high-profiled values and interests
that seem to have established normative importance. From US – Clove Cigarettes and EC – Seal
Products, I can see that these values and interests are more specific and more related to practical
considerations of details.

The acceptability of both the miscellaneous policy rationales and some high-profile
policy objectives would eventually depend on where the boundaries are drawn. If EC – Seal
Products is followed to allow domestic regulatory measures to be justified with policy rationales
that are not the purported policy objectives or policy objectives on the list as prescribed in the
subparagraphs of the exception clause, the scope of acceptable policy rationales would have to
be greatly expanded one way or another. Technically, the expansion is needed under the chapeau
of the exception clause. It seems clear that there is no clue in the chapeau to delineate the boundaries of the expanded scope. Nevertheless, both a general standard and expansive interpretation drawing on treaty texts and jurisprudence under sister clauses in and outside the GATT and GATS Agreements are possible routes to setting parameters for the expanded scope.
CHAPTER 5: IMPLICATIONS FOR RELEVANT WTO CLAUSES

The reconstruction of the chapeau of the exception clause would greatly expand domestic regulatory autonomy, but it may need coordination with other relevant clauses in and outside the WTO Agreements containing the exception clause. The most relevant clauses are the subparagraphs of the exception clause and the non-discrimination clauses, particularly the subparagraphs of GATT Article XX and GATT Article III:4. Two other WTO Agreements, the TBT Agreement and the SPS Agreement, also contain clauses, including TBT Article 2 and SPS Articles 2 and 5, serving basically the same purpose of GATT Articles III and XX combined, which is to maintain a balance between trade liberalization and domestic regulatory autonomy. The TBT Agreement and SPS Agreement overlap with GATT Articles III and XX, but only focus on technical regulations and standards and measures taken for sanitary or phytosanitary purposes, which are two specific groups of domestic regulatory measures. The new interpretation of the chapeau of the exception clause would certainly create repercussions in these Agreements as well.

5.1 Subparagraphs of the Exception Clause

Basically, in order for the reconstructed chapeau of the exception clause to work as intended, the subparagraph jurisprudence should avoid determining whether discrimination can be justified. The reason is simple. If discrimination is to be justified under the subparagraphs, only policy objectives on the list as prescribed in the subparagraphs can be invoked. The trick is to stick to the broad definition of a “measure”, which will be discussed first. However, GATT Article (g) contains an explicit “even-handedness” requirement. Specific attention should be paid to it in order to harmonize the relationship between the new chapeau interpretation and the subparagraphs, which will be discussed next. In some of the major subparagraphs, the key test for justifying disputed measures is the “necessity” test. It is argued that the greatest constraint on domestic regulatory autonomy is the “less restrictive” alternatives test as part of the necessity

Whether an alternative is “reasonably available” is an important factor of consideration in the less restrictive alternatives test, which resembles the rationale of administrative difficulties considered under the chapeau in *US – Gasoline*. A discussion of it is necessary to see whether analysis of reasonable availability and the analysis of administrative difficulties can be differentiated. Last, a general review of the necessity test will be conducted. It is possible to introduce the necessity test into the chapeau to assess whether discrimination can be explained by either the purported policy objectives, or most importantly, by other rationales. The subparagraphs are the right place for a look at a full-fledged necessity test, which can definitely shed light on the assessment under the chapeau. The following discussion is primarily based on the GATT jurisprudence and relevant comments, but it largely applies to the GATS exception clause, because GATT Article XX and GATS Article XIV have almost identical function, structure, and wording.

5.1.1 The scope of the measure

As reviewed in Chapter 1, the AB in *US – Gasoline* departed from the GATT jurisprudence that required the subparagraphs to examine the discrimination caused by the disputed measure. In *US – Gasoline*, the AB held that it was the entire measure (the baseline establishment rules) that needed to be examined to see whether it contributed to its purported policy objective instead of part of the measure (the refusal to provide individualized baselines to foreign refiners) that caused discrimination. The premise is that when the entire measure is examined, only the main scheme should be focused upon while “trivial detours” should be ignored. The AB had followed *US – Gasoline* regarding the scope of “measure” in later cases. But in *Thailand – Cigarettes (Philippines)*, the AB stated that “when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX (d) defense should focus on whether those regulatory differences are

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‘necessary’ to secure compliance with ‘laws and regulations’ that are not GATT-inconsistent.”

It seems that the AB reinstated the US – Section 337 precedent that examined, under the subparagraphs, part of the disputed measure that was the roots of discrimination. However, later in EC – Seal Products, the AB said the inconsistencies with GATT non-discrimination obligations were caused by “the combined operation” of both “the ‘ban’ that restrict market access” and “the IC exception” and the other exceptions. Therefore, the entire measure instead of the exceptions that were the cause of discrimination was examined and found necessary for the purported policy objective of the disputed measure. It seems that US – Gasoline was reinstated.

In US – Gasoline, it is clear that the broad definition of the “measure” helped the US measure pass the examination under the subparagraph. The broad definition of the “measure” is particularly important to measures containing internal inconsistencies. In disputes involving measures containing internal inconsistencies, measures in their entirety were easily found to contribute to their purported policy objectives while it is much more difficult to establish a positive connection between the internal inconsistencies within disputed measures and their purported policy objectives.

More importantly, the broad definition of the “measure” made it almost impossible for the subparagraph to examine discrimination. When the entire measure is examined in a dispute, what usually happens is that only the principal body of the measure is focused upon while internal inconsistencies and exemptions are neglected. For discriminatory measures, the subparagraphs simply becomes an easy portal for them to access the exception clause if the WTO judiciary keeps defining broadly the scope of the challenged “measure.” This actually works perfectly together with the chapeau as it was said that the primary function of the chapeau is to guard against discrimination. The subparagraphs are used to assess the disputed measure with respect to its trade restrictiveness while the discriminatory aspects of the disputed measure can be left for the chapeau to examine. This works even more perfectly together with the reconstructed chapeau as elaborated in Chapter 3. To be more specific, without the broad


definition of the scope of the “measure”, the reconstructed chapeau may not have the chance to justify disputed measures with internal inconsistencies. As discrimination caused by the internal inconsistencies of disputed measures can only be explained by policy rationales behind the internal inconsistencies and these policy rationales are different from the purported policy objectives and usually not on the list as prescribed in the subparagraphs, measures with internal inconsistencies would inevitably fail the subparagraphs if discrimination is examined under the subparagraphs. Only when the subparagraphs refuse to examine the discriminatory aspects of a disputed measure, particularly the discrimination caused by its internal inconsistencies, the chapeau has an opportunity to assess whether policy rationales other than the purported policy objective of the disputed measure can justify discrimination caused by its internal inconsistencies.

5.1.2 The “even-handedness” requirement in GATT Art XX (g)

While most subparagraphs of the exception clause can avoid examining discrimination, GATT Article XX (g) is an exception. GATT Art XX (g) contains an “even-handedness” requirement that domestic regulating authorities shall “make effective in conjunction with restrictions on domestic production or consumption” when the measure at dispute is “relating to the conservation of exhaustible natural resources.”574 The “even-handedness” requirement is basically a national treatment (NT) requirement regarding measures concerning natural resources. It may overlap with the NT obligation in GATT Article III if the disputed measure is imposed on like products produced by both domestic and foreign producers. It can also be independent if the disputed measure is a border measure or is not imposed on like products produced by both domestic and foreign producers. No matter whether it overlaps with the NT obligation under GATT Article III or not, a violation of the NT requirement in GATT Art XX (g) is not justifiable. If there is violation, the disputed measure will not be provisionally justified with the conservation objective. The regulating Member will not get a second chance to defend its measure with other policy rationales under the chapeau. Therefore, measures invoking GATT Art XX (g) have a more limited room for exemptions or flexibilities.

However, the NT requirement under GATT Art XX (g) is not difficult to meet. At least it is less demanding than that under GATT Article III. It is probably only concerned with the most gross discrimination. Lesser discrimination, no matter whether falling into GATT Article III or under the chapeau, could be outside the reach of GATT Art XX (g), and therefore could have an opportunity to be justifiable under the chapeau. US – Gasoline is a perfect example. In US – Gasoline, the US measure imposed baseline rules for pollutants contained in gasoline products in order to “control toxic and other pollution caused by the combustion of gasoline.” However, while domestic refiners were allowed to reduce pollutants according to individualized baselines, imported gasoline was subject to a uniform statutory baseline. However, the discrimination thus created was not inconsistent with NT requirement under GATT Art XX (g) since “restrictions on the consumption or depletion of clean air by regulating the domestic production of ‘dirty’ gasoline are established jointly with corresponding restrictions with respect to imported gasoline.” The AB in US – Gasoline further stated explicitly that “[t]here is, of course, no textual basis for requiring identical treatment of domestic and imported products.” Although there was discrimination, it was not inconsistent with the NT requirement under GATT Art XX (g). Therefore, the discrimination against foreign gasoline survived the NT requirement under GATT Art XX (g). Then, with the help of the broad definition of the “measure,” the discriminatory aspects of the measure were not focused on when examining its contribution to its conservation policy objective. Thus, the discrimination was finally examined under the chapeau.

In US – Gasoline, the AB held that “if no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone (emphasis original)” the disputed measure was inconsistent with the NT requirement under GATT Art XX (g). The impression is that the disputed measure would meet the NT requirement under GATT Art XX (g) as long as some measures are imposed on domestic production or consumption. Only the grossest discrimination, that is that restrictive measures are

imposed only on foreign products, producers, or consumption, would fail the NT requirement under GATT Art XX (g).

In the pre-WTO era, the NT requirement under GATT Art XX (g) had been interpreted more strictly. In the 1982 US – Canadian Tuna case, the panel found the United States only imposed restrictions on the domestic catches of selected species of tuna while imposing restrictions on all tuna and tuna products imported from Canada.\textsuperscript{580} It then concluded that the NT requirement under GATT Art XX (g) was not satisfied.\textsuperscript{581} Apparently, it is not only non-restriction on domestic production or consumption but also restrictions on domestic production or consumption not meeting certain criteria that will fail the NT requirement under GATT Art XX (g). In the 1988 Canada – Herring and Salmon case, the panel set up a general standard that “[a] trade measure could…only be considered to be made effective ‘in conjunction with’ production restrictions if it was primarily aimed at rendering effective these restrictions.”\textsuperscript{582} This case seemed to have imposed an “aim” test, which could be a more complicated NT requirement.

Since the very early WTO era, the WTO judiciary stopped complicating the NT requirement under GATT Art XX (g) any further. In US – Gasoline, as just discussed, only the minimum requirement was established.\textsuperscript{583} In US – Shrimp, the AB found that the restrictions imposed on imported shrimp or shrimp fishing vessels were also even-handedly imposed on domestic shrimp or shrimp fishing vessels.\textsuperscript{584} As mentioned in Chapter 2, US – Shrimp is a case where the same measure was imposed on like products originated from countries where different conditions prevail. However, the parties and the WTO judiciary did not try to make the NT requirement under GATT Art XX (g) complicated in that direction.

Things got a little more complicated once again later. In China – Raw Materials, the AB seemed to have paid attention to the phrase “made effective”, suggesting restrictions on domestic production and consumption should not be merely nominal but rather had to be “brought into

\textsuperscript{580} GATT Panel Report, United States — Prohibition of Imports of Tuna and Tuna Products from Canada (US – Canadian Tuna), L/5198 – 29S/91, adopted 22 February 1982, para. 4.10.
\textsuperscript{581} GATT Panel Report, United States — Prohibition of Imports of Tuna and Tuna Products from Canada (US – Canadian Tuna), L/5198 – 29S/91, adopted 22 February 1982, para. 4.12.
\textsuperscript{582} GATT Panel Report, United States — Prohibition of Imports of Tuna and Tuna Products from Canada (US – Canadian Tuna), L/5198 – 29S/91, adopted 22 February 1982, para. 4.6.
operation, adopted, or applied.” The AB in *China – Rare Earth* further elaborated that the restrictions imposed on domestic production or consumption must be “operative”, “in force”, or have “come into effect.” The restrictions must be “real” instead of “a possible limitation at some undefined point in the future.”

Overall, although with some complications, the NT requirement under GATT Art XX (g) is not very demanding. It is possible to make it more complicated by paying more attention to requiring measures imposed on domestic production or consumption to aim at natural resources conservation. In that case, a connection between measures imposed on domestic production or consumption on the one hand and the purported policy objective of the disputed measure on the other hand needs to be established, which would a be higher standard for conservation regulations to meet. However, for the reconstructed chapeau to work as intended, it is better to keep the threshold of the NT requirement under GATT Art XX (g) as low as possible.

5.1.3 Distinctions between “reasonable availability” in the less restrictive test and administrative difficulties under the chapeau

In Chapter 2, when I try to demonstrate that the rationales able to justify discrimination under the chapeau of the exception clause are not limited to those listed in the subparagraphs of the exception clause, I discuss *US – Gasoline* where administrative rationales were offered as explanation of discrimination by the respondent and examined by the WTO judiciary. However, while *US – Gasoline* supports *EC – Seal Products* and helps to overturn *Brazil – Retreaded Tyres* regarding the analysis of “arbitrariness and unjustifiability” under the chapeau of the exception clause, administrative rationales are not substantive policy rationales. They are more concerned with whether the same or similar treatment is reasonably available for imports given the resource constraints on the regulatory bodies in a specific situation.

Waincymer commented that the analysis under the chapeau of the exception clause conducted by AB in *US – Gasoline* smuggled the necessity test into the chapeau.

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Waincymer, the analysis under the chapeau in the AB’s report was not about substantive policy rationales as explanation for discrimination, but the analysis of necessity under the subparagraphs. To be more specific, what he meant is that the analysis of the US omission of plausible alternatives under GATT Article XX chapeau resembled that in the “less restrictive” test as part of the “necessity” test under some subparagraphs of Article XX.589

According to Sykes, there are two “less restrictive” tests (Sykes called them the “least restrictive” tests) in the “necessity” test. One is that domestic regulating authorities should ensure their measure is “not more trade-restrictive than required to achieve their appropriate level of … protection” or enforcement. This “less restrictive” test focuses on the connection between the disputed measure and its purported policy objective, particularly whether the means just match the appropriate level of protection aimed at by the purported policy objective. The other is that a disputed measure “could be considered to be necessary only if there were no alternative measure consistent with GATT, or less inconsistent with it,” while able to achieve the purported policy objective at the same level.590 This “less restrictive” test focuses on the existence of an alternative. The analysis discussed by Waincymer is more like the second “less restrictive” test under the subparagraphs.

On the one hand, in the second “less restrictive” test under the subparagraphs, whether the alternative is “reasonably available” is an important factor of consideration. When considering whether an alternative is “reasonably available”, “administrative difficulties” and “the difficulty of implementation” are important factors. The AB in earlier cases might have reservations about acknowledging that administrative difficulties would render an alternative to the disputed measure not “reasonably available.”591 In early cases, the AB only explicitly admitted that alternatives shown to be impossible to implement were not “reasonably available.”592 However, things began to change later. In EC – Asbestos, the AB for the first time acknowledged that “the difficulty of implementation” was a factor of consideration when determining an alternative to the disputed measure was “reasonably available.”593 Since then, it

593 WTO Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing
has become easier for regulating Members to argue that there is no alternative “reasonably available” if they can base their arguments on the administrative difficulties of adopting the proposed alternative.

On the other hand, a similar if not identical examination was established under the chapeau. In *US – Gasoline*, the respondent argued that the alternatives, which would eliminate the discrimination in the US measure, were not available because the “impracticability” of taking the alternatives.\(^{594}\) As mentioned in Chapters 2 and 3, the AB finally rejected this argument, but on factual bases. The AB did not reject the rationale of “administrative difficulties” as explanations to the unavailability of alternatives and hence as justification of discrimination under the chapeau in principle. It looks like the rationale of “administrative difficulties” should be able to rebut the availability of alternatives under the chapeau.

The consideration of “administrative difficulties” has been explicitly included in the determination of whether the alternative is “reasonably available” under the subparagraph while it is also able to provide justification for discrimination under the chapeau. Therefore, it looks like that one of the two exercises is redundant. To get rid of the redundancy, one way is to exclude the rationale of “administrative difficulties” from explanations for discrimination under the chapeau. I would argue it is indeed the way that the WTO judiciary would probably take in order not to disturb existing case law concerning the reasonably availability analysis under the subparagraphs, but the reasons behind this decision are a little more complicated.

The benefit of excluding the examination of “administrative difficulties” under the chapeau and retaining it under the subparagraphs is the “reasonably available” jurisprudence is left undisturbed. However, as discussed in a few places earlier, it is preferable for the subparagraphs not to examine the discriminatory aspects of a disputed measure. Therefore, it is desirable for the “less restrictive” test including the “reasonably available” analysis of the proposed alternative should also refuse to examine the discriminatory aspects of the disputed measure. That is, to be consistent with the subparagraph jurisprudence in a broader sense, the “reasonably available” analysis cannot examine an alternative targeting the discriminatory defects of the disputed measure. It can only assess whether an alternative that is less trade restrictive instead of being less discriminatory is reasonably available. Therefore, whether an

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alternative that is less discriminatory is reasonably available is still left for the chapeau to examine.

Thus, in theory, the redundancy issue is eliminated with the relevant analysis under both the subparagraphs and the chapeau jointly taking up the task of examining whether alternatives are reasonably available, but the analysis under the subparagraphs concentrates on alternatives that are less trade restrictive while the analysis under the chapeau concentrates on alternatives that are less discriminatory.

But in reality, the analysis whether an alternative is “reasonably available” cannot really distinguish an alternative that is less discriminatory from one that is less trade restrictive. That is to say, even if the WTO judiciary tries to avoid examining the discriminatory aspects of the disputed measure under the subparagraphs when the disputed measure creates discrimination, it is inevitable for the complainant to propose an alternative that is less discriminatory. The WTO judiciary has been successful in avoiding considering the discriminatory aspects of the disputed measure when it directly examines the connection between the disputed measure and its purported policy objective. However, it has not insisted on refusing to consider whether there is an alternative which is less discriminatory. Indeed, for a discriminatory measure, even if the WTO judiciary wants to focus only on its trade restrictiveness in the analysis of alternatives, it is also impossible. A less trade restrictive alternative to a discriminatory measure often proposes to lower the trade restrictiveness of the disputed measure imposed on imports while it does not change what is imposed on domestic products. Such a less trade restrictive alternative is certainly a less discriminatory alternative as well. An examination of this kind of “hybrid” alternatives cannot make a distinction between their less trade restrictive aspects and their less discriminatory aspects. Therefore, the WTO judiciary would eventually choose to exclude the rationale of “administrative difficulties” from explanations for discrimination under the chapeau.

5.1.4 A full-fledged “necessity” test

In Chapter 1, I have provided a review of the jurisprudence of and comments on the “necessity” test, but the purpose was to reveal that the relevant jurisprudential developments are increasingly more friendly to domestic regulations. Here, the review is conducted to shed light on the assessment of whether policy rationales other than the purported policy objective of the disputed measure can explain discrimination under the chapeau of the exception clause. After all,
the “necessity” test is the most important one to assess the connection between a disputed measure (or certain aspects of it) and a policy rationale.

It is easily to equate the “necessity” test with the second “less restrictive” test under the relevant subparagraphs. In many cases, it is true that the disputed measure did not pass the examination under the subparagraphs because it did not pass the “less restrictive” test, and the WTO judiciary tended to find that an less trade restrictive alternative was reasonably available. The importance of the “less restrictive” test was first established by the GATT panel in *US – Section 337*:

It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

The importance of the “less restrictive” test has since been honored by the judiciary of the world trading system in both the GATT era and the WTO era.

However, the “less restrictive” test is only part of the “necessity” test. If the WTO judiciary introduces the “necessity” test to determine whether policy rationales other than the purported policy objectives of the disputed measure could explain the discrimination often caused by the internal inconsistencies of the measure under the chapeau, we may need to have a full-fledged “necessity” test. Although a full-fledged “necessity” test is not always needed in actual cases, it is always necessary to know what key components it may have.

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As above discussed, the traditional “less restrictive” test was actually the second version of “less restrictive” test as identified by Sykes, which focuses on looking for less restrictive alternatives. It neglects the direct examination of the disputed measure itself. That did not change until Korea – Beef. In Korea – Beef, the AB stated:

[The] determination of whether a measure, which is not “indispensable”, may nevertheless be “necessary” within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.\(^\text{599}\)

The “weighing and balancing” test of the disputed measure in relationship to its purported policy objective was thus established. Basically, the “weighing and balancing” test consists of three factors to consider: (1) attainment of the purported policy objective of the disputed measure; (2) the importance of the values or interest furthered by the disputed measure; (3) trade restrictiveness of the disputed measure. As early as in US – Gasoline, the AB established that the basic requirements set out in the subparagraphs of the exception clause were different kinds or degrees of “connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.”\(^\text{600}\) Therefore, the first factor of the “weighing and balancing” test is central. Bown and Trachtman even gave it an independent name – the “suitability” test or the “simple means-ends rationality” test.\(^\text{601}\)

In later cases, it turned out the “weighing and balancing” test was not only concerned with the direct analysis of the disputed measure itself. The WTO judiciary has continued its focus on alternatives in the “weighing and balancing” test by assessing possible alternatives with reference to the disputed measure in a “less restrictive” examination.\(^\text{602}\) Du therefore commented that the “necessity” test became a “weighing and balancing” test with two steps: (1) the direct


analysis of the disputed measure as illustrated in Korea – Beef; (2) the “less restrictive” test that focuses on whether there is an alternative that is able to achieve the purported policy objective of the disputed measure and is reasonably available. These two steps also correspond with the two versions of the “less restrictive” test proposed by Sykes.

The second step is certainly different from the first step. However, it turns out that they have similar analytical frameworks. The AB said succinctly in EC – Asbestos that, after the first step was performed, “[t]he remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade.” That is, the examination of alternatives also needs to see how they contribute to the achievement of the purported policy objective of the disputed measure and how trade restrictive they are. Since alternatives are proposed on the premise that they also further the same values or interests as the disputed measure, the importance of the values and interests are not evaluated again, but conceptually, this factor of consideration is also included regarding the examination of alternatives. It is clear the “less restrictive” test largely overlaps with the first step except it focuses on the alternative while the first step focuses on the disputed measure respectively. In a sense, the only important difference is that the “less restrictive” test would need an additional analysis of whether the alternative is “reasonably available.”

Given the framework similarity between the two steps of analysis, I further argued in Chapter 1 that the application of the “necessity” test should include a juxtaposed “weighing and balancing” of both the disputed measure and the possible alternative. That is, the two steps are to be applied side by side and step by step as long as they are focusing on the same factors of analysis. Of course, whether the alternative is “reasonably available” is an exercise exclusive to the second step.

A full-fledged “necessity” test would also include some other factors of consideration not stressed in the case law. Three factors can be clearly identified. The first one is whether there exists the problem the disputed measure is supposed to address. This is logically the preliminary issue before the WTO judiciary engages in the examination of the connection between the disputed measure and its purported policy objective. The second one is what is the nature of the

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issue found to exist and hence how to phrase the policy objective of the measure. One good example can be found in EC – Seal products, where parties disagreed on whether the concern was about morals or seal welfare and whether the disputed measure had a public morals policy objective or an animal welfare policy objective.\textsuperscript{605} The third additional factor is to determine the ALOP of the disputed measure. It is also a preliminary issue. The WTO judiciary needs to know the intended level of attainment before it sets out to examine whether and how much the disputed measure (and possible alternatives) can achieve the purported policy objective of the disputed measure.

A final note has to be taken, which is that the examination of the connection between policy rationales other than the purported policy objective and the discriminatory aspects of the disputed measure does not necessarily only rely on the “necessity” test, at least not in every case. Thus, the jurisprudence concerning “relating to” as developed in cases involving GATT Article XX (g) would also be useful for the reconstructed chapeau.

Overall, as the subparagraphs of the exception clause are most closely related to the chapeau, it is most important for them to make accommodations for the reconstructed chapeau. The key is to avoid examining the discriminatory aspects of a disputed measure. GATT Article XX (g) and the “reasonably available” analysis under the subparagraphs may create some problems, but they can be dealt with to avoid overlap with the analysis under the reconstructed chapeau as much as possible. The subparagraphs can also support the reconstructed chapeau in a more positive way, which is that the tests to examine the connection between the disputed measure and its purported policy objectives can cross-fertilize the similar assessment of the connection between the discriminatory aspects of the disputed measure and policy rationales other than its purported policy objective under the chapeau.

5.2 GATT Article III:4

The balance between trade disciplines and domestic regulatory autonomy, as Hudec suggested, is primarily embodied by the relationship between GATT Articles III and XX.\textsuperscript{606} The


two versions of the “aim and effects” test proposals try to readjust the balance within GATT Article III by incorporating a policy analysis. However, they were turned down by the WTO judiciary. Now, as I propose to build on the developments in EC – Seal Products regarding the chapeau to readjust the balance, it is desirable to leave the Article III jurisprudence undisturbed. However, as people have repeatedly claimed that there are clues in certain cases to indicate the WTO judiciary is open to the “aim and effects” test, it is necessary to further clarify some of the discussions to put the “aim and effects” test to rest.

Detrimental impacts on products from certain origins resulting from “private choices” have been held not to constitute discrimination. The economic premise upon which the world trading system has been built is to exclude as much artificial influence, especially from governments, as possible, leaving trade to private choices. In other words, trade shall be conducted through private choices influenced by market factors to the extent possible. Only detrimental impacts on trade caused by government measures are of concern under the trade regime. However, cases ruled on this premise may look like that discrimination has been justified with policy considerations under GATT Article III. As a policy analysis is deferred to GATT Article XX, it is necessary to understand the cases accurately.

In Dominican Republic – Cigarettes, Dominican Republic required, among other things, that both importers and domestic producers post a bond to guarantee compliance with tax liabilities. According to Honduras, one of the problems with the bond requirement was that the bond was set at a fixed amount, not proportionate to the actual amount of tax that needed to be guaranteed. Honduras further claimed importers who have a lower market share than domestic

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producers would be burdened with a higher per unit cost of the bond, which was unfair. The panel ruled that Honduras did not present convincing evidence to support its claim in this regard. During appeal, Honduras claimed that the panel failed to compare the per-unit costs incurred or wrongly calculated the per-unit costs of imported cigarettes while determining whether imported cigarettes had been accorded with less favorable treatment. The AB said that the element of “treatment no less favourable” under GATT Article III:4 focused on whether the bond requirement “modifies the conditions of competition in the relevant market to the detriment of imported products.” Honduras argued that the bond requirement imposed a heavier economic burden upon imported cigarettes on a per-unit basis, which means that the bond requirement had modified the conditions of competition to the detriment of imported cigarettes. The AB, however, said that this was not necessarily true “if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.” Therefore, it was not the bond requirement that altered the conditions of competition to the detriment of imports or constituted discrimination.

In this case, the AB put the premise down clearly in the form of an operative rule. Transforming the unstated premise into a stated rule helps clear the ambiguity associated with the unstated premise, but it also risks being rigid and is susceptible to misinterpretation. What the AB said in this case might be used to suggest discrimination can be justified by more factors than market factors within the analytical framework of GATT Article III:4. If it is read literally, the consideration of “factors or circumstances unrelated to the foreign origin” may be read to include policy consideration. Under GATT Article III:4, it has long been established that discrimination analysis is an analysis of competitive effects. By adding a new analysis of whether “the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product,” the AB, however, seemed to have transformed Article III:4 into an analysis in the perspective of policy rationales as well as the perspective of competition in Dominican Republic – Cigarettes.

However, a literal reading of the AB’s statement in *Dominican Republic – Cigarettes* will render GATT Article XX, including the reconstructed chapeau, redundant. GATT Article XX has undoubtedly served the function of assessing measures at issue in the perspective of policy objectives. If GATT Article III:4 allows for a consideration of policy objectives, there will be an obvious overlap between GATT Articles III:4 and XX, especially rendering the reconstructed chapeau partially redundant. When one commentator suggested that the AB had created the flexibility in GATT ArticleIII:4 jurisprudence for “purpose inquiries under the ‘treatment no less favourable’ test” in *Dominican Republic – Cigarettes*, he certainly overlooked the confusion his suggestion would create with regard to the relationship between GATT Articles III:4 and XX.

Fortunately, such confusion is avoidable if one reads *Dominican Republic – Cigarettes* more carefully and is mindful of later cases that are relevant. The most important reason for the AB in *Dominican Republic – Cigarettes* to dismiss Honduras’ claim is that the AB held that Dominican Republic’s fixed bond requirement did not cause the detrimental effect. According to the AB, that effect occurred because “the importer of Honduran cigarettes has a smaller market share than two domestic producers.” The AB also said that the bond requirement might not cause a detrimental effect on imports in violation of GATT Article III “if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.” Taking these statements into consideration, it is logical to conclude that the AB’s decision was based on whether the causal relationship between disputed measures (bond requirement) and detrimental impacts on products from certain origins was interfered with by market factors. As found by the AB in this case, market factors were more proximate to the result of a higher per unit financial burden on imports from Honduras. Market factors not associated with governmental measures disconnected that causal relationship. It is fair to argue that the AB did not have policy considerations in mind in *Dominican Republic – Cigarettes* when it referred to “factors or circumstances unrelated to the foreign origin.”

In *Thailand – Cigarettes (Philippines)* which is a recent case concerning GATT Article III:4, the AB clarified the analysis of GATT Article III:4 in *Dominican Republic – Cigarettes*.

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The AB explained that the determination of “treatment no less favourable” must include a
determination of the existence of “genuine relationship between the measure at issue and its
adverse impact on competitive opportunities for imported products versus like domestic
products.” Thus, the AB re-affirmed that the added analytical step under GATT Article III:4 in
*Dominican Republic – Cigarettes* is an examination of causation between measure(s) at issue and
detrimental impact. The AB confirmed that policy rationales would not be considered in this
added analytical step. This step of examination is to see whether there are other factors such as
market factors interfering with the causal relationship between government measures and
detrimental effects. In other words, the added analytical step introduced into GATT Article III:4
in *Dominican Republic – Cigarettes* is to make sure modifications of competition conditions are
not caused by market factors before they find the disputed measure to be discriminatory. If
market factors are found to have got in the way, the fact that imports are in a disadvantaged
competitive position cannot be attributed to domestic regulatory measures, and government
actions cannot be found to have modified conditions of competition or caused discrimination. As
to the consideration of policy rationales of the disputed measure, it is not a relevant question
under GATT Article III:4. It is deferred to the analysis under GATT Article XX.

In *US – Clove Cigarettes* which is a recent TBT case, the panel borrowed this added
analytical step of GATT Article III:4 in *Dominican Republic – Cigarettes*. The language of
TBT Article 2.1 does not contain any requirement of consideration of policy rationales, but the
panel borrowed the analytical step of “factors or circumstance unrelated to the foreign origin”
from *Dominican Republic – Cigarettes* to that effect. The AB did not agree with the borrowing
though it agreed a policy analysis under TBT Article 2.1 was needed. The AB discarded the
borrowed analytical step from GATT Article III:4 and added a new one which is an assessment
of “whether the detrimental impact on imports stems exclusively from a legitimate regulatory
distinction.” That is, the AB created a new analytical step for policy analysis instead of
borrowing from *Dominican Republic – Cigarettes*. This indicates the AB in *US – Clove
Cigarettes* did not believe the added analytical step in *Dominican Republic – Cigarettes*

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621 TBT Article 2.1 contains both a national treatment obligation and a most favoured nation treatment, but *US – Clove Cigarettes* was only concerned with the national treatment part of the TBT Article 2.1.
contained an analysis of policy rationales although it needed a policy analysis under TBT Article 2.1. In a lengthy footnote, the AB also explicitly explained why it substituted the analytical step borrowed from *Dominican Republic – Cigarettes* with a new one. The reason is that the borrowed analytical step should be understood only as an inquiry into whether the detrimental impact was “attributable to” the measures at issue while not a “function of” some other factor(s) such as sales volume.623

In *EC – Seal Products*, the AB said more clearly that they “do not consider, as argued by the European Union, that for the purposes of an analysis under Article III:4, a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.”624 Levy and Regan therefore suggested that the discrimination created by the IC procedures against Canadian seal products could be explained with “the difference in scale of the Greenland and Canadian hunts,”625 which is definitely a consideration of market factors. Although Levy and Regan’s suggestion was not adopted by the AB, the AB made it clear that “there must be a ‘genuine relationship’ between the measure at issue and the adverse impact on competitive opportunities for imported products.”626 If that relationship is interrupted by market factors, government measures should not be held responsible for the detrimental impacts on trade.

Thus, the WTO judiciary has avoided mixing detrimental effects on imports caused by market factors and detrimental effects on imports caused by government policies together. The division of work between GATT Article III and GATT Article XX is therefore not disturbed. The reconstructed chapeau does not have to worry about overlapping with a policy analysis under GATT Article III.

5.3 Implications for Relevant TBT Clauses

As mentioned earlier, the issue that this study focuses on exists not only in GATT and GATS cases, but also has been found in SPS and TBT cases. To examine this issue comprehensively under the WTO, one must study it under the SPS and TBT contexts as well. The treaty structures of the SPS and TBT Agreements, however, are different from the treaty structures of the GATT and GATS Agreements. In terms of jurisprudential technicality, we may see the same issue poses itself differently in different treaty contexts, with an understanding that this issue will be somewhat redefined in terms of jurisprudential details. Therefore, I will pay attention to the different treaty contexts whenever necessary in the discussions in this and next sections.

In the TBT context, it looks more difficult to find treaty language to incorporate policy analysis to see whether discrimination, particularly discrimination caused by internal inconsistencies within technical regulatory measures, can be explained. But we can see that the creative interpretation of TBT Article 2.1 by the AB has provided a friendly test for internal inconsistencies, allowing discrimination caused by them to be justified with policy rationales, especially when we re-read the relevant TBT jurisprudence in light of EC – Seal products. However, there may be an overlap between TBT Articles 2.1 and 2.2, which should be taken care of in order for TBT Article 2.1 to perform a similar task that the reconstructed chapeau of the exception clause performs.

5.3.1 Treaty language of relevant clauses and key analytical frameworks

TBT Article 2.1, which is analogous to GATT Article III, reads: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.” Different from the GATT Agreement, the TBT Agreement crams both the NT obligation and the MFN obligation into one clause. To establish a violation of the NT obligation, three elements must be satisfied: (1) the measure at issue must be a technical regulation; (2) the imported and domestic products at issue must be like
products; and (3) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.\textsuperscript{627}

Since there is no exception clause in the TBT Agreement, the AB creatively interpreted TBT Article 2.1 to incorporate an inquiry into “whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction” to carve out a safe zone for domestic regulatory autonomy against a totally pro-trade reading.\textsuperscript{628} Thus, although there is no treaty language as basis for an examination of discrimination through the lens of policy rationales, through judicial creation, TBT Article 2.1 has become a provision that assesses discrimination in both the competition perspective and the perspective of policy rationales.

In the policy analysis of discrimination under TBT Article 2.1, the AB has set up a general standard for policy rationales that are able to justify seemingly discriminatory technical regulations, which is that the policy rationale proposed should be “legitimate.” Naturally, “legitimate” distinctions would come from “legitimate” policy rationales. As long as policy rationales are deemed legitimate, they are able to justify TBT regulatory discrimination. But what groups of policy rationales would qualify, in the newly added inquiry, to create “legitimate” distinction? Purported policy objectives of disputed measures or rationales other than the purported policy objectives? Or both? As revealed in Chapter 4, the AB did not directly answer this question in relevant TBT cases.

Also as discussed in Chapter 4, TBT Article 2.2 seems to have a legitimate objective requirement regarding disputed domestic standards measures. As TBT Article 2.2 is the most important context for the analysis of TBT Article 2.1, it may help to shed some light on the scope of acceptable policy rationales under TBT Article 2.1. I reproduce it here again:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or


safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

TBT Article 2.2 requires a determination of “legitimacy” of objectives of technical regulations. Compared with the closed-end list of acceptable policy objectives as prescribed in the subparagraphs of the exception clause, an open-ended list of legitimate policy objectives is provided here. Although the AB has not established an interpretation, the scope of acceptable policy objectives is definitely wider than that under the subparagraphs of the exception clause. As TBT Article 2.2 informs TBT Article 2.1, legitimate objectives recognized in TBT Article 2.1 will not be limited to a closed-end list either. That is to say, while the explicitly recognized policy objectives in the GATT and GATS contexts are limited, they are not as limited in the TBT Agreement in general and in TBT Article 2.1 in particular even though their scope is not certain as for now. As a result, if rationales other than the purported policy objectives of measures at issue are to be examined, their “legitimacy” will not be undermined by a closed-end list.

TBT Article 2.2 is more than a context for Article 2.1. It provides an examination of the disputed measure that is analogous to the necessity test in some the subparagraphs of the exception clause. In US – Clove Cigarettes, the panel came up with a two-step analytical framework under TBT Article 2.2: (1) whether the disputed technical regulation pursues a legitimate policy objective; (2) whether the disputed technical regulation is more trade restrictive than necessary to fulfill that legitimate objective (taking into account of the risks non-fulfillment would create).629 This was not disturbed by the AB during the appeal and has since been followed with some refinements.630

5.3.2 Key tests for examination of policy rationales

Now, let us take a look at the operative tests in the TBT cases to see how the WTO judiciary could use policy rationales not limited by a closed-end list to justify discrimination, particularly discrimination created by internal inconsistencies of the disputed technical regulations. The new interpretive creation under TBT Article 2.1 seems able to take over the task

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assigned to the reconstructed chapeau of the exception clause. But, it has to be pointed out first
that the newly added element in the analytical framework of TBT Article 2.1 remains somewhat
unclear when we start to probe what operative tests the AB employed.

If the reconstructed chapeau of the exception clause is followed, the analytical element of
TBT Article 2.1 created by the AB through interpretation would most likely consist of two tiers
of analysis. In the first tier, the WTO judiciary would examine discrimination in the perspective
of the purported policy objective of the disputed measure. If the purported policy objective could
explain the discrimination, the analysis is over and the second tier of analysis is not necessary. If
the purported policy objective could not explain the discrimination, then in the second tier of
analysis, the WTO judiciary would examine the discrimination in the perspective of policy
rationales other than the purported policy objective of the disputed measure.

What specific tests the WTO judiciary would use as it conducts these steps of analysis?
When discussing the newly added inquiry, the AB used interchangeable phrases like “whether
any detrimental impact reflects discrimination against imports,” “whether the technical
regulation is even-handed,” “arbitrary or unjustifiable discrimination” and whether the
detrimental impact “stems exclusively from a legitimate distinction.” In application, “even-
handedness” was mentioned most frequently and seemed to be used as the operative test in US–
Clove Cigarettes and US – Tuna II (Mexico), although it was less frequently mentioned and
“arbitrary or unjustifiable discrimination” was more frequently mentioned in US – COOL. In US
– COOL, instead of “even-handedness,” the AB applied the “arbitrary or unjustifiable
discrimination” test which is essentially a test to assess alternatives under the chapeau as
represented by US – Gasoline.631 Basically, the tests identified under TBT Article 2.1 regarding
the new interpretive creation are very similar to the ones used under the chapeau when analyzing
the element of “arbitrariness or unjustifiability” in EC – Seal Products.

However, the tests mentioned above have not really been applied to examine whether
policy rationales other than the purported policy objective of the disputed measure can explain
discrimination. In the few TBT cases that involve TBT Article 2.1 so far,632 the AB only

631 For the resemblance between the “arbitrary or unjustifiable discrimination” test under TBT Article 2.1 and the
“necessity” version of the “arbitrary or unjustifiable discrimination” test under GATT Article XX Chapeau, please
see more detailed discussion in Henry Hailong Jia, ‘Entangled Relationship between Article 2.1 of the TBT
756-758.
632 United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes),
assessed whether the purported policy objectives of the disputed measures could justify discrimination. That is to say, we can only observe what tests the WTO judiciary has used in the first tier of analysis. Although in \textit{US – Clove Cigarettes}, the United States proposed to justify discrimination in its regulatory measure with two policy rationales other than the purported policy objective of the measure at issue, the two policy rationales were quickly dismissed by the AB without a serious examination. Therefore there was no chance to see how the AB would apply a test to those two rationales.

Nevertheless, the assessment of whether policy rationales other than the purported policy objective of the disputed measure can explain discrimination under TBT Article 2.1 should not be very different from that under the reconstructed chapeau. Indeed, as can be seen in Chapters 2 and 3, the panel, in \textit{EC – Seal Products}, spelled out a three-step analytical framework to address the issue of whether the disputed measure stemmed exclusively from “legitimate regulatory distinctions” under TBT Article 2.1, which was almost identical to the three-step analysis of “arbitrariness or unjustifiability” proposed by the AB under the chapeau in the same case. Although the AB held \textit{EC – Seal Products} did not fall under the TBT Agreement,\textsuperscript{633} the AB implied that the panel’s rulings under the TBT Agreement, including its three-step analytical framework of the interpretive creation, followed the AB in \textit{US – Clove Cigarettes} and subsequent TBT cases.\textsuperscript{634}

5.3.3 Overlap between TBT Articles 2.1 and 2.2

Basically, TBT Article 2.2 contains a “less restrictive” test, which focuses on whether the disputed technical regulation is more trade restrictive than necessary to fulfill its purported policy objective. In application, this test is analogous to a mixture of the two versions of “less restrictive” tests identified by Sykes under the subparagraphs of the exception clause.\textsuperscript{635} Article 2.1 that provides non-discrimination obligations is apparently different from Article 2.2. The


relationship between Articles 2.1 and 2.2 is analogous to some extent to that between GATT Articles III and XX.

However, since the AB included a policy analysis through judicial creation under TBT Article 2.1, Article 2.1 is likely to overlap with Article 2.2. As discussed earlier, the tests identified under TBT Article 2.1 regarding the new interpretive creation are very similar to the ones used under the chapeau when analyzing the element of “arbitrariness or unjustifiability” in EC – Seal products. They are likely to be the “necessity” test or tests used in the subparagraphs of the exception clause to examine the connection between the disputed measure and its purported policy objective. While the “less restrictive” test under TBT Article 2.2 established since US – Clove Cigarettes is clearly part of the “necessity” test, the overlap between TBT Articles 2.1 and 2.2 seems inevitable.

In the context of the exception clause, both the reconstructed chapeau and the subparagraphs host the “necessity” test for both examine the connection between the disputed measure and its policy objectives. The way to avoid overlap is to confine the analysis under the subparagraphs to the entire measure while the focus of the analysis under the chapeau is on the discriminatory aspects of the measure. TBT Article 2.1 is apparently a non-discrimination clause. When a policy analysis is incorporated, it should be an analysis of policy objectives offered to explain the discriminatory aspects of the disputed measure. Thus, if TBT Article 2.2 can be dedicated to the examination of non-discriminatory aspects of the disputed measure, the overlap between TBT Articles 2.1 and 2.2 seems also avoidable.

The TBT jurisprudence supports devoting Article 2.2 to the examination of non-discriminatory aspects of the disputed measure. For example, when examining whether the disputed technical regulation pursues a legitimate policy objective, the panel in US – Clove Cigarettes stated that “we are mindful of the Appellate Body's guidance on the need to examine a technical regulation as a whole, taking into account, as appropriate, both any prohibitions and any exceptions to those prohibitions.” The panel actually ignored the exemption in the US ban on flavored cigarettes and concluded that the policy objective of the US ban “is to reduce smoking by youth.” It is more obvious when the panel assessed whether the disputed technical

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637 WTO Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para. 7.343
regulation is more trade restrictive than necessary to fulfill that legitimate objective (taking into account of the risks non-fulfillment would create). Refusing to delve into the exemption of the US ban,\textsuperscript{638} the panel found that the US measure as a whole was not more than necessary to fulfill its legitimate policy objective. To be more specific, the panel found that Indonesia was not successful in proving that the US ban “exceeded the level of protection intended by the United States,”\textsuperscript{639} or that the ban “did not materially contribute to its policy objective,”\textsuperscript{640} or that there was “a reasonable alternative which was less trade restrictive.”\textsuperscript{641} Obviously, the panel conducted its analysis by modeling the “necessity” jurisprudence concerning the subparagraphs of the exception clause. Indeed, it said it should not depart from “some aspects of the Article XX (b) jurisprudence” where they were applicable to TBT Article 2.2.\textsuperscript{642} These issues were not appealed. The AB did not have an opportunity to express its view in \textit{US – Clove Cigarettes}. Nevertheless, the relevant rulings by the panel in \textit{US – Clove Cigarettes} was endorsed by the AB in later cases.

In \textit{US – Tuna II (Mexico)}, in the panel’s examination of the US technical regulations under TBT Art 2.2, the panel based its analysis on the discriminatory aspects of the US labeling regulations and found that they could only partially fulfill its objectives, and therefore a less trade restrictive alternative was easily found.\textsuperscript{643} However, during appeal, the AB disagreed with the approach taken by the panel and ignored the discriminatory aspects of the US labeling regulations and the panel’s findings concerning TBT Article 2.2 were reversed.\textsuperscript{644}

In \textit{US – COOL}, when the United States once again disagreed with borrowing from the GATT Art XX (b) analysis concerning whether the disputed technical regulation is more trade restrictive than necessary to fulfill that legitimate objective (taking into account of the risks non-fulfillment would create), the AB explicitly held that the “necessity” test in TBT Art 2.2 was

\begin{itemize}
  \item \textsuperscript{639} WTO Panel Report, \textit{United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)}, WT/DS406/AB/R, adopted 24 April 2012, para. 7.375.
  \item \textsuperscript{640} WTO Panel Report, \textit{United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)}, WT/DS406/AB/R, adopted 24 April 2012, para. 7.415.
  \item \textsuperscript{641} WTO Panel Report, \textit{United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)}, WT/DS406/AB/R, adopted 24 April 2012, para. 7.421.
  \item \textsuperscript{642} WTO Panel Report, \textit{United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)}, WT/DS406/AB/R, adopted 24 April 2012, para. 7.369
  \item \textsuperscript{643} WTO Panel Report, \textit{United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))}, WT/DS381/R, adopted 13 June 2012, paras. 7.563, 7.564, 7.577, 7.578.
  \item \textsuperscript{644} WTO Appellate Body Report, \textit{United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))}, WT/DS381/R, adopted 13 June 2012, paras. 330, 331.
\end{itemize}
integrated with the “necessity” jurisprudence under the exception clause of the GATT and GATS Agreements. The panel, based on its findings under TBT Article 2.1, concluded the US labeling requirements also failed the examination under Article 2.2. Since the findings under Article 2.1 focused on discrimination and possible policy justification for discrimination. Therefore, the panel’s conclusions under Article 2.2 in US – COOL were necessarily based on its analysis of the discriminatory aspects of the US labeling requirements. However, the AB disagreed with the panel regarding the approach it took and the conclusion it made, and reversed the panel.

Overall, thanks to the creative interpretation by the AB in US – Clove Cigarettes, TBT Article 2.1 can give TBT measures with internal inconsistencies a chance to be justified with rationales different from their purported policy objectives. The tests examining those policy rationales would resemble the tests used in the analysis of “arbitrariness or unjustifiability” under the chapeau. However, TBT Article 2.2 needs to more clearly avoid examining the discriminatory aspects of disputed measures in its “less restrictive” analysis in order to avoid overlapping with TBT Article 2.1.

5.4 Implications for Relevant SPS Clauses

Compared with the TBT measures, it is easier to find a textual basis to build a policy analysis to justify discriminatory SPS measures. Particularly, SPS Articles 2.3 and 5.5 seem able to allow discrimination created by internal inconsistencies within SPS measures to be justified with policy rationales. However, the SPS Agreement is all about a special type of domestic regulatory measures that have the purported policy objective of protecting life and health. Are there any other policy rationales that are able to override the health objective to deserve a carve-out, or justify different appropriate levels of protection (ALOP) within one SPS measure? For these types of measures, it is difficult to find excuses for internal inconsistencies. It seems that

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the only flexibilities allowed within a SPS measure is based on calibration to different levels of risks posed to health or life, which are not really flexibilities of the sort this study is interested in. Nevertheless, I will try to discuss what the suggestions can be put forward regarding the relevant SPS jurisprudence if the reconstructed chapeau of the exception clause needs to be honored in the context of the SPS Agreement, assuming worthy policy rationales that deserve carve-outs or flexibilities in SPS measures can be found.

5.4.1 Treaty language of relevant clauses and key analytical frameworks

SPS Articles 2.3 and 5.5 both contain language guarding against “arbitrary or unjustifiable discrimination” and “a disguised restriction on international trade”, which seem to be able to examine internal inconsistencies within SPS measures and allow justification based on policy rationales. Article 2.3 contains a nondiscrimination/consistency requirement, which reads:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Article 5.5 may be seen to be “marking out and elaborating a particular route leading to the same destination set out in Article 2.3,”649 WTO judiciary usually only examine discrimination under Article 5.5 instead of under both Article 2.3 and Article 5.5. So Article 5.5 is the operative provision, which reads:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade…

The analysis under SPS Article 5.5 can be broken into three elements in case law:

The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human [,

animal, and plant life or health in several different situations. The second element to be shown is that those levels of protection exhibit arbitrary or unjustifiable differences (“distinctions” in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade. Overall, SPS measures that have different ALOPs can be justified if the different ALOPs correspond with different risks that exist, or if the ALOPs do not result in discrimination or restriction on trade even if they are arbitrary or unjustifiable. The first element provides an examination of whether the disputed SPS measure has promulgated different ALOPs in comparable situations. The second element assesses whether the difference between different ALOPs can be explained by different risk levels. The third element provides an assessment of whether different ALOPs result in discrimination or a disguised restriction of international trade.

How a measure would constitute a disguised restriction on international trade has not been really discussed in WTO law, particularly under the chapeau of the exception clause. It has not been discussed under SPS Article 5.5 either. Without taking it into account, it seems difficult to differentiate the second and third elements. Logically, a finding of arbitrary or unjustifiable difference in ALOPs should already mean that discrimination exists. The third element looks redundant. It seems the second element provides the key test under Article 5.5. The AB stressed that the third element focused on the “application” of SPS measures. It is also possible to include an examination of the impact on competitive opportunities in the third element to distinguish itself form the second element. However, in previous cases, the factors of analysis included in the third element are largely those discussed in the analysis of the first two elements. It is difficult to see how the analysis of the third element is fundamentally different from that of the second element.

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The analysis of the second element may utilize the necessity test. In explaining the setting of ALOPs to calibrate to different risk levels, an inevitable question may be whether the ALOPs set are necessary regarding different risk levels. Or if the setting of different ALOPs is allowed to be explained by invoking policy rationales other than calibration to different risk levels, the question whether the ALOPs set are necessary regarding the policy rationales invoked is also important. Since the analysis of third element may not be very different from the analysis of the second element, it is likely the third element may include a necessity test in its policy analysis.

SPS Article 5.6 provides a necessity requirement although it does not use the word “necessary” in the text. If Article 5.6 examines the discriminatory aspects of a disputed SPS measure, it is possible for it to overlap with Article 5.5. Article 5.6 reads:

Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

It basically asks whether the disputed SPS measure is necessary for the ALOPs it sets while the ALOPs are based on policy considerations like calibrating to risk levels or even other objectives. The footnote to SPS Article 5.6 clarifies that it asks the necessity question by providing an examination of alternatives. An examination of alternatives is only concerned with the second version of “less restrictive” test identified by Sykes. According to the footnote, an alternative exists if it (1) is reasonably available taking into account technical and economic feasibility; (2) is able to achieve the intended ALOP set by the regulating WTO Member; and (3) is less restrictive on trade than the disputed SPS measure.

5.4.2 “Calibration” to different risk levels

The SPS cases concerning discrimination have focused on the issue whether ALOPs shall be set differently in different but comparable circumstances regarding the severity of the same risks. In other words, if the issue of discrimination is involved, almost all SPS cases have been concerned with calibration to different levels of the same risks. It has to be noted that flexibilities

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allowed to accommodate different levels of the same health risks are still based on the consideration of the health objective. That is to say, SPS measures at issue should be allowed to be calibrated to conditions that are different in the perspective of the health objective as the only purported policy objective of SPS measures. Calibration to different risk levels in SPS measures are not concerned with the need for flexibilities driven by policy rationales other than the health objective. It is inherent justification for different treatment of like products based on health concerns, independent of other substantive policy considerations.656 Discrimination caused by internal inconsistencies are often not justifiable with the reason of calibrating to different risk levels.

In EC – Hormones, the European Union prohibited imported meat products treated with hormones for growth purposes.657 This prohibition was based on health concerns.658 The European Union was charged to have set too high an ALOP concerning the use of hormones for growth purposes while have not set the same ALOP concerning the use of certain other hormones. Imported meat products were detrimentally impacted most by the prohibition and hence the European Union was charged of violating nondiscrimination/consistency obligation under SPS Article 2.3 and Article 5.5.

It was argued that SPS Article 5.5 (particularly, the second element of analysis) was designed to allow calibration to different risk levels and require SPS measures to achieve “consistency” in accordance with different risk levels in application.659 If like products are treated differently according to their difference regarding risk levels, the WTO judiciary should not hold that the different treatment is arbitrary or unjustifiable, or constitutes discrimination. In EC – Hormones, the AB compared the risks related to growth hormones which were banned with the risks related to certain other hormones which were not banned and found the latter

656 Inherent justification means justification based upon rationales that would prevent a finding of discrimination in the first place. It is different from justifications as exceptions for discrimination already established, but this study call it justification for discrimination in a broader sense.
represented as high a risk as, if not a higher risk than, the former.\textsuperscript{660} The AB then found “the difference in the EC levels of protection in respect of the hormones in dispute when used for growth promotion, on the one hand, and certain other hormones, on the other hand, is unjustifiable in the sense of Article 5.5.”\textsuperscript{661}

When analyzing the third element, the AB seemed to avoid focusing on calibration to different risk levels. It said, when applying the third element of analysis, that “the degree of difference, or the extent of the discrepancy, in the levels of protection, is only one kind of factor to be considered. […] The difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof […] of discrimination or a disguised restriction on international trade.”\textsuperscript{662} However, it is clear that the AB cannot exclude the analysis of the second element from the third element. The third element still examines the same factors already examined in the analysis of the second element. Nevertheless, it may be argued that the AB wanted affirmative proof of protectionism in the third element of analysis.\textsuperscript{663} The AB seemed to have included a search for discriminatory intent. When it did not find any, it did not find the unjustifiably different ALOPs result in discrimination in analysis of the third element.\textsuperscript{664}

Overall, it is clear that, in \textit{EC – Hormones}, the second element of analysis under SPS Article 5.5 hosts an examination of calibration of ALOPs to risk levels. There was no other policy rationales offered to explain the difference between ALOPs related to different hormones. Even the third element does not appear to be very different from an examination of calibration to different risk levels.

In \textit{Australia – Salmon}, “to prevent the introduction of any infectious or contagious disease, or disease or pest affecting persons, animals or plants,” Australia prohibited the importation of uncooked salmon for commercial purposes.\textsuperscript{665} The panel held that Australia, by

\begin{footnotesize}
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\item \textsuperscript{665} WTO Panel Report, \textit{Australia – Measures Affecting Importation of Salmon (Australia – Salmon)}, WT/DS18/R, adopted 12 June 1998, para 2.16.
\end{itemize}
\end{footnotesize}
adopting arbitrary or unjustifiable distinctions in the ALOPs, had violated SPS Article 5.5 and, on that ground, had also acted inconsistently with the requirements contained in SPS Article 2.3.\(^{666}\) This conclusion was based on scientific studies that the risks associated with banned imported salmon were no greater than that associated with other salmon.\(^{667}\) Therefore, the same level of risks only warrants the same ALOPs.\(^{668}\) It was not reasonable to be over-cautious with regard to the banned salmon while other salmon were allowed access to Australian market.\(^{669}\) The panel’s findings on this issue were upheld during appeal.\(^{670}\) The AB agreed with the panel that the latter category of salmon represented “as high as, if not a higher risk than, the former category.”\(^{671}\) The AB also upheld the panel’s ruling that the Australian measure is discriminatory in the end, which was largely based on its findings in the analysis of the first two elements.\(^{672}\) Interestingly, regarding the third element, the AB did not take as many efforts as it did in EC – Hormones to distinguish it from the second element and commented that “All ‘arbitrary or unjustifiable distinctions’ in levels of protection will lead logically to discrimination between products.”\(^{673}\) This case is very similar to EC – Hormones and it also only recognized calibration to different risk levels as a legitimate justification for different ALOPs.

In 2000, “Guidelines to Further the Practical Implementation of Article 5.5 (Guidelines)” were adopted to clarify the practical implications of the requirement contained in SPS Article 5.5. What matters to this study is that the Guidelines affirms that “[w]hat a Member is comparing are the levels of protection against the risks posed by potential hazards to human, animal or plant life or health” when considering the ALOPs in different situations.\(^{674}\)

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\(^{674}\) “Guidelines to Further the Practical Implementation of Article 5.5”, G/SPS/15, para A.4.
In recent cases, calibration of SPS measures to different risk levels under SPS Article 5.5 has been reaffirmed. In *Australia – Apple*, apples imported from New Zealand were subject to certain SPS measures for the purpose of controlling the possible risks of disease spread while domestic apples were not.\(^\text{675}\) As to whether there were arbitrary or unjustifiable distinctions in the measures applied by Australia in different situations, the panel assessed it by comparing the risks involved in the comparable situations and the measures applied by Australia against such risks.\(^\text{676}\)

In *US – Poultry (China)*, the United States applied a higher ALOP to poultry products from China and lower ALOPs to poultry products from other WTO Members.\(^\text{677}\) This resulted in that poultry products from China were subject to a more stringent sanitary measure while poultry products from other WTO Members enjoyed more lenient sanitary treatments. The Panel turned to *Brazil – Retreaded Tyres* for help to determine whether the distinction between the ALOPs was arbitrary or unjustifiable.\(^\text{678}\) The Panel declared that, like in GATT Article XX cases, distinctions made under SPS Articles 2.3 and 5.5 could be justified if there was a legitimate cause or rationale in the light of the legitimate objectives of the measure at issue to explain them.\(^\text{679}\) However, this declaration did not mean a new approach was adopted to apply SPS Article 5.5. In assessing the distinction at issue, the panel concluded that there was no scientific evidence to support that different risk levels were associated respectively with poultry products from China and other WTO Members. Therefore, the panel held the distinction of ALOPs between poultry products from China and other WTO Members could not be properly explained and was hence arbitrary or unjustifiable. In essence, the *Poultry* panel followed the relevant case law starting from *EC – Hormone*, assessing the distinctions in ALOPs against the risk levels associated with relevant products.\(^\text{680}\) No other policy rationales were offered to explain the distinction of ALOPs.

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\(^\text{680}\) The Poultry Panel emphasized that the Salmon Panel’s ruling was upheld by the AB. See WTO Panel Report,
5.4.3 Extension of the SPS Article 5.5 jurisprudence to the examination of policy rationales other than health objectives as justification for discrimination

Hypothetically, the analysis under Article 5.5 can be extended beyond calibrating to different risk levels. Without considering judicial interpretation, the text alone does not really limit the analysis to calibration to different risk levels. Moreover, after reading the SPS Agreement, there is not another SPS provision in which discrimination caused by real internal inconsistencies within SPS measures can be examined. The analytical framework under SPS Article 5.5 has to provide for the analysis of internal inconsistencies if the reconstructed chapeau needs to be respected and transplanted into the SPS context. However, locating the specific analytical step and ascertaining the relevant test for policy rationales as justification for discrimination would prove to be quite difficult within SPS Article 5.5. The reason is that, compared with case law concerning other WTO Agreements, SPS case law offers little help. The analytical framework under SPS Article 5.5 has long been applied for the examination of distinctions calibrating to different risk levels. Or it has evolved only with calibration to different risk levels in mind. Therefore, Article 5.5 may be a blunt tool for the extension.

When examining discrimination caused by policy rationales other than the purported policy objectives of measures at issue, it is sensible to think that the second element shall provide a test, since there is a determination of whether the distinction in protection levels is arbitrary or unjustifiable in the assessment of the second element. If policy rationales other than the purported policy objectives can explain the distinction, the difference in ALOPs and related treatment would not be arbitrary or unjustifiable. In the case law, however, the AB only assessed the distinction in ALOPs calibrated to different risk levels in the analysis of the second element. It has never even hinted that the second element of analysis was able to examine discrimination based upon policy rationales other than the purported policy objectives.

The third element is also a candidate for receiving the proposed developments under the chapeau of the exception clause. Although the analysis of it overlaps with that of the second element, the case law concerning it is not exclusively about calibration to different risk levels. The panel in \textit{EC – Hormones} held that “the absence of any plausible justification” on the part of

EU for the significant difference in protection levels in compatible situations was one important step of analysis in the assessment of the third element. 681 This definitely can be seen as an examination in the policy objective perspective, and an opening to justification for discrimination based on rationales other than the purported policy objectives of the SPS measures at issue. As mentioned earlier, the AB in EC – Hormones also stressed that the third element should be different from the second element. 682

The test under the third element is not as clear as expected. What is a “plausible” justification needs further clarification. However, looking for plausible justification could not possibly be truly different from the determination of “arbitrariness or unjustifiableness” of discrimination in the policy objective perspective. Thus, if the WTO judiciary conducts a detailed examination of discrimination in the policy objective perspective in general or in the perspective of rationales other than the purported policy objectives of measures at issue in particular, the same tests as those used under the second element of analysis of SPS Article 5.5, TBT Article 2.1 and GATT Article XX Chapeau would probably be applied again.

The opening in the third element to the examination of policy rationales other than the purported policy objective of SPS measures seems to have been narrowed in some cases. For example, it is true that the third element may examine additional factors, but the additional consideration is at best relevant to the manner of the application of the SPS measures. 683 For another example, in Australia – Salmon, the Panel considered six factors in the analysis of the third element. Most of them seem to be factors demonstrating a nature of arbitrariness or unjustifiability also to be considered in the second element. 684 Also the AB appeared to suggest more than implicitly that the third element was not really independent from the second one. 685

Nevertheless, compared with a body of case law overwhelmingly dominated by the issue of calibrating to risk levels, the jurisprudence of the third element would be more friendly to a

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transplant from the chapeau of the exception clause. A transplant from the chapeau of the exception clause would mean borrowing indirectly from the typical necessity test when examining whether other policy rationales could justify discrimination contained in SPS measures. That may cause SPS Article 5.5 to overlap with Article 5.6.

5.4.4 Overlap between SPS Articles 5.5 and 5.6

Before discussing the possible overlap between SPS Articles 5.5 and 5.6, I would like to briefly discuss Article 5.4 that may also overlap with Article 5.5. SPS Article 5.4 requires WTO Member to “take into account the objective of minimizing negative trade effects.” It seems that Article 5.4 provides a “least trade restrictive” test. If the SPS Agreement is compared with the TBT Agreement, SPS Article 5.4 is more like TBT Article 2.2. It would overlap with Article 5.5, just as TBT Article 2.2 may overlap with Article 2.1. However, Article 5.4 has not been applied yet. The reason is that it is regarded as not operative. In EC – Hormones, the panel commented that “guided by the wording of Article 5.4…we consider that…[it] does not impose an obligation.” Therefore, SPS Article 5.4 would not really create any problem for SPS Article 5.5 when it extends to accommodate SPS measures with internal inconsistencies if there are policy rationales other than SPS objectives that explain the internal inconsistencies.

But Article 5.6 is different. It provides an operative obligation. Like Article 5.5, SPS Article 5.6 has its counterpart in Article 2 as well, which is Article 2.2. Besides other basic obligations, Article 2.2 contains a necessity requirement. That requirement is further developed in Article 5.6. Since SPS Articles 5.5 (and its roots in Article 2) contains a non-discrimination/consistency obligation. The relationship between Articles 5.5 and 5.6 is also analogous to that between TBT Articles 2.1 and 2.2, or as that between GATT Articles III and XX (actually only XX (b)) if there is a policy analysis under Article III.

As said earlier, when SPS Article 5.5 is open to examination of policy rationales other than the purported policy objective of SPS measures as they are offered to justify discrimination, it may need to import tests from the reconstructed chapeau of the exception clause. The possible

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overlap between TBT Articles 2.1 and 2.2 would replicate itself in the relationship between SPS Articles 5.5 and 5.6. Again, the way to avoid overlap is to confine the analysis under SPS Article 5.6 to the entire measure while focus the analysis under Article 5.5 on the discriminatory aspects of the measure.

In SPS cases, the scope of the measure has not been an explicit issue. One reason is the WTO judiciary avoided deciding it under SPS Article 5.6. For example, in one of the most classical SPS disputes – EC – Hormones, the panel exercised judicial economy and refused to decide it under both SPS articles 2.2 and 5.6, which was upheld by the AB.\(^{689}\) Another more important reason is that the WTO judiciary does not want to scrutinize ALOPs set by Members under SPS Article 5.6. In Australia – Salmon, the AB said that setting ALOPs is “a prerogative of the Member concerned and not of a panel or the Appellate Body” when it tried to find the ALOP set by respondent in that case.\(^{690}\) Under SPS Article 5.6, there usually is only one ALOP claimed by the respondents in SPS disputes, which is usually taken for granted by the WTO judiciary. If there is discrimination in terms of ALOPs set and measures imposed accordingly, it is ignored. Thus, it looks like the overlap between SPS Articles 5.5 and 5.6 can be avoided without much disturbance to the case law.

Overall, when compared with the relevant jurisprudence in the TBT context, there are more questions that need to be answered and more difficulties that need to be overcome, if the SPS jurisprudence is to receive the reconstructed chapeau of GATT Article XX into the SPS context. Of course, some work also needs to be done and some ambiguities need to be clarified regarding the relevant TBT jurisprudence and the jurisprudence concerning the subparagraphs of the exception clause in the GATT and GATS Agreements. It is probably only GATT Article III that does not need any change to pave the way for the reconstructed chapeau of the exception clause to take roots.

\(^{690}\) Australia – Measures Affecting Importation of Salmon (Australia – Salmon), WT/DS18/AB/R, adopted 20 October 1998, para. 199. (emphasis original)
CONCLUSION

The GATT Agreement, a cornerstone of the world trading system, was drafted more than 70 years ago. Over the years, more and more side agreements, a great number of which were built on specific clauses of the GATT Agreement, have been added to the treaty system under the world trade regime. However, the GATT Agreement remains unchanged. Its inadequacy to deal with contemporary issues including the balance between trade disciplines and domestic regulatory autonomy has been apparent.

The greatest constraints on domestic regulatory autonomy imposed by the GATT Agreement are the rule-exception structure in the Agreement and certain cumbersome conditions domestic regulatory measures have to meet under the exception clause. Among the conditions set under the exception clause, the most restrictive one is that domestic regulatory measures must have policy objectives that are on a short list as prescribed in the subparagraphs of the exception clause. In Hudec’s view, these constraints originally targeted explicit discrimination and were too strict for de facto discrimination that had become more common in domestic regulations.691 Hudec’s opinion has been widely shared.692 But Hudec did not foresee the restriction the relevant GATT jurisprudence imposed on domestic regulations would be taken to another level when domestic regulatory measures became more and more complex and refined.

As can be seen from WTO cases, Members have tended to take consideration of multiple legitimate values and interests and to design and implement measures in a more flexible way to accommodate these values and interests. This trend is probably inevitable due to the rise of the

regulatory state. However, these measures often contain internal inconsistencies in order to accommodate multiple policy objectives. Discrimination caused by the internal inconsistencies in such measures cannot be explained by the purported policy objectives that are often on the closed-end list as prescribed in the subparagraphs of the exception clause. What can really explain discrimination thus created are policy rationales that are different from the purported policy objectives of the measures and often not on the list as prescribed in the subparagraphs of the exception clause. However, under traditional WTO jurisprudence, discrimination is not justifiable by these policy rationales. It seems that Members have to design and implement their domestic regulatory measures without internal inconsistencies. Sometimes, they have very good rationales to have carve-outs in their measures or treat some products less favorably than other products even in the perspective of the purported policy objectives. While guarding against excuses for trade protectionism, the WTO should not interfere with Members’ autonomy to regulate in a more flexible way.

As the anti-globalization movement is becoming more powerful, it seems the WTO judiciary cannot wait any longer for a paralyzed political organ to re-adjust the balance between trade disciplines and domestic regulatory autonomy. Fortunately, in EC – Seal Products, for the first time, the panel identified and explicitly discussed a long-avoided question: How shall discrimination created by internal inconsistencies of a disputed domestic regulatory measures be justified? Also in EC – Seal Products, for the first time, the panel and the AB provided an answer that discrimination, particularly discrimination created by the internal inconsistencies of disputed domestic regulatory measures could be justified by policy rationales different from the purported policy objectives of the regulatory measures at issue. It seems the short list was circumvented.


EC – Seal Products was somewhat ambiguous. Therefore, the importance of EC – Seal Products has been under-valued. But I think the AB had pointed a very clear direction and following it has benefits in both the technical sense and the political sense. Technically, EC – Seal Products expanded domestic regulatory autonomy under the chapeau of the exception clause. This approach works better than the “aim and effects” approach, the major alternative favored by Hudec and others, by preserving the original division of work between GATT Article III and XX. Politically, since EC – Seal Products was the only case where the AB tried most earnestly to re-adjust the balance between trade disciplines and domestic regulatory autonomy, it should be followed if the WTO has to appease the anti-globalization powers.

After an examination of the relevant case law, it is clear that EC – Seal Products is reconcilable with most precedents except Brazil – Retreaded Tyres. It would not be difficult to overrule Brazil – Retreaded Tyres and further clarify and develop EC – Seal Products. On this assumption, this study further reconstructs the chapeau of the exception clause, which is turned into a tool to justify disputed domestic regulatory measures with policy rationales within a wider scope. Of course, this tool does not provide an unconditional endorsement for domestic regulatory measures conflicting with trade disciplines. Certain tests, possibly including a necessity test, have to be established to examine policy rationales not limited by the short list to guard against abuses. This study also tentatively probes the boundary of the expanded scope of policy rationales that would be acceptable under the chapeau to justify disputed domestic regulatory measures. To go down the road pointed out by EC – Seal Products, it is not enough to only reconstruct the chapeau of the exception clause. Relevant clauses in and outside the GATT Agreement are also discussed to harmonize WTO law with the reconstructed chapeau.

In recent years, the world trading system has experienced a very difficult time. Compared with many urgent and grave issues, the delicate balance between trade disciplines and domestic regulatory autonomy appears less important. Do we really need to go through all the troubles to reconstruct and tweak some of the most complicated WTO jurisprudence to draw a new line for that balance? One probable answer is no. No, we probably do not. There are so many more urgent and seemingly more fundamental issues need attention. However, the value of this study is that, if the WTO survives the current crises and things return to their normal state, the balancing issue this study focuses upon would become pivotal again to the world trading system. Also, the strict constraints imposed by WTO law, as interpreted and applied by the WTO judiciary, on domestic regulatory measures may have helped to fuel the anti-globalization movement. In that case, it is a self-redemption the WTO judiciary has to make on behalf of itself and the entire institution, better late than never.
BIBLIOGRAPHY AND REFERENCES

GATT/WTO LEGAL TEXTS


Singapore Ministerial Declaration, WT/MIN(96)/DEC, 1996

Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 2001.

**OTHER LEGAL TEXTS**

Article 38(1)d of the Statute of the ICJ

Article 53 of the Vienna Convention


**DISPUTE DOCUMENTS**

**GATT DISPUTES**


**WTO DISPUTES**


WTO Appellate Body Report, *European Communities – Trade Description of Sardines (EC –*


WTO Appellate Body Report, *United States – Measures Affecting the Production and Sale of
Clove Cigarettes (US – Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012.


Iceland's third-party submission, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)

Japan's third-party submission, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)

**OTHER CASES**

Belgium v Senegal, Judgment of 20 July 2012, ICJ Reports 2012


**BOOKS**


BOOK CHAPTERS


ARTICLES IN JOURNALS AND LAW REVIEWS


Dunoff, Jeffery L. ‘The Death of the Trade Regime’, 10 (4) European Journal of International Law 733-762 (1999),


Jackson, John. H. ‘Comments on Shrimp/Turtle and the Product/Process Distinction’, 11 (2)


Traverso, Enzo. ‘Trump’s Savage Capitalism: The Nightmare is Real’, 34 (1) World Policy


WORKING PAPERS AND OTHER SOURCES


President of the ICJ addressed the UN General Assembly on October 26, 2000 particularly on this topic. The speech is available at https://www.icj-cij.org/files/press-releases/9/2999.pdf.
