### General and Security Exceptions

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### 1 Introduction

The promotion and protection of public health, consumer safety, the environment, employment, economic development and national security are core tasks of governments. Often, trade liberalisation and the resulting availability of better and cheaper products and services facilitate the promotion and protection of these and other societal values and interests. Through trade, environmentally friendly products or life-saving medicines, that would not be available otherwise, become available to consumers and patients respectively. At a more general level, trade generates the degree of economic activity and economic welfare that enables governments effectively to promote and protect the societal values and interests referred to above.

In order to protect and promote these societal values and interests, however, governments also adopt legislation or take other measures that, inadvertently or deliberately, constitute barriers to trade. Members may be, politically and/or economically, 'compelled' to adopt legislation or other measures, which are inconsistent with rules of WTO law and, in particular, with the rules on non-discrimination and the rules on market access, discussed in Chapters 4–7. Trade liberalisation, market access and non-discrimination rules may conflict with other important societal values and interests. WTO law recognises this and, therefore, provides for a set of rules to reconcile trade liberalisation, market access and non-discrimination rules with the need to protect and promote other societal values and interests. As the 2004 Sutherland Report noted:

Neither the WTO nor the GATT was ever an unrestrained free trade charter. In fact, both were and are intended to provide a structured and functionally effective way to harness the value of open trade to principle and fairness. In so doing they offer the security and predictability of market access advantages that are sought by traders and investors. But the rules provide checks and balances including mechanisms that reflect political realism as well as free trade doctrine. It is not that the WTO disallows market protection, only that it sets some strict disciplines under which governments may choose to respond to special interests.

This chapter and the next two chapters, Chapters 9 and 10, address the wide-ranging exceptions to the basic WTO rules, allowing Members to adopt trade-restrictive legislation or other measures that pursue the promotion and protection of other societal values and interests. This chapter deals with the 'general exceptions' as well as the 'security exceptions'. Chapter 9 deals with the 'economic emergency exceptions'; and Chapter 10 discusses the 'regional trade exceptions'.

These exceptions differ in scope and nature. Some allow deviation from all GATT or GATS obligations; others allow deviation from specific obligations only; some allow for measures of indefinite duration; others allow for temporary measures only. However, while different in scope and nature, all the exceptions have something in common: they allow Members, under specific conditions, to adopt and maintain legislation or other measures that promote or protect other important societal values and interests, even though this legislation or these measures are inconsistent with substantive disciplines imposed by the GATT 1994 or the GATS. These exceptions clearly allow Members, under specific conditions, to

1. The Sutherland Report, para. 29. Emphasis omitted.
2. As explained above, WTO law provisions providing for special and differential treatment of developing-country Members and least-developed-country Members are not discussed in a separate chapter of this book, but are discussed together with the rules from which they allow deviation. See below, pp. 671–95.
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2 GENERAL EXCEPTIONS UNDER THE GATT 1994

Article XX of the GATT 1994, entitled 'General Exceptions', states:

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 (Member) of measures:

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

(c) 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;

(d) relating to the products of prison labour;

(e) imposed for the protection of national treasures of artistic, historic or archeological value;

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

(g) essential to the acquisition or distribution of products in general or local short supply;

Note that paragraphs (c), (d) and (f) of Article XX are not included in the quote above. These paragraphs relate to trade in gold and silver (see paragraph (c)); obligations under international commodities agreements (see paragraph (d)); and efforts to ensure essential quantities of materials to a domestic processing industry (see paragraph (f)). To date, these paragraphs have been of less importance in international trade law and practice and have not yet been invoked in WTO dispute settlement. Therefore, they are not discussed in this chapter.

4 Note that other agreements contain 'exceptions' or 'flexibilities' addressing the same exception. They are discussed together with these agreements, in other parts of this book.  

balance the affirmative commitments and the exceptions. It stated with regard to Article XX(g), the exception at issue in those cases, the following:

The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III. Nor may Article III be given so broad a reach as to effectively subvert the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX. Can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpretation only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose. This does not reflect a restrictive interpretation by the Appellate Body of the exceptions of Article XX of the GATT 1944. Rather, the Appellate Body strikes a balance between, on the one hand, trade liberalisation, market access and non-discrimination rules and, on the other hand, other societal values and interests. Article XX is in essence a balancing provision. Therefore, a narrow interpretation of Article XX is as inappropriate as a broad interpretation.

Finally, with regard to the nature and function of Article XX, the Appellate Body stated in Thailand - Cigarettes (Philippines) (2011) that:

[i]t is true that, in examining a specific measure, a panel may be called upon to analyze a substantive obligation and an affirmative defence, and to apply both to that measure. It is also true that such an exercise will require a panel to find and apply a 'line of equilibrium' between a substantive obligation and an exception. Yet this does not render that panel's analysis of the obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further and separate' assessment of whether such measure is otherwise justified. In that case, Thailand argued that the Appellate Body should instead reverse its finding of inconsistency with Article III.4 of the GATT 1944 after, and because, it had found that the panel erred in its analysis of Thailand's Article XX(g) defence. The Appellate Body refused to do so because the Article III.4 analysis and the Article XX(g) analysis are distinct and separate.

2.1.2 Scope of Application of Article XX

As noted above, some exceptions discussed in this and the next chapters allow deviation from all GATT or GATS obligations, while other exceptions allow deviation from specific obligations only. Article XX allows, under specific conditions, deviation from all GATT obligations. In other words, Article XX may

justify inconsistency with any of the GATT obligations, be it Article I:1 (MFN treatment), Article II:1 (tariff concessions), Articles III.2 and III.4 (national treatment), Article XI.1 (quantitative restrictions) or any other obligation under the GATT 1944. As discussed above, Article XX states that 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ...' In this sense, the scope of application of Article XX is broad. The question has arisen whether Article XX may also justify inconsistency with obligations set out in WTO agreements other than the GATT 1944. In China - Publications and Audiovisual Products (2010), China invoked Article XX(a) in order to justify measures that the panel found to be inconsistent with China's trading rights commitments under its Accession Protocol. China invoked Article XX, relying upon the introductory clause of paragraph 5.1 of its Accession Protocol, which reads:

'Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement...'

The panel in this case stated that:

China's invocation of Article XX(a) presents complex legal issues. We observe in this respect that Article XX contains the phrase 'nothing in this Agreement', with the term 'Agreement' referring to the GATT 1944, not other agreements like the Accession Protocol. The issue therefore arises whether Article XX can be directly invoked as a defence to a breach of China's trading rights commitments under the Accession Protocol, which appears to be China's position, or whether Article XX could be invoked only as a defence to a breach of a GATT 1944 obligation.

However, rather than resolving the issue whether China could invoke Article XX, the panel decided to proceed on the assumption that Article XX was available to China, and to examine first whether the measures found to be inconsistent with China's Accession Protocol satisfied the requirements of Article XX. This examination led the panel to conclude that the measures concerned could not be justified under Article XX. The panel in China - Publications and Audiovisual Products (2010) thus never ruled on the availability of Article XX. However, unlike the panel, the Appellate Body did address this issue. According to the Appellate Body, the phrase 'China's right to regulate trade' in paragraph 5.1 of China's Accession Protocol is a reference to its power to subject international commerce to regulation. This power may not be impaired by China's obligation to grant the right to trade, provided that China regulates
provided by Annex 6 of China's Accession Protocol, Article VIII of the GATT 1994, and the relevant structure of the Accession Protocol, including the specific exceptions to China's obligations to eliminate export duties. The same question, namely whether Article XX of the GATT 1994 is available to justify a measure inconsistent with paragraph 11.3 of China's Accession Protocol, arose again in China – Rare Earths (2014). China presented three specific arguments in support of its position, namely that: (1) paragraph 11.3 of China's Accession Protocol has to be treated as an integral part of the GATT 1994; (2) the terms 'nothing in this Agreement' in the chapeau of Article XX of the GATT 1994 do not exclude the availability of Article XX to defend a violation of paragraph 11.3 of China's Accession Protocol; and (3) an appropriate holistic interpretation, taking due account, of the object and purpose of the WTO Agreement, confirms that China may justify export duties through recourse to Article XX of the GATT 1994.29 The panel in China – Rare Earths considered that none of these arguments advanced by China constituted a cogent reason for departing from the Appellate Body's ruling in China – Rare Materials (2012) that Article XX was not available to justify measures inconsistent with paragraph 11.3 of China's Accession Protocol.30 On appeal, China did not ask the Appellate Body to reconsider its ruling in China – Rare Materials (2012). China's appeal was narrow in scope, and did not in fact involve any challenge to the panel's ultimate findings and conclusions regarding the WTO inconsistency of China's export duties. As China stated, its appeal was intended to obtain clarification of the systemic relationship between specific provisions in China's Accession Protocol and other WTO agreements.27 According to China, the panel should, on the basis of a 'holistic' interpretation of Article XII:1 of the WTO Agreement and the second sentence of paragraph 1.2 of China's Accession Protocol, have come to the conclusion that each provision of China's Accession Protocol is an integral part of the WTO Agreement or one of the Multilateral Trade Agreements to which the provision 'intrinsically relates'.28 After a detailed interpretation of Article XII:1 of the WTO Agreement and paragraph 1.2 of China's Accession Protocol, the Appellate Body disagreed with China's argument that a specific

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14 See id., para. 201. 15 Id., para. 228. See also id., paras. 221, 222.
16 Id., para. 228. 17 See id.
18 On the inconsistency of export duties with para. 11.3 of China's Accession Agreement, see supra, p. 472.
19 See Appellate Body Reports, China – Rare Materials (2012), para. 307.
20 See id., para. 304. 21 See supra, p. 550.
22 See id., para. 304. 23 See Appellate Body Reports, China – Rare Materials (2012), para. 307. Note, however, that Article XX of the GATT 1994 was available in China – Rare Materials (2012) with regard to the export restrictions, inconsistent with Article XII:1 of the GATT 1947, that at issue in that case. See supra, p. 488.
23 See Panel Reports, China – Rare Earths (2014), para. 740.
24 See id., paras. 772, 789, 7.304, 7.314, 7.415. See, however, the dissenting opinion, paras. 7.314-7.318.
25 See Appellate Body Reports, China – Rare Earths (2014), para. 742.
27 See id., paras. 5.13-5.14. The second sentence of paragraph 1.3 of China's Accession Agreement provides that the Protocol 'shall be an integral part of the WTO Agreement.'
provision in China’s Accession Protocol is an integral part of the WTO Agreement or one of the Multilateral Trade Agreements to which it intrinsically relates.\(^5\) The Appellate Body concluded as follows:

In our view, Paragraph 1.2 of China’s Accession Protocol serves to build a bridge between the package of Protocol provisions and the package of existing rights and obligations under the WTO legal framework. Nonetheless, neither obligations nor rights may be automatically transposed from one part of this legal framework into another. The fact that Paragraph 1.2 builds such a bridge is only the starting point, and does not in itself answer the question whether there is an objective link between an individual provision in China’s Accession Protocol and existing obligations under the Marrakesh Agreement and the Multilateral Trade Agreements, and whether China may rely on an exception provided for in these agreements to justify a breach of such Protocol provision.\(^6\)

Whether there is an objective link between an individual provision of China’s Accession Protocol and an obligation or right under any of the WTO agreements, such as the GATT 1994, and whether China may rely on an exception provided for in such WTO agreements, such as Article XX of the GATT 1994, are questions that according to the Appellate Body:

must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China’s Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements in the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.\(^7\)

In China - Raw Materials (2012), the panel and the Appellate Body noted that WTO Members have, on occasion, incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements.\(^8\) By way of example, they referred to Article 3 of the TRIMs Agreement, which states that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement". In such instances in which Article XX is explicitly incorporated by reference, the availability of Article XX is justified measures inconsistent with obligations under WTO agreements other than the GATT 1994 is of course a non-issue.

Apart from the question whether Article XX may apply to measures inconsistent with WTO agreements other than the GATT 1994, also other questions regarding its scope of application have arisen. With regard to the kind of measure that can be justified under Article XX, the panel in US - Shrimp (1998) ruled that Article XX could not justify measures that "undermine the WTO multilateral trading system." The measure at issue in US - Shrimp (1998) was a US measure, which required India, Pakistan, Thailand and Malaysia to harvest shrimp in the manner set out in US law if they wanted to export shrimp into the United States. The panel found that a measure of a Member ‘conditioning’ access to its market for a given product upon the adoption by the exporting Member of certain policies would undermine the multilateral trading system.\(^9\) On appeal, however, the Appellate Body categorically rejected this panel’s funding on the scope of measures that Article XX can justify. The Appellate Body held that:

conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX illusory, a result aberrant to the principles of interpretation we are bound to apply.\(^10\)

Measures requiring that exporting countries comply with, or adopt, certain policies prescribed by the importing country are, in fact, typical of the measures that Article XX can justify. They are definitely not a priori excluded from the scope of application of Article XX.

Another question relating to the scope of application of Article XX is whether it can also justify measures that protect, or purport to protect, a societal value or interest outside the territorial jurisdiction of the Member taking the measure – for example an import prohibition imposed by Richland on aluminium from Newland that is produced at very low cost but in a manner detrimental to the environment in Newland. To date, the Appellate Body has yet to rule whether such measures that protect, or purport to protect, a societal value or interest outside the territorial jurisdiction of the Member taking the measure, can be justified under Article XX. There is no explicit jurisdictional limitation in Article XX. However, there are an implied jurisdictional limitation, so that Article XX cannot be invoked to protect non-economic values outside the territorial jurisdiction of the Member concerned. In US - Shrimp (1998), a case involving an import ban on shrimp harvested through methods resulting in the incidental killing of sea turtles, the Appellate Body noted that sea turtles migrate to or traverse waters subject to the jurisdiction of the United States, and subsequently stated:

We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).\(^11\)
While the position of the Appellate Body on the question of the extra-territorial application of Article XX is still undetermined, the panel in EC – Tariff Preferences (2004) found that:

the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Community and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b) of GATT 1994.

Finally, note with regard to the scope of application of Article XX that the Appellate Body in EC – Seal Products (2014) held that the aspects of a measure to be justified under the paragraphs of Article XX are those aspects that gave rise to the finding of GATT inconsistency.

2.1.3 Reliance on Article XX

As discussed below, Article XX of the GATT 1994 is often invoked by a respondent in WTO dispute settlement. However, WTO Members rely upon Article XX to justify otherwise GATT-inconsistent measures in many more instances than the cases that are subject to dispute settlement. For 593 quantitative restrictions, or 81 per cent of all quantitative restrictions notified to the WTO as of 19 May 2015, Members relied on Article XX to justify these otherwise GATT-consistent measures.

For 311 of these quantitative restrictions, Members relied on Article XX(b) regarding measures "necessary to protect human, animal or plant life or health."

2.2 Two-Tier Test under Article XX of the GATT 1994

Article XX sets out a two-tier test for determining whether a measure, otherwise inconsistent with GATT obligations, can be justified. In US – Gasoline (1996), the Appellate Body stated:

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs

(a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under Article XX(b); second, further appraisal of the same measure under the introductory clauses of Article XX.

Thus, for a GATT-inconsistent measure to be justified under Article XX, it must meet: (1) the requirements of one of the exceptions listed in paragraphs (a)-(j) of Article XX; and (2) the requirements of the introductory clause, commonly referred to as the 'chapeau', of Article XX. The Appellate Body further clarified, in US – Shrimp (1998), that, to determine whether a measure can be justified under Article XX, one must always examine, first, whether this measure can be provisionally justified under one of the paragraphs of Article XX; and, if so, whether the application of this measure meets the requirements of the chapeau of Article XX. Hence, an analysis under Article XX first focuses on the measure at issue itself and then on the application of that measure. This distinction between the two elements of the Article XX test is well illustrated by the panel in Brazil – Retreaded Tyres (2007):

In its analysis under Article XX(b) [i] the panel will not... examine... the manner in which the measure is implemented in practice, including any elements extraneous to the measure itself that could affect its ability to perform its function... or consider situations in which the ban does not apply... These elements will, however, be relevant to later parts of the Panel’s assessment, especially under the chapeau of Article XX, where the focus will be, by contrast, primarily on the manner in which the measure is applied.

By its own terms, the chapeau of Article XX is concerned with the ‘manner’ in which a provisionally justified measure is ‘applied’; however, as the Appellate Body noted in Japan – Alcoholic Beverages II (1996), 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’. The examination of the ‘manner’ in which the measure at issue is ‘applied’ thus involves a consideration of both substantive and procedural requirements under the measure at issue.
To date, WTO Members have been successful only once in justifying otherwise GATT-inconsistent measures under Article XX of the GATT 1994. It is important, however, to make two observations in this respect. First, many of the otherwise GATT-inconsistent measures adopted to promote or protect societal values, which were initially found non-justifiable under Article XX, were subsequently modified (rather than withdrawn) in accordance with the DSB recommendations and rulings, and were not further challenged. Second, Members adopt or maintain very otherwise GATT-inconsistent measures to promote or protect societal values, which clearly meet the requirements of Article XX. These measures seldom go to WTO dispute settlement. Therefore, the limited success Members have had in invoking Article XX does not indicate that Article XX plays only a marginal role in allowing WTO Members to adopt or maintain otherwise GATT-inconsistent measures to promote or protect societal values. Rather, the opposite is true.

The following subsections will first discuss the specific exceptions and their requirements provided for in paragraphs (a)-(j) of Article XX, before analysing the requirements of the chapeau of Article XX.

2.3 Specific Exceptions under Article XX of the GATT 1994

Article XX sets out, in paragraphs (a)-(j), specific grounds of justification for measures, which are otherwise inconsistent with provisions of the GATT 1994. These grounds of justification, or policy objectives, relate to the protection of societal values such as human, animal or plant life or health, exhaustible natural resources, national measures of artistic, historic or archaeological value, and public morals. Comparing the terms used in the different paragraphs of Article XX, the Appellate Body stated in US - Gasoline (1996): Article XX uses different terms in respect of different categories: "necessary" - in paragraphs (a), (b) and (d); "essential" - in paragraph (j); "relating to" - in paragraphs (c), (e) and (f); "for the protection of" - in paragraph (l); "in pursuance of" - in paragraph (b); and "involving" - in paragraph (f).

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It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.

In EC - Seal Products (2014), the Appellate Body explained that provisional justification under one of the paragraphs of Article XX requires that a challenged measure "address the particular interest specified in that paragraph," and that "there be a sufficient nexus between the measure and the interest protected." The paragraphs of Article XX contain different requirements regarding the relationship, or nexus, between the measure at issue and the societal interest or value pursued. Some measures need to be "necessary" for the protection or promotion of the societal value they pursue (e.g. the protection of life and health of humans, animals and plants), while for other measures it suffices that they "relate to" the societal value they pursue (e.g. the conservation of exhaustible natural resources). Therefore, the grounds of justification, and the accompanying requirements provided for in Article XX, will be examined separately. This subsection focuses first and foremost on those grounds of justification, or policy objectives, which have been most frequently invoked in GATT and WTO dispute settlement.

2.3.1 Article XX(b)

Article XX(b) concerns measures which are "necessary to protect human, animal or plant life or health." It sets out a two-tier legal standard to determine whether a measure is provisionally justified under this provision. A GATT-inconsistent measure is provisionally justified under Article XX(b) if: (1) the measure is designed to protect the life or health of humans, animals or plants; and (2) the measure is necessary to protect the life or health of humans, animals or plants.

The first element of the analysis under Article XX(b) is often relatively easy to apply and has not given rise to major interpretive problems. To determine the policy objective pursued by a measure, panels and the Appellate Body have examined the design and structure of the measure. Overall, they have shown a significant degree of deference in accepting that the policy objective


59 On the "bargain" element of the Article XX(b) analysis, see Appellate Body Report, Canada - Tariffs (2014), paras. 5.669-5.671, and 5.135-5.136 (regarding the "design" element of the analysis under Article XX(b) and (d) of the GATT 1994; see below, pp. 579-607); and Appellate Body Report, India - Solar Cells (2018), para. 5.156 (regarding the "bargain" element of the analysis under Article XX(b) and Article XXI of the GATT 1994; see below, pp. 569 and 594).
of a measure is to protect the life or health of humans, animals or plants. The wide range of measures that has been considered to pursue this policy objective includes measures to reduce the smoking of cigarettes, measures to reduce air pollution, measures to reduce risks arising from the accumulation of waste tyres and measures to protect dolphins. In Brazil - Retreaded Tyres (2007), for example, Brazil submitted with regard to its import ban on retreaded tyres that:

the accumulation of waste tyres creates a risk of mosquito-borne diseases such as dengue and yellow fever - because waste tyres create perfect breeding grounds for disease-carrying mosquitoes and that these diseases are also spread through interstate transportation of waste tyres for disposal operations. [The] accumulation of waste tyres also creates a risk of tyre fires and toxic leaching ...

harm not only humans but also animals. The panel accepted Brazil's arguments, and concluded that:

Brazil's policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres falls within the range of policies covered by Article XX(b).

In China - Raw Materials (2012), China submitted with regard to the export restrictions on certain raw materials at issue in this case that these export restrictions were:

part of a comprehensive environmental protection framework whose objectives are pollution reduction for the protection of health of the Chinese population.

However, the respondents in this case, the European Union, the United States and Mexico, argued that China's export restrictions were not designed to address the health risks associated with environmental pollution, and that China's invocation of environmental and health concerns was merely a post hoc rationalization developed solely for purposes of this dispute. The panel found that China was unable to substantiate that the export restrictions at issue were part of a comprehensive programme maintained in order to reduce pollution, and thus cast serious doubts over whether policy objective pursued by the export

restriction was the protection of life or health of humans, animals or plants. As the Appellate Body held in EC - Seal Products (2014) relating to Article XX(b) and discussed below, a panel should take into account a Member's articulation of the objective pursued by the measure at issue, but is not bound by that articulation. To determine the objective pursued by the measure at issue, a 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.

As Article XX(b) covers measures designed for the protection of human, animal or plant life or health, it covers public health policy measures as well as environmental policy measures. However, as the panel noted in Brazil - Retreaded Tyres (2007), a party invoking Article XX(b) with regard to environmental policy measures "has to establish the existence not just of risks to the environment generally, but specifically of risks to human or plant life or health. For this reason, not all environmental policy measures would fall within the scope of application of Article XX(b) of the GATT 1994."

The second element of the analysis under Article XX(b), the 'necessity' requirement, is more complex than the first element. The interpretation and application of the 'necessity' requirement has evolved considerably over the years. It is not possible to give a full account of this evolution. Rather, this subsection focuses on those cases which best reflect the current interpretation and application of the 'necessity' requirement of Article XX(b). In fact, the current case law on the 'necessity' requirement was introduced by an Appellate Body report relating to the 'necessity' requirement, not in the context of Article XX(b), but in the context of Article XX(a). Namely, the Appellate Body report in Korea - Various Measures on Beef (2000), discussed in the next subsection.

The first case in which the Appellate Body applied this new approach to the 'necessity' requirement in the context of Article XX(a) was Brazil - Retreaded Tyres (2007). In its report in this case, the Appellate Body summed up how the 'necessity' requirement of Article XX(b) is currently interpreted and applied, as follows:

In order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance

56 See Brazil - Retreaded Tyres (2003).
57 See US - 'True Blue' (Branded) Article 21.3 (2002). Note that before the panel in EC - Seal Products (2014), the European Union invoked - without much argumentation - Article XX(b) to justify its EU Seal Regime. The European Union did not even assert that the precaution of seal welfare was in such the case for the EU Seal Regime. The panel found that the European Union had failed to establish a prima facie case for its defense under Article XX(b). See Panel Report, EC - Seal Products (2014), para. 1.64. With regard to European Union's invocation of Article XX(a), see below, p. 579.
58 Panel Report, Brazil - Retreaded Tyres (2003), para. 7.131 and 7.144.
59 Id., para. 7.102. This issue was not appealed.
60 Panel Reports, Chile - Raw Materials (2012), para. 7.69. 61 Id., para. 7.499.
62 Id., para. 7.514.
63 Appellate Body Reports, EC - Seal Products (2014), para. 5.144.
64 Panel Report, Brazil - Retreaded Tyres (2003), para. 7.48, noting that there was no evidence that there was a risk to human or animal or plant life or health. Article XX(b) could not be invoked to justify an environmental policy measure.
65 Note that Article XX(b) of the GATT is concerned with measures relating to the protection of human, animal or plant life or health, and measures relating to the protection of the environment.
66 Id., para. 5.144, noting that the Appellate Body report in the case under examination found that a measure is necessary when it is justified and the measure addresses a serious risk to environment.
67 See, e.g., GATT Panel Report, Thailand - Cigarettes (2012), para. 7.5. As discussed below, the evidence of the measures taken to address a risk to the environment is not necessary to determine necessity but is one of the factors to be considered.
of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.\(^\text{66}\)

The Appellate Body emphasised that the 'weighing and balancing' required to determine whether a measure is 'necessary' 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 judgement'.\(^\text{67}\)

To understand the current case law on the 'necessity' requirement of Article XX(b), it is important, however, to consider the Appellate Body's findings in EC – Asbestos (2001) relating to Article XX(b). While the Appellate Body had found that the measure at issue in this case – a French ban on asbestos and asbestos products – was not inconsistent with Article III-4 of the GATT 1994 and the panel's findings relating to Article XX(b) were therefore moot, the Appellate Body nevertheless addressed some of the issues that arise when determining whether an otherwise GATT-inconsistent measure is justified under Article XX(b). The Appellate Body in EC – Asbestos (2001) made four findings in this respect which deserve to be mentioned as they are important in understanding the current state of the law as set out in Brazil – Retreaded Tyres (2007).

First, according to the Appellate Body, the more important the societal value pursued by the measure at issue and the more this measure contributes to the protection or promotion of this value, the more easily the measure at issue may be considered to be 'necessary'.\(^\text{68}\) In EC – Asbestos (2001), the societal value pursued by the measure was the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The Appellate Body observed with regard to this value that it is 'both vital and important in the highest degree'.\(^\text{69}\) In EC – Asbestos (2001), the Appellate Body did not explicitly refer to the third factor in the 'weighing and balancing' process now applied to determine whether an otherwise GATT-inconsistent measure is 'necessary', namely, the restrictive impact of the measure at issue on international trade. However, in Brazil – Retreaded Tyres (2007), the Appellate Body clearly suggested with regard to this factor that the more restrictive the impact of the measure at issue on international trade, the more difficult it is to consider that measure 'necessary'.\(^\text{70}\)

Second, with regard to the existence of less trade-restrictive alternative measures, Canada asserted before the Appellate Body in EC – Asbestos (2001) that the panel had erred in finding that 'controlled use' of asbestos and asbestos products is not a reasonably available alternative to the import ban on asbestos. According to Canada, an alternative measure is only excluded as a 'reasonably available' alternative if implementation of that measure is 'impossible'. The Appellate Body stated that, in determining whether a suggested alternative measure is 'reasonably available', several factors must be taken into account, alongside the difficulty of implementation. It subsequently referred to its earlier report in Korea – Various Measures on Beef (2001) (concerning the 'necessity' requirement under Article XX(b)) and noted with regard to the determination of 'necessity' under Article XX(b):

We indicated in Korea – Beef that one aspect of the 'weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure 'contributes to the realisation of the end pursued'.\(^\text{71}\)

Canada, the complainant in EC – Asbestos (2001), had asserted that 'controlled use' of asbestos and asbestos products represented a 'reasonably available' measure that would serve the same end as the ban on asbestos and asbestos products. The issue for the Appellate Body was, therefore, whether France could reasonably be expected to employ 'controlled use' practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks. The Appellate Body concluded that this was not the case. It reasoned as follows:

In our view, France could not reasonably be expected to employ any alternative measure that would involve a continuation of the very risk that the Decree seeks to halt. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of 'controlled use' remains to be demonstrated. Moreover, even in cases where 'controlled use' practices are applied with greater certainty, the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a significant residual risk of developing asbestos-related diseases ... 'Controlled use' would, thus, not be an alternative measure that would achieve the end sought by France.\(^\text{72}\)

In Brazil – Retreaded Tyres (2007), the Appellate Body confirmed that a Member cannot reasonably be expected to employ an alternative measure if that measure does not allow it to achieve its desired level of protection with respect to the policy objective pursued. The Appellate Body also recalled in Brazil – Retreaded Tyres (2007) its finding in US – Gambling (2004) (concerning the 'necessity' requirement under Article XIV(a) of the GATS, discussed later in this chapter)\(^\text{73}\) that:

Alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it.


\(^{67}\) See ibid., para. 187. England added: Note also that with regard to Article XX(b) of the GATS, the Appellate Body held in US – Gambling (2005), paras. 306–7, that the 'weighing and balancing' is not necessarily limited to the three factors referred to above. See ibid., p. 407.

\(^{68}\) Appellate Body Report, EC – Asbestos (2001), para. 172. \(^{70}\) Ibid.

\(^{69}\) Appellate Body Report, Brazil – Retreaded Tyres (2003), para. 150.

\(^{71}\) See ibid., para. 174. \(^{72}\) Appellate Body Report, EC – Asbestos (2003), para. 172.

\(^{73}\) Ibid., para. 174. \(^{74}\) See ibid., pp. 508–10.
Third, the Appellate Body ruled in EC - Asbestos (2001) that it is for WTO Members to determine the level of protection of health or the environment they consider appropriate. Other Members cannot challenge the level of protection chosen; they can only argue that the measure at issue is not 'necessary' to achieve that level of protection.

Fourth, quoting from its case law on the SPS Agreement, the Appellate Body in EC - Asbestos (2001) ruled that: responsible and resourceful governments may act in good faith on the basis of, at a given time, may be a divergent opinion coming from qualified and respected sources. In justifying a measure under Article XX(b) of the GATT 1994, a Member may rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in settling health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the 'preponderant' weight of the evidence.

With regard to the contribution to the achievement of the objective pursued, or, in short, the contribution to the objective pursued, the Appellate Body ruled in Brazil - Retreaded Tyres (2007) that a measure contributes to the achievement of the objective 'when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.' The Appellate Body furthermore held that a panel enjoys certain latitude in choosing its approach to analysing the contribution made, that such an analysis may be performed in qualitative or quantitative terms; and that it ultimately depends upon 'the nature of the risk, the objective pursued, and the level of protection sought' as well as on 'the measure, quantity, and quality of evidence existing at the time the analysis is made.'

78 Appellate Body Report, Brazil - Retreaded Tyres (2007), para. 150. In Brazil - Retreaded Tyres (2007), the Appellate Body found that the alternative measures proposed by the European Communities were either already part of the strategy implemented by Brazil in deal with waste tyres, or the level of protection chosen by Brazil for waste tyres and required advanced technologies and know-how not readily available on a large scale. Therefore, they could not be regarded as 'reasonably available' alternatives to the import ban. See Appellate Body Report, Brazil - Retreaded Tyres (2007), paras. 150-51.
79 See Appellate Body Report, EC - Asbestos (2001), para. 184. This finding is in line with the case law on the so-called SPS Agreement as below, paras. 83, 85-86. See also Panel Report, Brazil - Retreaded Tyres (2007), para. 7.200.
80 As far as Brazilian EC - Asbestos (2001), a WTO Member cannot choose a zero risk level. This means that there will be few, if any, measures rather than a full ban that will achieve its level of protection. Note also that the panel in US - Gombling (1996) ruled that it is not the necessity of the policy objective but the necessity of the dispersed measures to achieve that objective which is at issue. See Panel Report, US - Gombling (1996), paras. 6.239-40.
82 See id., para. 145-46.
83 See id., para. 151.
84 Appellate Body Reports, EC - Seal Products (2003), para. 5, emphasis added.
85 See id. As the Appellate Body explained, the measure at issue in Brazil - Retreaded Tyres (2007) formed part of a broader policy scheme, and was not yet having, or likely itself to become, an immediately foreseeable impact on its objective. Accordingly, the Appellate Body sought in that dispute to determine whether the measure was 'apt to make a material contribution' to its objective.
86 See id., para. 5, emphasis added.
87 Appellate Body Report, Brazil - Retreaded Tyres (2007), para. 150.
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does not have to "show, in the first instance, that there are no reasonably available alternatives to achieve its objectives."90

Finally, as discussed above, the Appellate Body held in Brazil – Retreaded Tyres (2007), that when the 'weighting and balancing' analysis yields a preliminary conclusion of 'necessity', this conclusion needs to be confirmed by comparing the measure at issue with less trade-restrictive alternative measures. Note that in EC – Seal Products (2014) (concerning the 'necessity' requirement under Article XX(d), the Appellate Body held that 'in most cases' a comparison between the challenged measure and possible alternatives should be undertaken. Referring to its report in US – Tuna II (Mexico) (2012) (concerning the 'necessity' requirement under Article 2.2 of the TBT Agreement), the Appellate Body suggested that a comparison with alternative measures would not be required only when, for instance, the measure at issue is not trade-restrictive or makes no contribution to the achievement of the objective pursued.91 Note also that in EC – Seal Products (2014) the Appellate Body disagreed with the assertion that a preliminary determination of necessity is required before proceeding to compare the challenged measure with possible alternatives.92 As the Appellate Body held in US – COOL (Article 21.5 – Canada and Mexico) (2015) (concerning the 'necessity' requirement under Article XX(d) of the GATT 1994 and Article 2.2 of the TBT Agreement), the methodology to determine 'necessity' may be "tailored to the specific claims, measures, and facts at issue in a given case."93

2.2. Article XX(d)

As mentioned above, Article XX(d) concerns and can justify measures: 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 monopoly operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices. The list of 'laws or regulations', introduced by the word 'including', is clearly not exhaustive. Article XX(d) also covers types of 'laws and regulations' not listed. It thus allows for the pursuit of a wide range of policy objectives not limited to the policy objectives explicitly referred to.

Article XX(d) sets out a two-tier legal standard for the provisional justification of otherwise GATT-inconsistent measures.94 In Korea – Various Measures on Beef (2001), a dispute concerning Korean regulation on retail sales of both domestic and imported beef products (the dual retail system), allegedly designed to secure compliance with a consumer protection law, the Appellate Body ruled:

For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.95

Thus, for a GATT-inconsistent measure to be provisionally justified under Article XX(d) the measure: (1) must be designed to secure compliance with laws and regulations, such as customs law or intellectual property law, which are not themselves GATT-inconsistent; and (2) must be necessary to secure such compliance.96

With respect to the first element of the Article XX(d) analysis, namely, that the measure must be 'designed' to secure compliance, the Appellate Body held in Colombia – Textiles (2016) that:

a panel must examine the relationship between the measure and securing compliance with relevant provisions of laws or regulations that are not GATT-inconsistent.97

The Appellate Body considered that the terms 'to secure compliance' in Article XX(d) involve establishing the existence of such a relationship. The Appellate Body ruled that the relationship does not meet the requirements of the 'design' element of Article XX(d) analysis:

[i]f the assessment of the design of the measure, including its content, structure, and expected operation, reveals that the measure is incapable of securing compliance with relevant provisions of laws or regulations that are not GATT-inconsistent...98

It is clear that the examination of the 'design' of the measure is not a particularly demanding element of the Article XX(d) analysis. If the measure at issue is incapable of securing compliance, such that there is no relationship between the measure and securing compliance, further analysis with regard to whether this measure is 'necessary' would not be required. This is because there is no justification under Article XX(d) for a measure that is not 'designed' to secure compliance.99 However, as the Appellate Body noted,

97 See also Appellate Body Report, Japan – Solar Cells (2016), para. 5.58.
98 See also, referring to Appellate Body Report, Argentina – Financial Services (2016), para. 4.103, and Appellate Body Report, Mexico – Taxes on Soft Drinks (2003), para. 73.
a panel must not -- structure its analysis of the [design element] in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent’s defence relating to the ‘necessity’ analysis.99

The panel in Colombia — Textiles (2016) had found that there was no relationship between the compound tariff, the measure at issue, and securing compliance with Colombia’s anti-money laundering legislation. Therefore, the panel concluded that the measure at issue was not ‘designed’ to secure compliance with Colombia’s anti-money laundering legislation, and ceased its Article XX(d) analysis. The Appellate Body reversed this finding. On the basis of the panel’s own findings, the Appellate Body considered that the compound tariff is not incapable of securing compliance with Colombia’s anti-money laundering legislation, such that there is a relationship between the measure and securing such compliance. The Appellate Body therefore concluded that the measure at issue is ‘designed’ to secure compliance with Colombia’s anti-money laundering legislation. As the measure is ‘designed’ to secure compliance, the panel should not have ceased its Article XX(d) analysis at the ‘design’ element, but should have proceeded to the ‘necessity’ element of the analysis, so as not to foreclose crucial aspects of the respondent’s defence relating to the ‘necessity’ of the measure at issue.100

In EEC — Parts and Components (1990) the question arose whether the phrase ‘to secure compliance with laws or regulations’ could be interpreted to mean to ensure the attainment of the objectives of the laws or regulations concerned. The panel in this case rejected this interpretation. It observed that Article XX(d) does not refer to the objectives of laws or regulations, but only to laws or regulations, and concluded this provision covers measures designed to secure compliance with laws or regulations as such and not with their objectives.101 In the same vein, the panel in Colombia — Textiles (2016), and most recently the panel in Colombia — Textiles (2016), held that ‘to secure compliance’ means to enforce obligations rather than to ensure the attainment of the objectives of laws or regulations.102

With regard to the meaning of the terms ‘laws or regulations’ in the context of the phrase ‘to secure compliance with laws or regulations’ in Article XX(d), the Appellate Body held in India — Solar Cells (2016) that the terms ‘laws or regulations’ refer to rules of conduct and principles governing behaviour or practice that form part of the domestic legal system of a Member.103 With regard to the latter element (i.e. that form part of the domestic legal system), the Appellate Body referred to its report in Mexico — Taxes on Soft Drinks (2006) in which it held that:

[the terms ‘laws or regulations’ are generally used to refer to domestic laws or regulations. As Mexico and the United States note, previous GATT and WTO disputes in which Article XX(d) has been invoked as a defence have involved domestic measures. ... We agree with the United States that one does not immediately think about international law when confronted with the term ‘laws’ in the plural. ... In our view, the terms ‘laws or regulations’ refer to rules that form part of the domestic legal system of a WTO Member.104]

‘Laws or regulations’ within the meaning of Article XX(d) are thus ‘rules that form part of the domestic legal system of a Member’. However, as the Appellate Body already explicitly recognised in Mexico — Taxes on Soft Drinks (2006) and confirmed in India — Solar Cells (2016), the rules that form part of the domestic legal system of a Member include ‘rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member’s legal system.’105 In India — Solar Cells (2016), the Appellate Body ruled that:

An assessment of whether a given international instrument or rule forms part of the domestic legal system of a Member must be carried out on a case-by-case basis, in light of the nature of the instrument or rule and the subject matter of the law at issue, and taking into account the functioning of the domestic legal system of the Member in question.106

Note, however, that even if a particular international instrument can be said to form part of the domestic legal system of a Member, this does not, in and of itself, establish the existence of a rule, as a ‘law or regulation’ within the meaning of Article XX(d).107

With regard to the determination of whether a rule is a ‘law or regulation’ within the meaning of Article XX(d), the Appellate Body ruled in India — Solar Cells (2016) that:

a panel should evaluate and give due consideration to all the characteristics of the relevant instrument and should avoid focusing exclusively or solely on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognised by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments

99 See UIU, referring to Appellate Body Report, Applesides — Financial Services, para. 4.201.
101 GATT Panel Report, EEC — Parts and Components (1990), paras. 5.16—5.17.
103 See Appellate Body Report, India — Solar Cells (2016), para. 5.106.
104 See Appellate Body Report, Mexico — Taxes on Soft Drinks (2006), para. 6. Note that Mexico had argued before the panel that the measures at issue in this case were necessary to secure compliance by the United States with the United States’ obligations under the NAFTA. See Panel Report, Mexico — Taxes on Soft Drinks (2006), para. 8.142.
105 Appellate Body Report, Mexico — Taxes on Soft Drinks (2006), para. 73. See also Appellate Body Report, India — Solar Cells (2016), para. 5.140. As the Appellate Body observed in India — Solar Cells (2016), if subject to the domestic legal system of a Member, there may well be other ways in which international instruments or rules can become part of that domestic legal system.
107 See id., para. 5.144.
containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule." 108

As the Appellate Body explained, determining whether a rule is a 'law or regulation' within the meaning of Article XX(d) is relatively straightforward in case of a specific, legally enforceable rule under a single provision of a domestic legislative act. 109 However, in other cases such determination may be more complex. It is possible that a rule, which constitutes a 'law or regulation' within the meaning of Article XX(d), is not contained in a single instrument or a provision thereof, but that several elements of one or more instruments function together to set out a rule of conduct or course of action. 110 It is also possible that a rule, which cannot be enforced in a court of law, nevertheless sets out a rule of conduct or course of action, which constitutes a 'law or regulation'. 111 'Laws or regulations' may, in appropriate cases, include rules in respect of which a Member seeks to 'secure compliance', even when compliance is not coerced. 112

With regard to the meaning of the terms 'to secure compliance' in the context of the phrase 'to secure compliance with laws or regulations' in Article XX(d), the Appellate Body stated in Mexico - Taxes on Soft Drinks (2006) that these terms 'speak to the types of measures that a WTO Member can seek to justify under Article XX(d) and relate to the design of the measures sought to be justified. 113 The panel in that case had found that there was uncertainty regarding the effectiveness of the tax measures at issue, and that it was therefore not convinced that these measures were meant 'to secure compliance'. The Appellate Body, however, did not agree with this reasoning:

In our view, a measure can be said to be designed 'to secure compliance' even if the measure cannot be guaranteed to achieve its result with absolute certainty. Nor do we consider that the 'use of coercion' is a necessary component of a measure designed 'to secure compliance'. Rather, Article XX(d) requires that the design of the measure contribute 'to securing compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. 114

The Appellate Body further clarified in India - Solar Cells (2016) that an otherwise GATT-inconsistent measure can be said 'to secure compliance' with laws or regulations:

...when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations. 115

As the Appellate Body explained, it is important, in this regard, to distinguish between the specific rules, obligations or requirements with respect to which a measure seeks to secure compliance, on the one hand, and the objectives of the relevant laws or regulations on the other hand. 116 As the Appellate Body stated in India - Solar Cells (2016):

The 'more precisely' a respondent is able to identify specific rules, obligations, or requirements contained in the relevant 'laws or regulations', the 'more likely' it will be able to elucidate how and why the inconsistent measure secures compliance with such 'laws or regulations'. 117

With regard to the requirement that the 'laws or regulations' are not GATT-inconsistent, note that in EC - Trademarks and Geographical Indications (2005) the European Communities argued that the GATT-inconsistent measures at issue were employed to secure compliance with EU legislation, namely, EC Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. The panel found, however, EC Council Regulation (EEC) No. 2081/92 to be inconsistent with the GATT 1994, and therefore not to qualify as a 'law or regulation' within the meaning of Article XX(d). 118 Similarly, in Thailand - Cigarettes (Philippines) (2011), the panel rejected an Article XX(d) defence by Thailand that the measures at issue were necessary to secure compliance with Thai tax laws, because the panel had already found that these laws were GATT-inconsistent. 119

Article XX(d) requires that the laws or regulations are 'not inconsistent'. It does not require that the laws or regulations are consistent. This is not without consequence for the burden of proof which rests on the respondent. 120 The use of the double negative ('not inconsistent') suggests that the respondent must not positively show the consistency of the relevant law or regulation, unless that consistency is explicitly challenged by the complainant. Note, as the panel in Colombia - Textiles (2016) recalled, that:

the Appellate Body has made it clear that a responding Member's law should be treated as WTO-consistent until proven otherwise. 121

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108 Ibid., para. 5.113.
109 See id., para. 5.114.
110 See ibid., paras. 5.106-5.109 (regard to Article XVIII of the GATS; see below, pp. 612-614).
111 See Appellate Body Report, India - Solar Cells (2016), para. 5.229; 112 Ibid.
113 Ibid., para. 74, emphasis added.
115 Ibid., para. 5.113.
116 See Appellate Body Report, Argentina - Financial Services (2016), fn. 495 to para. 6.210. Note that the objections may arise in considering the context of specific rules, obligations or requirements of the laws or regulations.
119 See Panel Report, Thailand - Cigarettes (Philippines) (2011), para. 7.596. This latter finding was reversed on appeal but for a different reason. The Appellate Body was 'compelled' to reverse this panel finding because the panel made an obvious error in the relevant paragraphs of its report by referring to the wrong Thai legislation. See Appellate Body Report, Thailand - Cigarettes (Philippines) (2011), para. 7.596.
Finally, note that, as held by the panel in Korea – Various Measures on Beef (2001), a measure need not be designed exclusively to secure compliance with the relevant law or regulation. It is sufficient that the measure was put in place, at least in part, in order to secure compliance with the law or regulation.\footnote{See Panel Report, Korea – Various Measures on Beef (2001), para. 508.}

With respect to the second element of the Article XX(d) analysis, namely the "necessity" requirement, it was – as already noted above – in the context of a case involving Article XX(d) that the current approach to the interpretation and application of the "necessity" requirement was introduced by the Appellate Body. The case in question was Korea – Various Measures on Beef (2001). In its report in this case, the Appellate Body first noted that:

[Extract from the text]

The Appellate Body subsequently stated:

It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as necessary a measure designed as an enforcement instrument.

There are other aspects of the enforcement mechanism to be considered in evaluating that measure as necessary. One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at least.

The greater the contribution, the more easily a measure might be considered to be necessary.

Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce, that is, in respect of a measure inconsistent with Article III, restrictive effects on imported goods. A measure with a relatively slight impact upon imported products might more easily be considered as necessary than a measure with intense or broader restrictive effects.\footnote{See, for example, Appellate Body Report, Korea – Various Measures on Beef (2001), para. 145.}

The Appellate Body thus came to the following conclusion in Korea – Various Measures on Beef (2001) concerning the "necessity" requirement of Article XX(d):

In sum, 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.\footnote{See Panel Report, Korea – Various Measures on Beef (2001), para. 526. As noted by the Appellate Body in Korea – Various Measures on Beef (2001), the process of weighing and balancing these factors: is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-consistent measure is 'reasonably available'.\footnote{See Appellate Body Report, Korea – Various Measures on Beef (2001), para. 526.}

As noted in case law relating to Article XXI(a) of the GATT 1994, discussed below, and Article XXI(b) of the GATT 1994, discussed above, the "necessity" requirement under Article XX has been further clarified.\footnote{See Appellate Body Report, Korea – Various Measures on Beef (2001), para. 526.}

As the Appellate Body first ruled in US – Gambling (2005) with regard to the "necessity" requirement in Article XIV(a) of the GATS, it rests upon the complaining Member to identify possible alternative measures, after which it is for the responding Member to show that the proposed alternative measures are not reasonably available, are not less trade-restrictive or do not make an equivalent contribution to the objective pursued.\footnote{See Appellate Body Report, Korea – Various Measures on Beef (2001), para. 526.}

With regard to the "relative importance" of the interests or values protected (or intended to be protected) by the law or regulation with which compliance is to be secured, the Appellate Body held in Korea – Various Measures on Beef (2001):

Clearly, Article XX(d) is susceptible of application in respect of a wide variety of 'laws and regulations' to be enforced, it seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as necessary a measure designed as an enforcement instrument.\footnote{See Appellate Body Report, Korea – Various Measures on Beef (2001), para. 526.}

In Colombia – Parts of Entry (2010), for example, the panel found that combating under-invoicing and money laundering associated with drug trafficking was "a relatively more important reality for Colombia than for many other countries."\footnote{See Appellate Body Report, Colombia – Parts of Entry (2010), para. 5.143. The panel found that "the objective of securing compliance with the Colombian anti-money laundering legislation..."}
reflects social interests that can be characterized as vital and important in the highest degree.\footnote{572}

With regard to the ‘contribution’ of the measure to securing compliance with the law or regulation concerned, the panel in Colombia – Textiles (2016) noted that – as the Appellate Body ruled in Brazil – Retreaded Tyres (2007) \footnote{139} and Article XX(b) of the GATT 1994 \footnote{130} – that a measure contributes to the objective when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.\footnote{131} Note that in the context of its analysis under Article XX(a) \footnote{132}, discussed below, the Appellate Body ruled in Colombia – Textiles (2016) \footnote{133} that in assessing the contribution of the measure at issue to the objective it pursues:

a panel’s duty is to assess, in a qualitative or quantitative manner, the extent of the measure’s contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution.\footnote{134}

As the Appellate Body explained, this is, as it ruled previously, the greater the contribution of the measure at issue to the objective pursued, the more easily that measure might be considered to be ‘necessary’.\footnote{135} The Appellate Body also recalled that:

Since [a] measure’s contribution is ... only one component of the necessity calculus under Article XX, the assessment of whether a measure is ‘necessary’ cannot be determined by the degree of contribution alone, but will depend on the manner in which the other factors of the ‘necessity’ standard inform the analysis.\footnote{136}

Applying these considerations in the context of its analysis under Article XX(d) in Colombia – Textiles (2016), the Appellate Body found that Colombia, the respondent, did not demonstrate with sufficient clarity the extent, i.e. the degree, of the contribution made by the compound tariff to secure compliance with Colombia’s anti-money laundering legislation, and thus made it impossible to weigh and balance the contribution to the objective with the other factors in order to determine whether the measure at issue is ‘necessary’.\footnote{137}

With regard to the ‘trade-restrictiveness’ of the measure at issue, the Appellate Body found in Korea – Various Measures on Beef (2001) \footnote{138} that a measure with a relatively slight impact on imported products might more easily be considered as ‘necessary’ than a measure with an intense and broad trade-restrictive impact.\footnote{139}

On the other hand, it would be difficult for a panel to find a measure with severe trade-restrictive effects to be ‘necessary’, unless – as the Appellate Body found in Brazil – Retreaded Tyres (2007) \footnote{140} – that measure is apt to make a material contribution to the achievement of its objective.\footnote{141}

In the context of its analysis under Article XX(a), discussed below, the Appellate Body ruled in Colombia – Textiles (2016) \footnote{142} that in assessing the trade-restrictiveness of the measure at issue:

In assessing this factor, a panel must seek to assess the degree of a measure’s trade restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade.\footnote{143}

Similar to its finding on the contribution of the measure at issue to its objective, discussed above, the Appellate Body also found with regard to the trade-restrictiveness of the measure at issue that Colombia, the respondent, did not establish with sufficient clarity the degree of trade-restrictiveness of the measure, and thus made it impossible to weigh and balance this factor with the other factors in order to determine whether the measure at issue is necessary.\footnote{144}

Note that the panels in, for example, Canada – Wheat Exports and Grain Imports (2004), Colombia – Port of Entry (2009) and Colombia – Textiles (2016) \footnote{145} have applied the ‘necessity’ requirement of Article XX(d) as interpreted and clarified by the Appellate Body in Korea – Various Measures on Beef (2001).\footnote{146} Also note that the Appellate Body’s ruling in this case on the ‘necessity’ element of Article XX(d) formed the basis of the Appellate Body’s later rulings on the ‘necessity’ requirement of Article XIV(a) of the GATS (in US – Gambling (2005)), Article XX(b) of the GATT 1994 (in Brazil – Retreaded Tyres (2003)), Article XX(a) of the GATT 1994 (in EC – Seal Products (2014)) and Article XIV(c) of the GATS (in Argentina – Financial Services (2016)). However, this case law on the ‘necessity’ requirement did not cease to evolve.\footnote{147}

2.3 Article XX(g)

Article XX(g) concerns measures relating to the conservation of exhaustible natural resources. Like Article XX(b), it addresses measures that depart from core GATT rules for environmental protection purposes. Article XX(g) sets out a three-tier legal standard requiring that a measure: (1) relate to the conservation

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\footnote{572}{Panel Report, Colombia – Textiles (2016), para. 7.526.}
\footnote{139}{See Panel Report, Brazil – Retreaded Tyres (2007), para. 7.99, referring to Appellate Body Report, Brazil – Retreaded Tyres (2007), para. 7.45.}
\footnote{130}{Appellate Body Report, Colombia – Textiles (2016), para. 6.15, Note that the degree of a measure’s contribution to its objective may be expressed in a qualitative or quantitative manner. See ibid.}
\footnote{131}{See ibid., discussed below, p. 595.}
\footnote{133}{Appellate Body Report, Colombia – Textiles (2016), para. 6.934 and 6.97.}
\footnote{134}{See Panel Report, Colombia – Textiles (2016), para. 6.934 and 6.97.}
\footnote{135}{See Panel Report, Colombia – Textiles (2016), para. 6.934 and 6.97.}
\footnote{136}{See Panel Report, Colombia – Textiles (2016), para. 6.934 and 6.97.}
\footnote{137}{Appellate Body Report, Korea – Various Measures on Beef (2001), para. 183. See also Panel Report, Colombia – Textiles (2016), para. 7.496.}
\footnote{139}{Appellate Body Report, Colombia – Textiles (2016), para. 6.26, discussed below.}
\footnote{140}{See ibid., paras. 6.25 and 6.27.}
\footnote{142}{With regard to Article XX(d) of the GATT 1994, see above, pp. 522-44. With regard to Article XX(g) of the GATT 1994 and Article XV(d) and XVII(b) of the GATS, see below, pp. 570-90, 598-11 and 612-34.}
of exhaustible natural resources'; (2) 'relate to' the conservation of exhaustible natural resources; and (3) be 'made effective in conjunction with' restrictions on domestic production or consumption.

With respect to the first element of the analysis under Article XX(g), namely, that the measure must relate to the 'conservation of exhaustible natural resources', the Appellate Body ruled in China - Rare Earths (2012) that the term 'conservation' means 'the preservation of the environment, especially of natural resources'. Subsequently, the panel in China - Rare Earths (2014) recognised that, when interpreting the term 'conservation', the international law principles of sovereignty over natural resources and sustainable development should be taken into account. Understood in the light of every State's permanent sovereignty over their own natural resources, the panel considered that the term 'conservation' in Article XX(g):

does not simply mean placing a moratorium on the exploitation of natural resources, but includes also measures that regulate and control such exploitation in accordance with a Member's development and conservation objectives.413

Thus, the panel agreed with China that the term 'conservation' as used in Article XX(g) is not limited to mere preservation of natural resources.414 According to the panel, resource-endowed WTO Members are entitled under WTO law:

to design conservation policies that meet their development needs, determine how much of a resource should be exploited today and how much should be preserved for the future, including for use by future generations, in a manner consistent with their sustainable development needs and their international obligations.415

As the panel emphasised, the right of WTO Members to adopt conservation programmes is, however, not a right to control the international markets in which extracted products are bought and sold.416 The right of WTO Members to adopt 'conservation programmes' does not permit the exercise of boundless discretion such that WTO Members may adopt GATT-inconsistent measures as they see fit.417 The panel in China - Rare Earths (2014) noted:

In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood... China has, however, agreed to exercise its rights in conformity with WTO rules, and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources.418

413 Appellate Body Reports, China - Rare Earths (2012), para. 916.
414 See Panel Reports, China - Rare Earths (2011), para. 7.262-7.263. The panel argued that these principles should be taken into account pursuant to Article 31(2)(a) of the Vienna Convention on the Law of Treaties, since the panel in China - Rare Earths (2012) had held that the interpretation of Article XX(g) should 'take into account' the principle of sovereignty over natural resources. See Panel Reports, China - Rare Earths (2012), para. 7.261.
415 Panel Reports, China - Rare Earths (2014), para. 7.266.
416 See idd. 147-48, para. 7.261. See also Appellate Body Report, DS - Nigeria (under IV).
417 Panel Reports, China - Rare Earths (2014), para. 7.261.
418 Ibid, para. 7.260. See also Panel Reports, China - Rare Earths (2012), para. 7.362.

The meaning to be given to the term 'conservation' as used in Article XX(g) must strike an appropriate balance between trade liberalisation, sovereignty over natural resources and the right to sustainable development. To strike this balance, the panel in China - Rare Earths (2014), as the panel in China - Raw Materials (2012), gave a rather broad meaning to the term 'conservation', broader than the Appellate Body did in China - Raw Materials (2012). The panel's interpretation of the term 'conservation' was not appealed but the Appellate Body nevertheless noted in China - Rare Earths (2014):

It seems to us that, for the purposes of Article XX(g), the precise contours of the word 'conservation' can only be fully understood in the context of the exhaustible natural resource at issue in a given dispute. For example, 'conservation' in the context of an exhaustible natural resource may entail preservation through a moratorium in preparation for its extraction, or by snapping its extraction altogether. In respect of the 'conservation' of a living natural resource, such as a species facing the threat of extinction, the word may encompass not only limiting or halting the activities creating the danger of extinction, but also facilitating the replenishment of that endangered species.419

With regard to the concept of 'exhaustible natural resources', the Appellate Body adopted in US - Shrimp (1998) a broad, 'evolutionary interpretation. In this case, the complainants had taken the position that Article XX(g) was limited to the conservation of 'mineral' or 'non-living' natural resources. Their principal argument was rooted in the notion that 'living natural resources are renewable' and therefore cannot be 'exhaustible' natural resources. The Appellate Body disagreed. It noted:

We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible to depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as finite as petroleum, iron ore and other non-living resources.420

The Appellate Body further noted with regard to the appropriate interpretation of the concept of 'exhaustible natural resources':

The words of Article XX(g), 'exhaustible natural resources', were actually coined more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement - which informs not only the GATT 1994, but also the other covered agreements - explicitly acknowledges the objective of sustainable development.421

419 See Panel Reports, China - Rare Earths (2014), para. 7.261. An discussion above, the Appellate Body ruled in China - Raw Materials (2012) that the term 'conservation' means the protection of the environment, especially of natural resources.
420 Appellate Body Reports, China - Rare Earths (2014), para. 5.69.
... From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term of 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather by definition, evolutionary. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.154

The Appellate Body thus concluded on the scope of the concept of 'exhaustible natural resources' that measures to conserve exhaustible natural resources, whether living or non-living, may fail within Article XX(g).155

With respect to the second element of the analysis under Article XX(g), namely, that the measure must be a measure 'relating to' the conservation of exhaustible natural resources, the Appellate Body in US – Shrimp (1998), Article XX(g) requires a 'close and real' relationship between the measure and the policy objective. The means employed, i.e. the measure, must be reasonably related to the end pursued, i.e. the conservation of an exhaustible natural resource. A measure may not be disproportionately wide in its scope or reach in relation to the policy objective pursued. In China – Raw Materials (2012), the Appellate Body, referring to its report in US – Shrimp (1998) stated that:

[In order to fall within the ambit of Article XX(g), a measure must 'relate to' the conservation of exhaustible natural resources. The term 'relate to' is defined as 'having some connection with, being connected to'. The Appellate Body has found that, for a measure to relate to conservation in the sense of Article XX(g), there must be a close and genuine relationship of ends and means].156

In China – Rare Earths (2014), the panel stated that the assessment of whether a measure 'relates to' conservation must focus on the design and structure of that measure and that the analysis under Article XX(g) does not require an evaluation of the actual effects of the concerned measure.157 The Appellate Body found that the panel did not err in making these statements, but noted that a panel is 'not precluded from considering evidence relating to the actual operation or the impact of the measure at issue'.158

The third element of the analysis under Article XX(g), namely, that the measure at issue is 'made effective in conjunction with', has been interpreted and applied by the Appellate Body in US – Gasoline (1996) as follows:

[The clause 'if such measures are made effective in conjunction with', has been interpreted and applied by the Appellate Body in US – Gasoline (1996) as follows:

restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.159

Basicly, the third element of the Article XX(g) analysis is a requirement of 'even-handedness' in the imposition of restrictions on imported and domestic products. Article XX(g) does not require imported and domestic products to be treated identically; it merely requires that they are treated in an 'even-handed' manner. The Appellate Body in US – Gasoline (1996) stated in this respect:

There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment – consisting real, not merely formal, equality of treatment – it is difficult to see how inconsistency with Article III:4 would have arisen in the first place.160

Applying the 'even-handedness' requirement to the baseline establishment rules, the measure at issue in US – Gasoline (1996), the Appellate Body found that restrictions on the consumption or depletion of clean air by regulating the domestic production of 'dirty' gasoline were established 'jointly with corresponding restrictions with respect to imported gasoline'.161 The baseline establishment rules at issue in US – Gasoline (1996) thus met the 'made effective in conjunction with' requirement.

In US – Shrimp (1998), the Appellate Body confirmed its approach to the third element of the Article XX(g) analysis. It found in that case that the record reflected that the United States had – through earlier regulations – taken measures applicable to US shrimp trawl vessels to prevent the incidental killing of sea turtles. Because of these regulations imposing restrictions on domestic production, the import ban at issue in this case met the 'even-handedness' requirement of the third element of the Article XX(g) analysis.162

In China – Rare Earths (2014), China argued on appeal that the panel had considered the requirement of 'even-handedness' to be a separate requirement that must be fulfilled in addition to the conditions expressly set out in Article XX(g). The Appellate Body stated that:

[The term 'even-handedness' was used in US – Gasoline as a synonym or shorthand reference for the requirement in Article XX(g) that restrictions be imposed not only on international trade but also on domestic consumption or production. As we see it, 'even-handedness' is not a separate requirement to be fulfilled in addition to the conditions expressly set out in subparagraph (g). Rather, in keeping with the Appellate Body report in US – Gasoline, the terms of Article XX(g) themselves embody a requirement of even-handedness in the imposition of restrictions].163

As the panel's position on the requirement of 'even-handedness' was not clear, the Appellate Body concluded that the panel erred to the extent that it found that

154 Ibid., para. 129 and 130.
155 Ibid., para. 131. Here, that, in coming to this conclusion, the Appellate Body also referred to 'recent acknowledgement by the international community of the importance of protected, cultural, and intellectual actions in protecting natural resources.' See ibid. The Appellate Body also noted that already the panel in US – Canada (Timber, 1983), at para. 6.4, and Canada – Forest Products (1988), at para. 6.4, had found both to be an 'exhaustible natural resource.' See ibid.
157 See Panel Reports, China – Rare Earths (2014), paras. 7.208 and 7.378.
158 See Appellate Body Reports, China – Rare Earths, paras. 5.114.
161 161, 21, 20-20.
162 In regulations pursuant to the US Endangered Species Act, issued in 1987 and fully effective in 1990.
164 Appellate Body Reports, China – Rare Earths (2014), para. 9.124.
2.3.4 Publications and Audiovisual Products (2010) was the that the burden of conservation be evenly distributed between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. According to the Appellate Body, the panel erred to the extent that it found that the burden of conservation must be evenly distributed. The Appellate Body also noted, however, that it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g).

2.3.4.1 Article XX(a)

While Articles XX(b), (d) and (g) have frequently been invoked by respondents in GATT and WTO dispute settlement to justify otherwise GATT-inconsistent measures, Article XX(a), which concerns measures necessary for the protection of public morals, was virtually dormant until recently. The panel in China - Publications and Audiovisual Products (2010) was the first panel to interpret and apply Article XX(a). The measures at issue in that case concerned restrictions on trading and distribution of publications and audiovisual products in China. These measures provided for a content-review mechanism and a system for the selection of importation entities which played an essential role in the content review of imported publications and audiovisual products. Only 'approved' importation entities were authorised to import publications and audiovisual products. China invoked Article XX(a) to justify certain of these otherwise GATT-inconsistent restrictions on trading and distribution of publications and audiovisual products. According to China, these restrictions could be justified under Article XX(a) because the 'system of selecting importation entities undertaking content review is, as a whole, necessary to protect public morals'.

2.3.4.2 More recently, Article XX(a) was invoked by the European Union in EC - Seal Products (2014) and by Colombia in Colombia - Textiles (2016). In EC - Seal Products (2014), the European Union invoked Article XX(a) to justify the measures at issue, collectively referred to as the 'EU Seal Regime', which were found to be inconsistent with Articles I and III-4 of the GATT 1994. The EU Seal Regime prohibited the importation and placing on the EU market of seal products except where they were: (1) derived from hunts conducted by Inuit or other indigenous communities (EC exception); (2) derived from hunts conducted for marine resource management purposes (MMR exception); or (3) imported for the personal use of travellers. The European Union contended that the EU Seal Regime was adopted to address EU public moral concerns regarding animal welfare and in particular the welfare of seals. The European Union sought to justify the EU Seal Regime under Article XX(a) on the grounds that it was 'necessary to protect public morals'. In Colombia - Textiles (2016), Colombia invoked Article XX(a) to justify the compound tariff applied on imports of textiles, apparel and footwear, which had been found inconsistent with Articles II:1(a) and II:1(b), first sentence of the GATT 1994. Colombia contended that the compound tariff was an important instrument in the fight against money laundering linked with drug trafficking and other criminal activities and with Colombia's internal armed conflict. Colombia thus sought to justify the otherwise GATT-inconsistent compound tariff as necessary to protect public morals in Colombia.

In Colombia - Textiles (2016), the Appellate Body ruled:

In order to establish whether a measure is justified under Article XX(a), the analysis proceeds in two steps. First, the measure must be 'designed' to protect public morals. Second, the measure must be 'necessary' to protect such public morals.

With regard to the first step, or element, of the Article XX(a) analysis, i.e. the examination of the 'design' of the measure at issue, the Appellate Body held in Colombia - Textiles (2016):

the phrase 'to protect public morals' calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection of public morals. If this assessment reveals that the measure is incapable of protecting public morals, there is no relationship between the measure and the protection of public morals.

If a measure is incapable of protecting public morals and is therefore not 'designed' to protect public morals, there is no need for a panel to engage in the second step, or element, of the Article XX(a) analysis, namely an examination...
of whether the measure at issue is 'necessary' to protect public morals. It is because there is no justification under Article XX(a) for a measure that is not 'designed' to protect public morals. However, as the Appellate Body also noted in Colombia – Textiles (2016):

if the measure is not incapable of protecting public morals, this indicates the existence of a relationship between the measure and the protection of public morals. In this situation, further examination of whether the measure is 'necessary' is required under Article XX(a).

It is clear that the examination of the 'design' of the measure is not a particularly demanding element of the Article XX(a) analysis. A measure is considered to be 'designed' to protect public morals if it is not incapable of protecting public morals, such that there is a relationship between the measure and the objective of protecting public morals. By contrast and as discussed below, the examination of the 'necessity' of the measure at issue, i.e. the second element of the Article XX(a) analysis, entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the protection of public morals. As the Appellate Body noted in Colombia – Textiles (2016):

a panel must not structure its analysis of the [design] element in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the 'necessity' analysis.

The panel in Colombia – Textiles (2016) had found that there was no relationship between the compound tariff, the measure at issue, and combating money laundering, one of the policies designed to protect public morals in Colombia. Therefore, the panel concluded that the measure at issue was not 'designed' to combat money laundering and therefore not 'designed' to protect public morals. The Appellate Body reversed this finding. On the basis of the panel's own findings, the Appellate Body considered that the compound tariff was not incapable of combating money laundering, such that there is a relationship between the measure at issue and the protection of public morals. The Appellate Body therefore concluded that the measure at issue is 'designed' to protect public morals. As the measure is 'designed' to protect public morals, the panel should not have ceased its Article XX(a) analysis at the 'design' element, but should have proceeded to the 'necessity' element of the analysis, so as not to foreclose crucial aspects of the respondent's defence relating to the 'necessity' of the measure at issue.

With respect to the term 'public morals', the panels in China – Publications and Audiovisual Products (2010), EC – Seal Products (2014) and Colombia – Textiles (2016) all adopted the interpretation given to the term 'public morals' in the context of Article XVI(a) of the GATS by the panel in US – Gambling (2005). As discussed below, the panel in US – Gambling (2005) found, in brief, that:

(1) the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation;
(2) the content of the concept of 'public morals' can vary from Member to Member, depending upon a range of factors, including prevailing social, cultural, ethical, and religious values; and
(3) Members should be given some scope to define and apply for themselves the concept of 'public morals' in their respective territories, according to their own systems and scales of values.

In line with this deferential interpretation of the concept of 'public morals', the panel in China – Publications and Audiovisual Products (2010) proceeded with its analysis on the assumption that:

each of the prohibited types of content listed in China's measures is such that, if it were brought into China as part of a physical product, it could have a negative impact on 'public morals' in China within the meaning of Article XX(a) of the GATT 1994.

In EC – Seal Products (2014), the panel found that EU public concerns regarding animal welfare, and in particular the welfare of seals, fell within the scope of the concept of 'public morals' under Article XX(a) of the GATT 1994. In Colombia – Textiles (2016), the panel found that Colombia had presented sufficient evidence to demonstrate the existence of a real and present concern in Colombia with regard to money laundering, as well as with regard to the way in which money laundering is linked with drug trafficking and other criminal activities and with Colombia's internal armed conflict. The panel therefore concluded that 'combating money laundering is one of the policies designed to protect public morals in Colombia.'

To determine whether the policy objective pursued by the measure at issue is the protection of public morals, a panel has in the very first place to identify the policy objective of the measure. This is not always a straightforward exercise. A panel


176 Appellate Body Report, Colombia – Textiles (2016), paras. 6.71 and 6.75. 177 See ibid., para. 6.73.

178 See ibid. As discussed below, the examination of the 'necessity' of the measure at issue involves a process of weighing and balancing a series of factors, including the importance of the interests or values at stake, the contribution of the measure to the objective pursued and the trade-mitigation impact of the measure. Indeed, in most cases, a distinction between the challenged measure and possible alternatives should ultimately be undertaken. See below, p. 594.

179 See ibid., para. 6.73, referring to Appellate Body Report, Argentina – Financial Services, para. 6.203. If a panel finds that the measure at issue makes some degree of contribution to the objective pursued, but seems to achieve other functions, namely the importance of the interests or values at stake, the contribution of the measure to the objective pursued and the trade-mitigation impact of the measure at issue, it would necessarily be an error in law. Without the determination of whether the degree of the contribution, when weighed and balanced against the degree of trade-mitigation and the importance of the interests pursued, is sufficient to justify the measure under Article XX(a). See ibid., para. 6.43.


182 See Annex pp. 319-320. See ibid. eg. Panel Report, Colombia – Textiles (2016), para. 7.340. Note that the finding by the panel was not appealed and that it was therefore not addressed by the Appellate Body.

183 See Panel Reports, EC – Seal Products (2014), paras. 7.441.

may well be confronted with conflicting arguments by the parties as to what is or are the objective(s) pursued by the measure at issue. In EC – Seal Products (2004), Norway argued on appeal that the panel had erred in finding that the ‘sole’ objective of the EU Seal Regime was to address EU public moral concerns regarding seal welfare. According to Norway, the protection of the interests of Inuit communities (IC interests) and the promotion of the interests of marine resources management (MERM interests) were also policy objectives pursued by the EU Seal Regime. The European Union argued that the panel correctly found that the ‘principal’ or ‘main’ objective of the EU Seal Regime was to address EU public moral concerns regarding the welfare of seals. The Appellate Body held that:

A panel 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.

After a careful examination of the panel report, the Appellate Body disagreed with Norway that the panel had found that the ‘sole’ objective of the EU Seal Regime was to address EU public moral concerns regarding seal welfare. According to the Appellate Body the panel had found that the ‘principal’ objective of the EU Seal Regime was to address public concerns on seal welfare and that IC and other interests had been ‘accommodated’ in the EU Seal Regime so as to mitigate the impact of the Regime on those interests.

In Colombia – Textiles (2016), the Appellate Body held that in order to determine whether a relationship between the measure at issue and the objective of protecting public morals exists, or, in other words, whether the measure at issue is ‘designed’ to protect public morals:

- a panel must examine evidence regarding the design of the measure at issue, including its content, structure, and expected operation.

The Appellate Body observed that the measure at issue may expressly mention an objective falling within the scope of ‘public morals’ in that society. However, such express reference may not, in and of itself, be sufficient to establish that the measure is ‘designed’ to protect public morals. Conversely, the Appellate Body also observed:

- a measure that does not expressly refer to ‘public morals’ may nevertheless be found to have such a relationship with public morals following an assessment of the design of the measure at issue, including its content, structure, and expected operation.

In EC – Seal Products (2014), Canada, one of the complainants, claimed on appeal that the panel had erred in finding that the EU Seal Regime was ‘designed’ to protect public morals within the meaning of Article XX(a). According to Canada, the phrase ‘to protect’ requires the identification of a risk to public morals against which the EU Seal Regime seeks to protect. Canada based its argument on the statement of the panel in EC – Asbestos (2001) that ‘the notion of “protection” … implies the existence of a health risk’. The Appellate Body, however, observed that this statement was made in the context of Article XX(b) which focuses on the protection of human, animal or plant life or health and that the protection of human, animal, or plant life or health may well ‘imply a particular focus on the protection from or against certain dangers or risks’. According to the Appellate Body, the notion of risk in the context of Article XX(b) is, however, ‘difficult to reconcile with the subject-matter of protection under Article XX(a), namely, public morals’. Contrary to Canada, the Appellate Body therefore did not consider that:

- the term ‘to protect’, when used in relation to ‘public morals’ under Article XX(a), required the Panel — to identify the existence of a risk to EU public moral concerns regarding seal welfare.

In the same vein, the Appellate Body also had ‘difficulty’ accepting Canada’s argument that ‘a panel is required to identify the exact content of the public morals standard at issue’. The Appellate Body recalled that, as the panel in US – Gambling (2005) had stated, that the content of public morals can be characterized by a degree of variation, and, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values.

Finally, note that the Appellate Body, in EC – Seal Products (2014), ruled that a Member has the right to determine the level of protection of public morals that it considers appropriate; and that Members may thus set different levels of protection even when responding to similar interests of moral concern. The fact that the European Union sets different levels of protection with regard to animal welfare risks in seal hunts than with regard to animal welfare risks in EU slaughterhouses or terrestrial wildlife hunts is therefore irrelevant to whether the EU Seal Regime is a measure ‘designed to protect public morals’ within the meaning of Article XX(a).

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184. See Appellate Body Reports, Colombia – Textiles (2016), para. 6.22.
185. Id.

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191. Note that Canada did not directly challenge the panel’s finding that there are public moral concerns in relation to animal welfare in the European Union.
194. See id., para. 5.186. 195. Id.
198. See id., para. 5.186.
With regard to the second element of the Article XX(a) analysis, namely the 'necessity' requirement, the panel in China – Publications and Audiovisual Products (2010) first recalled that it is the measures at issue (i.e. the restrictions on trading and distribution), and not the policy objective pursued (i.e. the content review and the protection of 'public morals'), that must be 'necessary'.

Subsequently, the panel engaged in the examination of the 'necessity' of the measures at issue. Very much in line with the case law on the 'necessity' requirement of Article XX(b) and (d) of the GATT 1994, the panel: (1) identified the importance of the interests or values at stake;298 (2) identified, for each of the measures at issue, the contribution made to the achievement of the protection of 'public morals'; and (3) identified the restrictive impact on international trade of each of the measures at issue.299 The panel then 'weighed and balanced' these three factors, and came to the conclusion with regard to some of the measures at issue that they were not necessary to protect public morals,300 while with regard to other measures it concluded that – absent reasonably available, less trade-restrictive alternative measures – these measures could be characterized as 'necessary'.301 For the latter measures, the panel subsequently analysed the alternative measures proposed by the United States and came to the conclusion that, because at least one less trade-restrictive alternative measure was available, the measures at issue were not 'necessary' to protect public morals.302 On appeal, the Appellate Body upheld most of the panel's intermediate findings and upheld the panel's conclusion that the measures at issue were not 'necessary' to protect public morals.303 The Appellate Body observed:

The less restrictive the effects of the measure, the more likely it is to be characterized as 'necessary'. Consequently, if a Member chooses to adopt a more restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the 'necessity' of the measure will 'outweigh' such restrictive effect.304

Referring to and in line with its prior case law on the 'necessity' requirement, the Appellate Body held in EC – Seal Products (2014):

As the Appellate Body has explained, a necessity analysis involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.

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298 See Panel Report, China – Publications and Audiovisual Products (2010), para. 7.303. The panel echoed its 2006 statement that this element of the necessity analysis is 'difficult to define, as it is concerned with the historical context of the particular issue under examination'.
299 See para. 7.977, noting that in the TBT context the 'necessity' requirement was 'clearly intended to serve as an additional safeguard against over-restrictive measures'.
300 See ibid., para. 7.884.
301 See e.g. ibid., para. 7.886.
302 See also ibid., paras. 7.886 and 7.888.
303 See e.g. ibid., paras. 7.886 and 7.888.
304 See ibid., para. 7.886.
305 See ibid., paras. 7.886 and 7.888.
306 See e.g. ibid., paras. 7.886 and 7.888.
307 See e.g. ibid., para. 7.886.
308 See ibid., para. 7.886. This alternative measure proposed by the United States was a measure under which the Chinese government would in given the said responsibility for the conduct of the content review.
310 See ibid., para. 310.
312 See ibid., para. 7.809. This alternative measure proposed by the United States was a measure under which the Chinese government would in given the said responsibility for the conduct of the content review.
314 See ibid., para. 310.
According to the Appellate Body, the panel in EC – Seal Products (2014) erred to the extent that it applied a standard of ‘materiality’ as a generally applicable predetermined threshold in its contribution analysis.216

The panel in EC – Seal Products (2014) also found that the EU Seal Regime contributed to a certain extent to its objective of addressing the EU public moral concerns on seal welfare.217 On appeal Canada and Norway argued that the panel failed to make ‘clear and precise’ findings regarding the ‘actual’ contribution of the EU Seal Regime to the identified objective, and that ‘such findings were required in order to establish which alternative measures could be compared.218 However, as already discussed above, the Appellate Body held in Brazil – Retreaded Tyres (2007) that a panel enjoys certain latitude in choosing its approach to analyse the contribution made; that such an analysis may be performed in qualitative or quantitative terms; and that it ultimately depends upon ‘the nature of the risk, the objective pursued, and the level of protection sought’ as well as on ‘the nature, quantity, and quality of evidence existing at the time the analysis is made’.219

In EC – Seal Products (2014), the panel had opted for a qualitative ‘contribution’ analysis, which focused mainly on the design and expected operation of the EU Seal Regime.220 Such ‘contribution’ analysis may be by its nature not to ‘clear and precise’ findings regarding the ‘actual’ contribution of the EU Seal Regime to the objective of addressing the EU public moral concerns on seal welfare. The Appellate Body considered, however, that in the circumstances of this case and the information available to the panel such ‘contribution’ analysis was not improper.221

In Colombia – Textiles (2016), the Appellate Body ruled that in assessing the contribution of the measure at issue to the objective it pursues:

a panel’s duty is to assess, in a qualitative or quantitative manner, the extent of the measure’s contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution.222

As the Appellate Body explained, this is because, as it ruled previously, the greater the contribution of the measure at issue to the objective pursued, the more easily that measure might be considered to be ‘necessary’.223 The Appellate Body also recalled that:

Since [a] measure’s contribution is...only one component of the necessity calculus under Article XX, the assessment of whether a measure is ‘necessary’ cannot be determined by

the degree of contribution alone, but will depend on the manner in which the other factors of the ‘necessity’ standard inform the analysis.224

In Colombia – Textiles (2016), the Appellate Body found that Colombia, the respondent, did not demonstrate with sufficient clarity the extent, i.e. the degree, of the contribution made by the compound tariff to the objective of combating money laundering, and thus made it impossible to weigh and balance the contribution to the objective with the other factors in order to determine whether the measure at issue is ‘necessary’.225

With respect to the trade-restrictiveness of the measure at issue, the Appellate Body held in Colombia – Textiles (2016) that:

In assessing this factor, a panel must seek to assess the degree of a measure’s trade restrictiveness, rather than merely ascertaining whether or not the measure ‘lazies some restric-


216 See id., para. 5.216. For more details, see above, paras. 160–4.


220 See Appellate Body Reports, EC – Seal Products (2014), para. 5.220.

221 See id., paras. 5.222 and 5.224. See also the statement in para. 5.308 that “It is not clear what greater clarity or precision the Panel could have achieved by the circumstances of this case”.


224 See Appellate Body Report, Colombia – Textiles (2016), paras. 5.219 and 6.22.

225 See id., para. 5.218. See also Appellate Body Report, Australia – Financial Services (2006), paras. 6.224, regarding Article XX(c)(2) of the GATT, discussed above, paras. 603–4.

226 Id., para. 5.218. See also Appellate Body Report, Colombia – Tariffs (2006), paras. 8.46 and 8.62.


228 With the measurement of a measure’s contribution to its objective, the examination of a measure’s trade-restrictiveness may be done in a qualitative or quantitative manner. See id.


Products (2014) the Appellate Body disagreed with the assertion that 'a preliminary determination of necessity is required before proceeding to compare the challenged measure with possible alternatives'.

In EC – Seal Products (2014), the complainants, Canada and Norway, proposed an alternative measure for the EU Seal Regime market access for seal products, which would be conditioned on compliance with animal welfare standards, and certification and labelling requirements. The panel concluded this alternative measure was not reasonably available. On appeal, the Appellate Body upheld this conclusion. The Appellate Body considered that the panel had established that the alternative measures proposed by Canada and Norway would not allow the European Union to achieve its desired level of protection of the public moral concerns regarding seal welfare. The panel was thus correct to conclude that the alternative measure was not reasonably available. Note that in this context of its review of the panel’s assessment of the alternative measure proposed by Canada and Norway, the Appellate Body observed:

As we see it, if there are reasons why the prospect of imposing an alternative measure faces significant, even prohibitive, obstacles, it may be that such a measure cannot be considered ‘reasonably available’. We would not exclude a priori the possibility that an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry.

Thus, in assessing whether an alternative measure is reasonably available, the burden on the industry or industries concerned can potentially also be of relevance.

In Colombia – Textiles (2016) the Appellate Body recalled that it had ruled in US – Gambling (2005) that an alternative measure may be found not to be 'reasonably available' where 'it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.'

Finally, a comment regarding the relationship between the 'design' and 'necessity' elements of the analysis under Article XX(i). In Colombia – Textiles (2016), the Appellate Body held that these two steps, or elements, are:

categorically distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure in issue is 'necessary to protect public morals'. As the assessment of those two steps is not entirely disjuncted, there may, in fact, be some overlap in the sense that certain evidence and considerations may be relevant to both aspects of the defence under Article XX(i).

While Article XX(i) has only been invoked three times in dispute settlement proceedings to date, it is frequently 'used' (explicitly or otherwise) by Members to impose import bans or restrictions on a wide array of products. Bangladesh, for example, invokes Article XX(i) to justify an import ban on horror comics, obscene and subversive literature and 'maps, charts and geographical globes which indicate the territory of Bangladesh but do not do so in accordance with the maps published by the Department of Survey, Government of the People’s Republic of Bangladesh'. From the Report of the Working Party on the Accession of Saudi Arabia, it appears that this Member, which acceded to the WTO in December 2005, invokes Article XX(i) of the GATT 1944 to ban the importation of the Holy Quran; alcoholic beverages and intoxicants of all kinds; all types of machines, equipment and tools for gambling or games of chance; live swine, meat, fat, hair, blood, guts, limbs and all other products of swine; dogs (other than hunting dogs, guard dogs or guide dogs for the blind); mummified animals; and all foodstuffs containing animal blood in their manufacturing.

233 Appellate Body Report, Colombia – Textiles (2016), para. 6.28, referring to Appellate Body Report, Argentina – Financial Services (2014), para. 5.233, regarding Article XX(i) of the GATS, discussed below, pp. 6.86-8.12, in Colombia – Textiles (2016). The Appellate Body noted that in the context of the 'sole issue' step of the analysis, a panel is not precluded from taking into account evidence and considerations that may also be relevant to the assessment of the contribution of a measure to the context of the examination of 'necessity'. See also para. 6.33. See also Appellate Body Report, India – Solar Cells (2014), para. 5.61, regarding Article XX(i) and Article XX(ii) of the GATT 1944. See above, pp. 5.46-7 and below, pp. 5.48-9.


241 Article XX(i) further states: 'Provided that any such measures shall be consistent with the principle that all Members are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement, shall be discontinued as soon as the conditions giving rise to them have ceased to exist.'


235 Appellate Body Report, Colombia – Textiles (2016), para. 6.29, referring to Appellate Body Report, Argentina – Financial Services (2014), para. 5.233, regarding Article XX(i) of the GATS, discussed below, pp. 6.86-8.12, in Colombia – Textiles (2016). The Appellate Body noted that in the context of the 'sole issue' step of the analysis, a panel is not precluded from taking into account evidence and considerations that may also be relevant to the assessment of the contribution of a measure to the context of the examination of 'necessity'. See also para. 6.33. See also Appellate Body Report, India – Solar Cells (2014), para. 5.61, regarding Article XX(i) and Article XX(ii) of the GATT 1944. See above, pp. 5.46-7 and below, pp. 5.48-9.


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supply' within the meaning of Article XX(i). The objective of the DCR measures was, according to India, to ensure access of Indian solar power producers to a continuous and affordable supply of the solar cells and modules needed to generate solar power.

For an otherwise GATT-consistent measure to be provisionally justified under Article XX(i), a Member must establish that: (1) the measure is ‘designated’ to address the acquisition or distribution of products in general or local short supply; and (2) the measure is ‘essential’ to address the acquisition or distribution of such products.241

With regard to the concept of ‘products in general or local short supply’, the panel in India – Solar Cells (2016), found that this concept refers to:

a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market. They do not refer to products in respect of which there merely is a lack of domestic manufacturing capacity.242

As India had not argued that the quantity of solar cells and modules available from all sources, i.e. both international and domestic, is inadequate to meet the demand in India,243 the panel concluded that solar cells and modules are not ‘products in general or local short supply’ in India, and that therefore the DCR measures cannot be justified under Article XX(i) of the GATT 1994.244 India appealed the panel’s interpretation and application of Article XX(i), and in particular the ‘products in general or local short supply’ requirement. India argued that the existence of a situation of ‘short supply’ within the meaning of Article XX(i) is to be determined exclusively by reference to whether there is ‘sufficient’ domestic manufacturing of a given product. The Appellate Body disagreed with India and upheld the panel’s findings.245 The Appellate Body ruled in India – Solar Cells (2016) that:

Article XX(i) of the GATT 1994 reflects a balance of different considerations to be taken into account when assessing whether products are ‘in general or local short supply’.246

In determining whether a product is in ‘general or local short supply’, a panel should examine:

the extent to which a particular product is ‘available’ for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be ‘in general or local short supply’, but also such factors as the relevant product and geographical market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad.247

243 See id., para. 7.44.
244 See Appellate Body Report, India – Solar Cells (2016), para. 5.40.
245 Ibid., para. 5.39.
246 Ibid.

The Appellate Body emphasised in particular that:

Due regard should be given to the total quantity of imports that may be ‘available’ to meet demand in a particular geographical area or market. It may thus be relevant to consider the extent to which international supply of a product is stable and accessible, by examining factors such as the distance between a particular geographical area or market and production sites as well as the reliability of local or transnational supply chains.248

The factors that are relevant in determining whether products are ‘in general or local short supply’ within the meaning of Article XX(i), will necessarily depend on the particularities of each case. In all cases, however, the respondent has the burden of demonstrating that the quantity of ‘available’ supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.249

In the light of its finding that the products at issue were not ‘in general or local short supply’ within the meaning of Article XX(i), it was unnecessary for the panel to make any further findings on whether the DCR measures are ‘essential’ to the acquisition of solar cells and modules for the purpose of Article XX(i). The panel therefore did not make such findings.250 However, while leaving aside the question of whether the terms ‘essential’ and ‘necessary’ establish the same legal threshold, the panel in India – Solar Cells (2016) noted that:

the parties agree that the threshold for establishing that a measure is ‘essential’ under XX(i) is at least as high as that for establishing that a measure is ‘necessary’ under Article XX(i). The parties further agree that the general analytical framework that would need to be applied to assess whether the DCR measures are ‘essential’ under Article XX(i) is similar to the two-step analysis of assessing whether a measure is ‘necessary’ to realise a given objective. [All of the third parties... also seem to agree with the foregoing.]251

On appeal, also the Appellate Body, after upholding the panel’s finding that the products at issue were not ‘in general or local short supply’, saw no need to further examine whether the measures at issue were provisionally justified under Article XX(i). However, the Appellate Body noted that:

the analytical framework for the ‘design’ and ‘necessity’ elements of the analysis contemplated under Article XX(i) is relevant mutatis mutandis also under Article XX(i).252

With regard to the examination of whether a measure is ‘essential’ within the meaning of Article XX(i), the Appellate Body recalled that, as it had stated in its case law under Article XX(i), in a continuum ranging from ‘indispensable’ to ‘making a contribution to’, a ‘necessary’ measure is located significantly closer

241 Emphasis added. The Appellate Body observed in this regard that the different levels of economic development of Members may, depending on the circumstances, impact the ‘availability’ of supply of a product in a given market. Developing countries may be more vulnerable to disruptions in supply than developed countries. See id., para. 5.23.
243 See id., para. 7.385.
244 See Appellate Body Report, India – Solar Cells (2016), para. 5.40.
245 Ibid., para. 5.39. 251 Ibid.
246 Appellate Body Report, India – Solar Cells (2016), para. 5.40. On the analytical framework for the ‘design’ and ‘necessity’ elements of the analysis under Article XX(i) (as Article XX(i) import exchanges, pp. 184–7 and 516–9.)
2.3.6 Other Paragraphs of Article XX

In addition to Articles XX(a), (b), (d), (g) and (j) of the GATT 1994, also Articles XX(e) and (f) deserve to be mentioned, albeit briefly, as there is no relevant case law on either provision.

Article XX(e) of the GATT 1994 concerns measures "relating to" the products of prison labour. On the basis of Article XX(e), Members can, for example, ban the importation of goods that have been produced by prisoners. Article XX(e) is currently of little importance, and there is no case law under this paragraph to date. It has been suggested, however, that this could change if an evolutionary interpretation of the concept of "products of prison labour" would allow this concept to include products produced in conditions of slave labour or conditions contrary to the most fundamental labour standards. 255

Article XX(f) concerns measures "imposed for" the protection of national treasures of artistic, historic or archaeological value. It allows Members to adopt or maintain otherwise GATT-inconsistent measures for the protection of national treasures. Note that Article XX(f) does not require that these measures are "necessary" for, but merely that they are "imposed for", the protection of national treasures. There is no case law on Article XX(f) to date. If the concept of "national treasures of artistic value" could be given a broad meaning to include also "endangered" cultural goods, Article XX(f) may be useful to justify import and export restrictions or bans imposed for the protection and promotion of cultural identity and/or diversity.

2.4 Chapeau of Article XX of the GATT 1994

As discussed above, Article XX sets out a two-tier test for determining whether a measure, otherwise inconsistent with GATT obligations, can be justified. First, a measure must meet the requirements of one of the particular exceptions listed in the paragraphs of Article XX. Second, the application of that measure must meet the requirements of the chapeau of Article XX. The legal requirements imposed by the chapeau of Article XX of the GATT 1994 have been highly relevant in dispute settlement practice. Several of the most controversial decisions by panels and the Appellate Body have turned on these requirements. The Chapeau of Article XX, with regard to measures provisionally justified under one of the paragraphs of Article XX, imposes:

- 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.

Note that by its express terms, the chapeau of Article XX addresses not so much the measure at issue as such, but focuses on the "application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX." 256

2.4.1 Object and Purpose of the Chapeau of Article XX

With respect to the object and purpose of the chapeau of Article XX, the Appellate Body ruled in US - Gasoline (1996):

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned. 257

Further, in US - Shrimp (1998), the Appellate Body stated with regard to the chapeau:

We consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or reduce the substantive treaty rights in, for example, Article XXXI, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. 258

In short, the object and purpose of the chapeau of Article XX is to avoid that provisionally justified measures are applied in such a way as would constitute a

256 Ibid.
minue or an abuse of the exceptions of Article XX. According to the Appellate Body, a balance must be struck between the right of a Member to invoke an exception under Article XX and the substantive rights of the other Members, under the GATT 1994. The chapeau was inserted at the head of the list of 'General Exceptions' in Article XX to ensure that this balance is struck and to prevent abuse.\(^{361}\) The Appellate Body held in US - Shrimp (1998):

In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a limited and conditional exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.\(^{362}\)

According to the Appellate Body, the chapeau of Article XX is an expression of the principle of good faith, a general principle of law as well as a general principle of international law, which controls the exercise of rights by States. As the Appellate Body held:

One application of this general principle, the application widely known in the doctrine of 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 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.\(^{363}\)

In light of the above, the Appellate Body came to the following conclusion in US - Shrimp (1998) with respect to the interpretation and application of the chapeau:

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XII) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.\(^{364}\)

In short, the interpretation and application of the chapeau in a particular case is a search for the appropriate line of equilibrium between, on the one hand, the right of Members to adopt and maintain trade-restrictive legislation and measures that pursue certain legitimate societal values or interests and, on the other hand, the right of other Members to trade. The search for this line of equilibrium is guided by the requirements set out in the chapeau that the application of the trade-restrictive measure may not constitute: (1) 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'; or (2) 'a disguised restriction on international trade'. The following subsections examine these requirements of the chapeau in more detail.\(^{365}\)

2.4.2 Arbitrary or Unjustifiable Discrimination

For a measure to be justified under Article XX, the application of that measure, pursuant to the chapeau of Article XX, may not constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'. In US - Gasoline (1996), the Appellate Body found that the 'discrimination' at issue in the chapeau of Article XX must necessarily be different from the discrimination addressed in other provisions of the GATT 1994, such as Articles I and III. The Appellate Body stated:

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the [measure at issue] [was] inconsistent with Article III.4 ... The provisions of the chapeau cannot logically refer to the same standard by which a violation of a substantive rule has been determined to have occurred.\(^{366}\)

As the Appellate Body noted, the chapeau of Article XX does not prohibit discrimination per se, but rather arbitrary or unjustifiable discrimination.\(^{367}\) In US - Shrimp (1998), the Appellate Body found that three elements must exist for 'arbitrary or unjustifiable discrimination' to be established: (1) the application of the measure at issue must result in discrimination; (2) this discrimination must be arbitrary or unjustifiable in character; and (3) this discrimination must occur between countries where the same conditions prevail.\(^{368}\) The Appellate Body further elaborated on the concept of 'discrimination' within the meaning of the chapeau of Article XX, and stated:

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that 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, so that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.

\(^{361}\) Note that while there are some similarities between the chapeau of Article XX of the GATT 1944 and Article 1.1 of the TRIPs Agreement, the Appellate Body ruled in EC - Seal Products (2004), para. 5.297, that given the differences between the legalities under the chapeau of Article XX of the GATT 1944 and Article 1.1 of the TRIPs Agreement, the panel need in applying the same legal test to the chapeau of Article XX as it applies under Article 1.1 of the TRIPs Agreement, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.


\(^{363}\) Ibid., para. 158. See also Appellate Body Report, Brazil - Applicable Zs (2003), paras. 213 and 224.


\(^{365}\) See also Appellate Body Reports, EC - Seal Products (2004), paras. 5.297.


\(^{367}\) Ibid., paras. 153 and 155. See also Appellate Body Report, Brazil - Applicable Zs (2003), para. 198. This was reiterated in Appellate Body Report, Brazil - Applicable Zs (2003), para. 224.

\(^{368}\) Appellate Body Report, EC - Seal Products (2004), para. 5.396.

We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.\(^{271}\)

The Appellate Body came to the conclusion in US - Shrimp (1998) that the measure at issue constituted 'arbitrary discrimination' as follows:

Section 609, in its application, imposes a single, rigid and unyielding requirement that countries applying for certification... adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute 'arbitrary discrimination' within the meaning of the chapeau.\(^{272}\)

The Appellate Body thus decided that discrimination may result when the same measure is applied to countries where different conditions prevail. When a measure is applied without any regard for the difference in conditions between countries this measure is applied in a rigid and inflexible manner, the application of the measure may constitute 'arbitrary discrimination' within the meaning of the chapeau of Article XX.

To implement the recommendations and rulings in US - Shrimp (1998), the United States modified the measure at issue in this case. Malaysia challenged the GATT consistency of the implementing measure in an Article 21.5 proceeding.\(^{273}\)

The panel in US - Shrimp (Article 21.5 - Malaysia) (2003) concluded that, unlike the original US measure, the implementing measure was justified under Article XX and thus GATT-consistent. On appeal the Appellate Body held:

In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme comparable in effectiveness. Authorising an importing Member to condition market access on exporting Member's putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'.\(^{274}\)

Note that the Appellate Body thus seemed to introduce into the chapeau of Article XX an 'embryonic' and 'soft' requirement on Members to recognize the equivalence of foreign measures comparable in effectiveness.\(^{275}\) The Appellate Body found in US - Shrimp (Article 21.5 - Malaysia) (2001) that the revised US measure at issue in the implementation dispute was sufficiently flexible to meet the standards of the chapeau.\(^{276}\) The Appellate Body added:

[A] measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in any exporting Member, including, of course, Malaysia. Yet this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in every individual exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in every individual Member.\(^{277}\)

Pursuant to the chapeau of Article XX, the application of measures provisionally justified under one of the paragraphs of Article XX may not only not constitute 'arbitrary discrimination', it may also not constitute 'unjustifiable discrimination'. As noted by the panel in EU - Seal Products (2014), in many disputes the existence of arbitrary and unjustifiable discrimination are addressed together. This was the case, for example in US - Shrimp (Article 21.5 - Malaysia) (2001), US - Gambling (2005), and Brazil - Retreaded Tyres (2007). Yet, these are distinct concepts.\(^{278}\) In US - Gasoline (1996), the Appellate Body concluded that the measure at issue constituted 'unjustifiable discrimination' for the following reasons:

We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on in justification by the United States for rejecting individual baselines for foreign refiners, and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute 'unjustifiable discrimination'.\(^{279}\)

Note that the Appellate Body emphasised the deliberate nature of the discrimination, i.e. discrimination that is foreseen and not merely inadvertent or unavoidable. Likewise, the panel in Argentina - Hides and Leather (2001) found that the application of the measure at issue resulted in unjustifiable discrimination as several alternative measures were available, which rendered the measure not unavoidable.\(^{280}\)


\(^{275}\) See Panel Report, EU - Seal Products (2001), para. 7,446.


The Appellate Body in US – Shrimp (1998) also addressed the question of whether the application of the measure at issue constituted an "unjustifiable discrimination" within the meaning of the chapeau. The Appellate Body noted the following:

Another aspect of the application of Section 609 that bears heavily on any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellants, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibitions against the shrimp exports of those other Members.287

The Appellate Body made three observations in this respect.288 First, the Congress of the United States expressly recognised in enacting Section 609 the importance of securing international agreements for the protection and conservation of the sea turtle species. Second, the protection and conservation of highly migratory species of sea turtle, i.e. the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts are recognised in the WTO Agreement itself, as well as in a significant number of other international instruments and declarations. Third, the United States negated and concluded the Inter-American Convention for the Protection and Conservation of Sea Turtles. The existence of this regional agreement provided convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. However, the record did not show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries.289 The Appellate Body therefore concluded:

Clearly, the United States negotiated seriously with some, but not with other Members (including the appellants), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved.290

The extent to which a Member has to seek a multilateral solution to a problem before it may make use of unilateral measures was one of the main issues in US – Shrimp (Article 21.5 – Malaysia) (2001). The Appellate Body made it clear that, in order to meet the requirement of the chapeau of Article XX, the Member needs to make serious efforts, in good faith, to negotiate a multilateral solution before resorting to unilateral measures.291 Failure to make such efforts may lead to the conclusion that the discrimination is "unjustifiable." Applying this standard in US – Shrimp (Article 21.5 – Malaysia) (2001) the Appellate Body upheld the findings of the panel that "in view of the serious, good faith efforts made by the United States to negotiate an international agreement" with respect to actions on the protection of sea turtles, the US measure was "applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination."292

The panel in Brazil – Retreaded Tyres (2007) considered that the Appellate Body reports in US – Gasoline (1996), US – Shrimp (1998) and US – Shrimp (Article 21.5 – Malaysia) (2001), all discussed above, provided useful illustrations on what might render discrimination "arbitrary" or "unjustifiable" within the meaning of the chapeau of Article XX.293 However, the panel continued:

We do not assume ... that exactly the same elements will necessarily be determinative in every situation ... We recall in this regard the Appellate Body's observation, in its ruling in US – Shrimp, that the "location of the line of equilibrium [between the right of a Member to invoke an exemption under Article XX and the rights of the other Members under varying substantive provisions], as expressed in the chapeau, is not fixed and unchanging; the line moves in the kind and the shape of the measures at stake vary and as the facts make up specific cases differ."294

In Brazil – Retreaded Tyres (2007), the panel had determined that discrimination arose in the application of the measure at issue, an import ban on retreaded tyres, from two sources: discrimination arising from the exemption from the import ban of imports of remoulded tyres originating in MERCOSUR countries (the "MERCOSUR exemption"); and discrimination arising from the importation of used tyres under court injunctions.295

With regard to the application of the import ban, in conjunction with imports of remoulded tyres under the MERCOSUR exemption, the panel found that this application constituted neither arbitrary nor unjustifiable discrimination,296 as the MERCOSUR exemption was granted to MERCOSUR countries pursuant to a

288 See id., paras. 167-6.
289 The record also did not show that the United States attempted to have recourse to such international instruments that existed to achieve cooperative efforts to protect and conserve sea turtles, i.e. before imposing the import ban. The United States, for example, did not make any attempt to secure the cooperation of its fellow members due to shrimp trading in the CITES Standing Committee as a subject requiring consensual action by States.
294 See ibid., para. 135.
295 See ibid., para. 134.
ruling by the MERCOSUR Tribunal finding an import ban on remoulded tyres inconsistent with MERCOSUR rules.\textsuperscript{292} The panel thus ruled that:

the discrimination resulting from the MERCOSUR exemption cannot, in our view, be said to be 'capricious' or 'random'. To that extent, the measure at issue is not being applied in a manner that would constitute arbitrary discrimination.\textsuperscript{293}

The panel considered that if imports of remoulded tyres under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the import ban would be significantly undermined, the application of the import ban, in conjunction with the exemption, would constitute a means of unjustifiable discrimination.\textsuperscript{294} The panel found, however, the levels of imports 'not to have been significant'\textsuperscript{295} and thus concluded that the operation of the MERCOSUR exemption had not resulted in the measure being applied in a manner that would constitute unjustifiable discrimination.\textsuperscript{296}

Similarly, with regard to the application of the import ban, in conjunction with imports of used tyres under court injunctions, the panel found that this application did not constitute arbitrary discrimination because the discrimination was not the result of 'capricious' or 'random' action (but the result of court injunctions).\textsuperscript{297} However, the panel concluded that the application of the import ban, in conjunction with imports of used tyres under court injunctions, constituted unjustifiable discrimination because the imports of used tyres under court injunctions had taken place 'in significant amounts', undermining Brazil's stated policy objective.\textsuperscript{298}

On appeal, the Appellate Body, referring to its analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination in US – Fuel Oil (1996), US – Shrimp (1998) and US – Shrimp (Article 21.5 – Malaysia) (2001), noted that:

[analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination.\textsuperscript{299}]

The Appellate Body thus rejected the panel's interpretation of the term 'unjustifiable' as it did not depend on the cause or rationale of the discrimination but, instead, 'focused exclusively on the assessment of the effects of the discrimination.'\textsuperscript{300} According to the Appellate Body, an abuse of the Article XX exceptions – contrary to the purpose of the chapeau – exists when the reasons given for discrimination:

bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.\textsuperscript{301}

Therefore, whether discrimination is 'arbitrary or unjustifiable' should be assessed in light of the objective of the measure.\textsuperscript{302}

The Appellate Body then had to assess whether the explanation provided by Brazil, namely, that it had introduced the MERCOSUR exemption to comply with a ruling issued by the MERCOSUR Tribunal, was 'acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres.'\textsuperscript{303} The Appellate Body stated:

[We have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.]

... The ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.\textsuperscript{304}

While the Appellate Body agreed with the panel that Brazil's decision was not 'capricious' or 'random', since decisions to implement rulings of judicial or quasi-judicial bodies cannot be characterised as such, it noted that:

discrimination can result from a rational decision or behaviour, and still be 'arbitrary or unjustifiable', because it is explained by a rationale 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.\textsuperscript{305}

The Appellate Body made a similar finding with regard to the imports of tyres under court injunctions.\textsuperscript{306}

In brief, the application of a provisionally justified measure will constitute 'arbitrary or unjustifiable' discrimination when the discrimination arising in the application of the provisionally justified measure is explained by a rationale that bears no relationship to the objective of the measure or even goes against that objective.

As the Appellate Body held in Brazil – Retreaded Tires (2007), whether discrimination is arbitrary or unjustifiable depends on the cause or rationale of the discrimination, not on the effects of the discrimination (as the panel had held).
The rationale of the discrimination must be assessed in light of the contribution of the discrimination to achieving the legitimate objective provisionally found to justify the measure at issue. In EC - Seal Products (2014), the Appellate Body found that one of the most important factors in the assessment of arbitrary or unjustifiable discrimination 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. 268

In EC - Seal Products (2014), the Appellate Body concluded that the measure at issue, the EU Seal Regime, which was provisionally justified under Article XX(a), was applied in a manner that constituted arbitrary or unjustifiable discrimination. 269 The Appellate Body advanced three main reasons for coming to this conclusion. First, the European Union did not show that the manner in which the EU Seal Regime treated seal products derived from IC hunts (i.e. hunts by Inuit and other indigenous communities) as compared to seal products derived from commercial hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Both IC hunts and commercial hunts seriously affected seal welfare. Second, given the considerable ambiguity in the 'substance' and 'partial use' criteria of the IC exception, 270 seal products derived from what should in fact be properly characterised as commercial hunts could potentially enter the EU market under the IC exception. The European Union did not sufficiently explain how such instances could be prevented in the application of the IC exception. Third, the Appellate Body was not persuaded that the European Union had made comparably efforts to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. 271

In Colombia - Textiles (2016), the panel found that Colombia had failed to demonstrate that the measure at issue, the compound tariff, was justified under Article XX(a) or Article XX(d) of the GATT 1994. 272 The panel therefore considered that it was not necessary for it to analyse whether the compound tariff meets the requirements of the chapeau. 273 Nevertheless, the panel conducted its assessment of the chapeau by assuming, for the sake of argument, that Colombia had succeeded in showing that its measure is provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994. The panel summarised the current case law on 'arbitrary or unjustifiable discrimination' as follows:

With regard to the element of 'arbitrary or unjustifiable discrimination', the analysis relates primarily to the cause or the rationale of the discrimination, that is, whether the discrimination that results from the application of the same measure has a legitimate cause or basis in the light of the guidelines laid down in the paragraphs of Article XX. In other words, there is arbitrary or unjustifiable discrimination when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. 274

The panel in Colombia - Textiles (2016) thus concluded that the measure at issue, the compound tariff, was applied in a manner that constituted 'arbitrary or unjustifiable discrimination', because the various exclusions from the application of the measure did not bear any relationship with the measure's declared objective of combating money laundering. 275 On appeal, the Appellate Body upheld the panel's findings that Colombia had not demonstrated that the compound tariff was provisionally justified under Article XX(a) or Article XX(d) and did therefore not consider it necessary to review the panel's findings pertaining to the chapeau of Article XX. 276

Finally, as noted above, the chapeau of Article XX of the GATT 1994 refers to arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In US - Shrimp (1998) the Appellate Body had stated that the discrimination referred to in the chapeau of Article XX 'may occur not only between different exporting Members, but also between exporting Members and the importing Member concerned'. 277 More recently, in EC - Seal Products (2014), the Appellate Body noted with regard to the 'conditions' that are relevant in this context the following:

the identification of the relevant 'conditions' under the chapeau should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found. If a respondent considers that the conditions prevailing in different countries are not 'the same' in relevant respects, it bears the burden of proving that claim. 278

In EC - Seal Products (2014), the Appellate Body found that the European Union, the respondent, had not shown that the 'conditions' with regard to seal welfare prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand are relevantly different. 279 In the absence of a showing by the respondent that the conditions were 'relevantly different', the conditions were assumed to be the same.
2.5 Policy Space for Members to Protect Other Societal Values

In two prominent WTO disputes involving the protection of the environment, US - Gasoline (1996) and US - Shrimp (1990), the measures at issue were found to be provisionally justified under Article XX(g), but the application of the measures failed to satisfy the requirements of the chapeau of Article XX. The public perception of the Appellate Body reports in these disputes has been negative and unsympathetic. In particular, there is a widely held view among environmental activists that the WTO undermines necessary environmental legislation. It is noteworthy that the Appellate Body (with foresight but only with relative success) added a paragraph to the end of both its reports in US - Gasoline (1996) and its report in US - Shrimp (1989). In these paragraphs, the Appellate Body explained in straightforward language the policy space for Members to enact environmental legislation and the limited nature of its rulings in both cases. In US - Shrimp (1998), the Appellate Body concluded with the following observation:

In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

What we have decided in this appeal is simply this: although the measures of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.

As we emphasized in United States - Gasoline, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.320

3 GENERAL EXCEPTIONS UNDER THE GATS

Like the GATT 1994, the GATS also provides for a 'general exceptions' provision allowing Members to deviate, under certain conditions, from obligations and commitments under the GATS. Article XIV of the GATS provides, in relevant part:

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;

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

necessary to secure compliance with laws or regulations which are not inconsistent
with the provisions of this Agreement including those relating to:
(i) the prevention of deceptive and fraudulent practices or to deal with the effects of
a default on services contracts;
(ii) the protection of the privacy of individuals in relation to the processing and
dissemination of personal data and the protection of confidentiality of individual
records and accounts;
(iii) safety;
(d) inconsistent with Article XVII provided that the difference in treatment is aimed at
ensuring the equitable or effective imposition or collection of direct taxes in respect of
services or service suppliers of other Members;
(e) inconsistent with Article II, provided that the difference in treatment is the result of
an agreement on the avoidance of double taxation or provisions on the avoidance of
double taxation in any other international agreement or arrangement by which the
Member is bound.

The similarities between Article XX of the GATT 1944 and Article XIV of the
GATS are striking. However, there are also differences. An obvious difference is
that some of the justifications in Article XIV of the GATS, such as the mainte-
nance of public order, the protection of safety and privacy, and the equitable
effective imposition or collection of direct taxes, do not appear (at least not
explicitly) in Article XX of the GATT 1944. Likewise, some exceptions in Article
XX of the GATT 1994, such as the protection of national treasures of artistic
value, are not included in Article XIV of the GATS. Note also that while all the
exceptions in Article XX of the GATT 1944 allow for deviation from all GATT
obligations, the exceptions in Articles XIV(d) and (e) of the GATS only allow for
deviation from the national treatment obligation and the MFN treatment obli-
gation respectively. Nevertheless, because of the similarity in architecture and in
core concepts, Article XX of the GATT and its jurisprudence provide us with a
basis to interpret Article XIV of the GATS. In the first case that dealt with Article
XIV of the GATS, US – Gambling (2005), the Appellate Body stated:
Article XIV of the GATS sets out the general exceptions from obligations under that Agreement
in the same manner as does Article XX of the GATT 1994. Both of these provisions affirm the
right of Members to pursue objectives identified in the paragraphs of these provisions even
if, in doing so, Members act inconsistently with obligations set out in other provisions of the
respective agreements, provided that all of the conditions set out therein are satisfied. Similar
language is used in both provisions, notably the term ‘necessary’ and the requirements set out
in their respective chapeaus. Accordingly, like the Panel, we find previous decisions under
Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.231

3.1 Two-Tier Test under Article XIV of the GATS

As with Article XX of the GATT 1994, Article XIV of the GATS sets out a two-
tier test for determining whether a measure, otherwise inconsistent with GATS
obligations, can be justified. As the Appellate Body in US – Gambling (2005)

stated:
Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a ‘two-tier anal-
ysis’ of a measure that a Member seeks to justify under that provision. A panel should first
determine whether the challenged measure falls within the scope of one of the paragraphs
of Article XIV. This requires that the challenged measure address the particular interest
specified in that paragraph and that there be a sufficient nexus between the measure and
the interest protected. The required nexus – or ‘degree of connection’ – between the measure
and the interest is specified in the language of the paragraphs themselves, through the use of
terms such as ‘relating to’ and ‘necessary to’. Where the challenged measure has been found


232 See US – Gambling (2005) and Appellate – Financial Services (2016). Article XIV of the GATS was not
involved in China – Publications and Audiovisual Products (2000) or China – Electronic Payment Services
(2012).
233 Note that the grounds of justification in Article XIV of the GATS do not include a ground equivalent to
Article XXII of the GATT 1994, relating to the conservation of exhaustible natural resources. See also
above, pp. 571-8.
3.2.1 Article XIV(a)

Article XIV(a) of the GATS deals with measures which are necessary to protect public morals or to maintain public order. Article XIV(a) sets out a two-tier legal standard to determine whether a measure is provisionally justified under this provision. The Member invoking Article XIV(a) must establish that: (1) the measure at issue is designed to protect public morals or maintain public order; and (2) the measure is necessary to fulfill that policy objective.

With regard to the first element of the analysis under Article XIV(a), note that the panel in US - Gambling (2005) dealt extensively with this element. Antigua and Barbuda challenged the GATS-consistency of a number of US federal and state laws, including the Wire Act, the Travel Act and the Illegal Gambling Business Act, which prohibit the remote supply of gambling and betting services, including Internet gambling. 327 The United States, inter alia, argued that the measures at issue could be justified under Article XIV(a) of the GATS, as necessary to protect public morals and maintain public order. With regard to the meaning of the concepts of 'public morals' and 'public order', the panel in US - Gambling (2005) found that it can vary in time and space depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protecting that they consider appropriate. Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals and public order under Article XIV(a) of the GATS. 328

According to the panel:

Members should be given some scope to define and apply for themselves the concepts of 'public morals' and 'public order' in their respective territories, according to their own systems and scales of values. 329

To determine the ordinary meanings of 'public morals' and 'public order', the panel in US - Gambling (2005) turned to the Shorter Oxford English Dictionary, and found that the term 'public' is defined therein as: 'Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation.' The panel thus concluded that a measure that is sought to be justified under Article XIV(a) must be aimed at 'protecting the interests of the people within a community or a nation as a whole'. 330 The term 'morals' was defined by

...
above is very relevant for the interpretation and application of the ‘necessity’ requirement of Article XIV of the GATS.\textsuperscript{128} On appeal, the Appellate Body in \textit{US - Gambling (2005)} thus stated that the weighing and balancing process to determine whether a measure is ‘necessary’ to maintain public order or protect public morals within the meaning of Article XIV(a) of the GATS begins with:

an assessment of the ‘relative importance’ of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be ‘weighed and balanced’. The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel’s determination of the ‘necessity’ of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.\textsuperscript{129}

Next, having assessed each of these factors:

[a] comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this ‘weighing and balancing’ and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is ‘necessary’ or, alternatively, whether another, WTO-consistent measure is ‘reasonably available’.

With respect to the availability and the nature of an ‘alternative measure’, the Appellate Body noted:

An alternative measure may be found not to be ‘reasonably available’, however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a ‘reasonably available’ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.

As to the question of who bears the burden of proof to establish the existence of a reasonably available ‘alternative measure’, the Appellate Body noted that:

it is not the responding party’s burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.

Rather, it is for a responding party to make a prima facie case that its measure is ‘necessary’ by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be ‘weighed and balanced’ in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is ‘necessary’.

The panel in \textit{US - Gambling (2005)} concluded that the United States had not established that its measures were ‘necessary’ because, in rejecting Antigua’s invitation to engage in bilateral or multilateral consultations, it had failed to explore and exhaust reasonably available WTO-consistent alternatives to the measures at issue.\textsuperscript{130} According to the Appellate Body, the panel’s examination of ‘necessity’ was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives.\textsuperscript{131} Engaging in consultations with Antigua was not an appropriate alternative for the panel to consider because consultations are ‘by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case’.

Having reversed the panel’s conclusion on ‘necessity’, the Appellate Body then examined for itself whether the measures at issue, the Wire Act, the Travel Act and the Illegal Gambling Business Act, were ‘necessary’ within the meaning of Article XIV(a) of the GATS.\textsuperscript{132} The Appellate Body agreed with the United States that the ‘sole basis’ for the panel’s conclusion that the measures were not necessary was its finding relating to the requirement of consultations with Antigua.

As the Appellate Body had found that the panel had erred in finding that consultations with Antigua constituted a measure reasonably available to the United States,\textsuperscript{133} and as Antigua had raised no other ‘alternative measure’, the Appellate Body concluded as follows:

In our opinion, therefore, the record before us reveals no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not ‘necessary’ within the meaning of Article XIV(a). Because the United States made its prima facie case of ‘necessity’, and Antigua failed to identify a reasonably available alternative measure, we conclude that the United States demonstrated that its statutes are ‘necessary’, and therefore justified, under paragraph (a) of Article XIV.

Thus, according to the Appellate Body, the measures at issue in \textit{US - Gambling (2005)}, which prohibit the remote supply of gambling and betting services, including Internet gambling, are ‘necessary’ for the maintenance of public

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\textsuperscript{128} Id., paras. 379-81.

\textsuperscript{129} Id., paras. 380-81.


\textsuperscript{132} Id., paras. 378-79.

\textsuperscript{133} Id., paras. 380-81.

\textsuperscript{134} The Appellate Body noted that the panel had acknowledged that it would have found that the United States had made its prima facie case that its measures were ‘necessary’ if the United States had not refused to accept Antigua’s invitation to consults. See id., para. 325.

\textsuperscript{135} See id., paras. 380-81. \textsuperscript{136} See id., para. 386.
order and the protection of public morals within the meaning of Article XIV of the GATS.

3.2.2 Article XIV(c)
As mentioned above, Article XIV(c) can justify otherwise GATS-inconsistent measures which are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATS. Article XIV(c) gives three broad examples of such laws or regulations, namely, those relating to: (1) the prevention of deceptive and fraudulent practices or the effects of a default on services contracts; (2) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and (3) safety. As the panel in US – Gambling (2005) and in Argentina – Financial Services (2016) noted, this list in Article XIV(c) of possible laws and regulations is not exhaustive.

Article XIV(c) also covers types of ‘laws or regulations’ not listed. As Article XX(d) of the GATT 1994, Article XIV(e) of the GATS thus allows for the pursuit of a wide range of policy objectives not limited to the policy objectives explicitly referred to.

Referring to the Appellate Body’s ruling in Korea – Various Measures on Beef (2001) regarding Article XX(d) of the GATT 1994, the Appellate Body ruled in Argentina – Financial Services (2016) that for a measure to be provisionally justified under Article XIV(c) of the GATS, two elements must be shown: (1) the measure must be one designed to secure compliance with laws or regulations that are not themselves inconsistent with the GATS; and (2) the measure must be necessary to secure such compliance.

With regard to the first element of the Article XIV(c) analysis, the Appellate Body ruled in Argentina – Financial Services (2016), referring to its report in Mexico – Taxes on Soft Drinks regarding Article XX(d), that:

a measure can be said ‘to secure compliance’ with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty.

However, the Appellate Body further ruled that:

where the assessment of the design of the measure, including its context and expected operation, reveals that the measure is incapable of securing compliance with specific rules, obligations, or requirements under the relevant law or regulation, as identified by a respondent.

Further analysis with regard to whether this measure is ‘necessary’ to secure such compliance may not be required.

As the Appellate Body explained, this is so because a measure that is not ‘designed’ to secure compliance with a Member’s laws or regulations cannot be justified under Article XIV(c). The Appellate Body cautioned, however, panels not to structure the examination of the ‘design’ element of the analysis under Article XIV(c) in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent’s defence relating to the ‘necessary’ element of the analysis.

With regard to the second element of the Article XIV(c) analysis, the ‘necessary’ requirement, the Appellate Body observed in Argentina – Financial Services (2016) that this element:

entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations. In particular, this element entails an assessment of whether, in the light of all relevant factors in the ‘necessity’ analysis, this relationship is sufficiently proximate, such that the measure can be deemed to be ‘necessary’ to secure compliance with such laws or regulations.

In US – Gambling (2005), the Appellate Body had ruled with regard to the second element of the Article XIV(c) analysis, that:

the standard of ‘necessity’ provided for in the general exceptions provision is an objective standard. To be sure, a Member’s characterization of a measure’s objectives and of the effectiveness of its regulatory approach – as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials – will be relevant in determining whether the measure is, objectively, ‘necessary’. A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the ‘necessity’ of the measure before it.

The examination required to determine whether a measure is necessary under Article XIV(c) of the GATS is essentially the same as the examination required under Article XX(d) of the GATT 1994, discussed above.

In US – Gambling (2005) and Argentina – Financial Services (2016), the Appellate Body applied this examination of ‘necessity’ in the context of Article XIV(e) of the GATS. As already discussed above in the context of Article XIV(e), the Appellate Body held in US – Gambling (2005) held:

The process begins with an assessment of the ‘relative importance’ of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be ‘weighted and balanced’. The Appellate Body has pointed to two factors that, in most cases, will be relevant

to a panel's determination of the 'necessity' of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

A comparison between the challenged measure and possible alternatives should therefore be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is "reasonably available".360

Note that the 'weighing and balancing' exercise is not necessarily limited to the three factors referred to above.361

Finally, note that the Appellate Body in Argentina – Financial Services (2016) ruled with regard to the relationship between the "design" element and the "necessity" element of the analysis under Article XIV(c) that these two elements are "conceptually distinct, yet related, aspects" of the same inquiry. According to the Appellate Body, the examination of the two elements "may overlap in the sense that some considerations may be relevant to both elements of the Article XIV(c) defence".362 The Appellate Body observed that:

"[the way in which a panel organizes its examination of these elements in scrutinizing a defence in any given dispute will be influenced by the measures and laws or regulations at issue, as well as by the way in which the parties present their respective arguments."363

3.2.3 Other Paragraphs of Article XIV

With regard to the remaining paragraphs of Article XIV of the GATS, a distinction must be drawn between paragraph (b), which requires that the measure be necessary to achieve the policy objective pursued, and paragraphs (d) and (e) which do not impose such a "necessity" requirement.

Paragraph (b) relates to measures "necesary to protect human, animal or plant life or health". Hence, for an otherwise GATS-inconsistent measure to be provisionally justified under Article XIV(b): (1) the policy objective pursued by the measure must be the protection of life or health of humans, animals or plants; and (2) the measure must be necessary to fulfill that policy objective. To date, there has been no case on the requirements set out by Article XIV(b). However, as regards the 'necessity' requirement, it may be assumed that the interpretation of this requirement under Article XIV(a) and (c) of the GATS and the extensive case law on the 'necessity' requirement of Article XX(a), (b) and (d) of the GATT 1994 are relevant.364

With regard to Article XIV(d) and (e) of the GATS, it must be noted that the scope of these provisions is rather narrow. As already discussed above, the exceptions set out in these provisions only justify inconsistency with the national treatment obligation of Article XVI of the GATS or the MFN treatment obligation of Article II of the GATS.364 With regard to measures relating to direct taxation, Article XIV(d) of the GATS allows Members to adopt or enforce measures which are inconsistent with the national treatment obligation of Article XVII provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members.

Footnote 6 to Article XIV(d) contains a non-exhaustive list of measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes. This list includes measures taken by a Member under its taxation system which apply: (1) to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or (2) to non-residents or residents to prevent the avoidance or evasion of taxes.

Article XIV(e) of the GATS allows a Member to adopt or enforce measures which are inconsistent with the MFN treatment obligation of Article II provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Note that Article XIV of the GATS does not contain a counterpart to Article XXI(e) of the GATT relating to the conservation of natural resources. In this regard, the 1993 Uruguay Round Decision on Trade in Services and the Environment notes that, 'since measures necessary to protect the environment typically have as their objective the protection of human, animal or plant life or health, it is not clear that there is a need to provide for more than is contained' in Article XIV(b). The Decision contemplates that the Committee on Trade and Environment should examine and report 'whether any modification of Article XIV is required to take into account the relationship between services trade and the environment, including sustainable development'. No such modification of Article XIV of the GATS has occurred.

3.3 Chapeau of Article XIV of the GATS

As discussed above, Article XIV of the GATS sets out a two-tier test for determining whether a measure, otherwise inconsistent with GATS obligations, can be justified. Under this test, once it has been established that the measure at issue meets the requirements of one of the paragraphs of Article XIV, it must be examined whether the measure meets the requirements of the chapeau of Article...
The chapeau of Article XIV requires that the application of the measure in issue does not constitute: (1) "arbitrary or unjustifiable discrimination between countries where like conditions prevail"; or (2) "a disguised restriction on trade in services."

Note that the language of the chapeau of Article XIV of the GATS is quite similar to that of the chapeau of Article XX of the GATT 1994. Therefore, many lessons can be drawn from the extensive case law on the application of the chapeau of Article XX, discussed in detail above. The panel in US–Gambling (2005) looked at this case law and concluded:

"To sum up these interpretive principles, the chapeau of Article XX of the GATT 1994 addresses not so much a challenged measure or its specific content, but rather the manner in which that measure is applied, with a view to ensuring that the exceptions of Article XX are not abused. In order to do so, the chapeau of Article XX identifies three standards which may be invoked in relation to the same facts: arbitrary discrimination, unjustifiable discrimination and disguised restriction on trade. In our view, these principles would also be applicable in relation to Article XIV of the GATS."

Moreover, the panel stated that, in determining whether the application of the measures at issue constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade":

"the absence of consistency in this regard may lead to a conclusion that the measures in question are applied in a manner that constitutes 'arbitrary and unjustifiable discrimination' between countries where like conditions prevail or a 'disguised restriction on trade'."

In the course of its examination of the requirements of the chapeau of Article XIV of the GATS, the panel found that the United States had not prosecuted certain domestic remote suppliers of gambling services and that the US Interstate Horseracing Act was 'ambiguous' as to whether or not it permitted certain types of remote betting on horse racing within the United States. On the basis of these two findings indicating a lack of consistency in the application of the prohibition on the remote supply of gambling and betting services, the panel in US–Gambling (2005) concluded that:

"the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that constitutes 'arbitrary and unjustifiable discrimination' between countries where like conditions prevail and/or a 'disguised restriction on trade'."


"374 See above, pp. 550-60."


3.4 The Prudential Exception under the GATS Annex on Financial Services

In addition to the general exceptions under the GATS, as set out in Article XIV thereof, the GATS, and in particular its Annex on Financial Services, provides for a specific exception regarding measures taken for prudential reasons. Paragraph 2(a) of the Annex on Financial Services states:

"Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used in a manner that is counterproductive with regard to the objective it has itself declared in order to provisionally justify the measures at issue."

The panel in Argentina–Financial Services (2016) considered that to avail itself of the prudential exception of paragraph 2(a) of the Annex on Financial Services, a Member must demonstrate that the measure at issue: (1) is a measure affecting the supply of financial services; (2) is taken for prudential reasons; (3) is 'disguised restriction on trade' in accordance with the requirements of the chapeau of Article XIV.

On appeal, the United States argued that the 'consistency' standard applied by the panel is not adequate for a complete examination under the requirements of the chapeau of Article XIV. The Appellate Body, however, dismissed this argument of the United States and upheld the panel's 'consistency' standard.

The panel in Argentina–Financial Services (2016) also found that the provisionally justified measures were applied in a manner that constituted arbitrary and unjustifiable discrimination. Referring to the Appellate Body Report in Brazil–Retreaded Tyres (2007) regarding Article XX(b) of the GATT 1994, discussed above, the panel noted that Argentina was applying the measures at issue 'in a manner that is counterproductive with regard to the objective it has itself declared in order to provisionally justify the measures at issue.'
4 SECURITY EXCEPTIONS UNDER THE GATT 1994 AND THE GATS

In addition to the 'general exceptions' contained in Article XX of the GATT 1944 and Article XIV of the GATS, WTO law also provides for exceptions relating to national and international security. This section discusses, first, the security exceptions of Article XXI of the GATT 1944 and, second, the security exceptions of Article XIV bis of the GATS.

4.1 Article XXI of the GATT 1944

Article XXI of the GATT 1944, entitled 'Security Exceptions', states:

Nothing in this Agreement shall be construed

(a) to require any [Member] to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fusillable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any [Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Unlike Article XX, Article XXI has, to date, not played a significant role in the practice of dispute settlement under the GATT 1947 or the WTO. Article XXI has been invoked only in a few disputes. Nevertheless, this provision is not without importance. WTO Members do, on occasion, take trade-restrictive measures, either unilaterally or multilaterally, against other Members as a means to achieve national or international security. Members taking such measures will seek justification for these measures under Article XXI. As will be discussed, there are significant structural and interpretative differences between Article XX and Article XXI.

4.1.1 Article XXI(a) and (b)

Traditionally, in international relations, national security takes precedence over the benefits of trade. This may be the case in three types of situation. First, States may consider it necessary to restrict trade in order to protect strategic domestic production capabilities from import competition. The judgment as to which production capabilities deserve to be qualified as strategically important differs among countries and is, to a great extent, political. Some Members argue that industries equipping the military, industries producing staple foods and industries producing gasoline or other energy productions are of 'strategic' importance. Second, States may wish to use trade sanctions, as an instrument of foreign policy, against other States, which either violate international law or pursue policies considered to be unacceptable or undesirable. Third, States may want to prohibit the export of arms or other products of military use to countries with which they do not have friendly relations. Note that GATT provisions, other than Article XXI, may allow Members leeway, for example, to preserve national industries of strategic importance. WTO Members can, subject to limitations, provide protection through import tariffs, production subsidies and government procurement practices. In some situations, however, Article XXI can be useful to provide justification for otherwise GATT-inconsistent measures.


See Panel Report, Argentina - Financial Services (2016), paras. 7.047 - 7.060. The panel therefore did not go on to address the question of whether the measures were being used as a means to avoid GATS commitments or obligations.

Note that also other WTO agreements, such as the TIR Agreement, contain provisions relating to measures taken in the context of national security policies. See e.g. Article 2.1 of the TIR Agreement. See below, p. 612.


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(b) to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fusillable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

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Note that also other WTO agreements, such as the TIR Agreement, contain provisions relating to measures taken in the context of national security policies. See e.g. Article 2.1 of the TIR Agreement. See below, p. 612.
Article XXI(a) allows a Member to withhold information that it would normally be required to supply when it considers the disclosure of that information 'contrary to its essential security interests'. Some Members have interpreted this provision broadly. In this regard, note the following statement by the United States on 24 September 1949:

The United States does consider its security to be involved - and to the security interest of other friendly countries - to reveal the names of the commodities that it considers to be most strategic.\footnote{GATT/OP.3/9, 9.}

Article XXI(b) allows a Member to adopt or maintain certain measures which that Member considers necessary for the protection of its essential security interests. The categories of measure concerned are broadly defined in subparagraphs (i)-(iii) of Article XXI(b) as: (i) measures relating to fissionable materials; (ii) measures relating to trade in arms or in other materials, directly or indirectly, for military use; and (iii) measures taken in time of war or other emergency in international relations. In view of the wording of Article XXI(b), and in particular the use of the terms 'action which it considers necessary' (emphasis added), the question arises whether the exceptions of this paragraph are 'justiciable', i.e. whether the application of these exceptions can usefully be reviewed by panels and the Appellate Body. Indeed, Article XXI(b) gives a Member very broad discretion to take national security measures which it 'considers necessary' for the protection of its essential security interests. However, it is imperative that a certain degree of 'judicial review' be maintained; otherwise the provision would be prone to abuse without redress.\footnote{388} At a minimum, panels and the Appellate Body should conduct an examination as to whether the measures taken constitutes an apparent abuse. With regard to avoiding abuse of the exceptions listed in Article XXI(b), and more generally the exceptions listed in Article XXI as a whole, it must be noted that, unlike Article XX of the GATT 1947, Article XXI does not have a chapeau to prevent misuse or abuse of the exceptions contained therein.\footnote{389}

The exceptions of Article XXI(b) have been invoked in a few GATT disputes and have been discussed on a few other occasions before the establishment of the WTO. For instance, in one of the very first panel reports, the panel in United States – Export Restrictions (Czechoslovakia) (1949), it was stated that:

any country must be the judge in the last resort on questions relating to its own security. On the other hand, every Contracting Party should be cautious not to take any step which might have the effect of undermining the General Agreement.\footnote{390}

In 1982, in the context of the armed conflict between the United Kingdom and Argentina over the Falkland Islands/Islas Malvinas, the European Economic Community and its Member States as well as Canada and Australia applied trade restrictions against imports from Argentina. In a 'reaction' to these actions, the GATT Contracting Parties adopted a Ministerial Declaration, which stated that:

the contracting parties undertake, individually and jointly ... to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement.\footnote{391}

At the time, the GATT Contracting Parties also adopted the following Decision Concerning Article XXII of the General Agreement:

Considering that the exceptions envisaged in Article XXII of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved; Noting that recourse to Article XXII could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement; Recognizing that in taking action in terms of the exceptions provided in Article XXII of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected; That until such time as the Contracting Parties may decide to make a formal interpretation of Article XXII it is appropriate to set procedural guidelines for its application;

The Contracting Parties decide that:

1. Subject to the exception in Article XXIIa, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXII.
2. When action is taken under Article XXII, all contracting parties affected by such action retain their full rights under the General Agreement.
3. The Council may be requested to give further consideration to this matter in due course.\footnote{392}

In 1985, the United States imposed a trade embargo on Nicaragua.\footnote{393} The United States was strongly opposed to the communist Sandinistas who were in power in Nicaragua at that time. Nicaragua argued that the trade embargo imposed by the United States was inconsistent with Articles II, I, V, X and XIII and Part IV of the GATT and could not be justified — as the United States argued — under Article XXII. Nicaragua requested the establishment of a panel. According to the United States, however, Article XXII left it to each Contracting Party to judge what action it considered necessary for the protection of its essential security interests.\footnote{394} A panel was established in this case but the terms of reference of this
the United Nations. Article 41 of the UN Charter empowers the Security Council to impose economic sanctions, once it has determined the existence of any threat to the peace, breach of the peace or act of aggression. Such Security Council decisions to apply economic sanctions are binding on UN Members according to Article 25 of the UN Charter. Hence, Article XXI(c) enables WTO Members to honour their commitments under the UN Charter, as well as the GATT.

At first glance, the issue of ‘justiciability’, discussed above with regard to Article XXI(b), appears less problematic for the exception provided in Article XXI(c), given that this provision does not refer to what the Member invoking the exception ‘considers’ to be necessary. The basis for the departure from GATT obligations must be an obligation under the UN Charter, and a panel can assess the question of whether there is such an obligation.

4.2 Article XIV bis of the GATS

Article XIV bis of the GATS, entitled ‘Security Exceptions’, allows Members to adopt and enforce measures, in the interest of national or international security, otherwise inconsistent with GATS obligations. The language of this provision is virtually identical to Article XXI of the GATT 1994, like Article XXI of the GATS 1994. Article XIV bis of the GATS is not without importance. On occasion, WTO Members take unilateral or multilateral measures affecting the trade in services of other Members, as a means to achieve national or international security. Members taking such measures can seek justification for these measures under Article XIV bis. To date, Article XIV bis of the GATS has never been invoked in dispute settlement proceedings. However, in terms of ‘justiciability’ Article XIV bis, and in particular paragraph 2 thereof, is likely to be as problematic as Article XXI(b), discussed above.634

5 SUMMARY

Trade liberalisation, market access and non-discrimination rules may conflict with other important societal values and interests, such as the promotion and protection of public health, consumer safety, the environment, employment, economic development and national security. WTO law provides for rules to

Panel stated that the panel could not examine or judge the validity or motivation for the invocation of Article XXI by the United States. In its report, the panel therefore concluded that:

as it was not authorized to examine the justification for the United States' invocation of Article XXI, it could not find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement.610

To date, the exceptions of Article XXI have not been invoked in any case before a WTO panel or the Appellate Body. Nonetheless, that, in the US – Cuban Liberty and Democratic Solidarity Act dispute in 1996 between the European Communities and the United States, commonly referred to as US – Helms-Burton Act dispute, the United States informed the WTO that it would not participate in the panel proceedings since it was of the opinion that the Helms–Burton Act was not within the scope of application of WTO law and, therefore, not within the jurisdiction of the panel. The Helms–Burton Act permits US nationals to bring legal action in US courts against foreign companies that deal or traffic in US property confiscated by the Cuban government. The European Communities contended that this and other measures provided for under the Helms–Burton Act were inconsistent with the obligations of the United States under Articles I, III, V, XI and XIII of the GATT 1994.611 According to the United States, however, this dispute concerned diplomatic and security issues and ‘was not fundamentally a trade matter’ and, therefore, not a WTO matter.612 Few Members shared this opinion.613

Note that in 2015, the Russian Federation, referring to the 1982 Decision Concerning Article XXI of the General Agreement, quoted above, requested that WTO Members engage in negotiations on the scope of the rights and obligations under Article XXI of the GATT 1994 and Article XIV bis of the GATS, and adopt by June 2016 a General Council decision on the interpretation of these provisions. The WTO Members did not engage in negotiations on this issue.

4.1.2 Article XXI(c)

Article XXI(c) of the GATT 1994 allows WTO Members to take actions in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security. This means that Members may depart from their GATT obligations in order to implement economic sanctions imposed by

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612 WT/DS173/C, dated 16 October 1996, para. 5. As the report of the European Communities, the panel proceeded to submit to the parties the factual content of the report since the panel had already issued a modified report in the dispute. No such solution has ever been explicitly agreed upon by the United States and has never applied the mutual ring-fencing aspects of the Helms–Burton Act.

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The requirements whether societal GATS.
The GATT XX of market liberalisation, market access and non-discrimination rules with other societal values and interests under specific conditions, to give priority to certain societal values and interests over trade liberalisation, market access and non-discrimination. This chapter discusses the 'general exceptions' and the 'security exceptions' under the GATT 1994 and the GATS.

The most widely available of the exceptions 'reconciling' trade liberalisation, market access and non-discrimination rules with other societal values and interests are the 'general exceptions' of Article XX of the GATT 1994 and Article XIV of the GATS.

Article XX of the GATT 1994 and Article XIV of the GATS allow, under specific conditions, for deviation from any GATT 1994 or GATS obligation, be it the MFN treatment, national treatment, market access or any other obligation under the GATT 1994 or GATS. Neither Article XX of the GATT nor Article XIV of the GATS are available to justify inconsistencies with any other WTO agreement unless they have been expressly or implicitly incorporated into such agreement.

The Agreement on Trade Related Investment Measures is the only other WTO agreement, which expressly incorporates Article XX of the GATT 1994. Article XX can thus be invoked to justify inconsistencies with this Agreement. Certain provisions of China's Accession Protocol implicitly incorporate Article XX of the GATT 1994 and Article XX can therefore be invoked by China to justify a breach of the obligations under these provisions.

Article XX of the GATT 1994 and Article XIV of the GATS are in essence balancing provisions. Central to the interpretation and application of both provisions is the balance to be struck between trade liberalisation on the one hand and other societal values and interests on the other. Therefore, a narrow interpretation of these provisions is as inappropriate as a broad interpretation.

The Appellate Body has yet to rule on whether measures that aim to protect a societal value or interest outside the territorial jurisdiction of the Member taking the measure, can be justified under Article XX of the GATT 1994 or Article XIV of GATS. There is no explicit jurisdictional limitation in Article XX or Article XIV but it is an open question whether such a jurisdictional limitation can be implied.

In determining whether a measure which is otherwise GATT-inconsistent can be justified under Article XX of the GATT 1994, one must always examine: first, whether this measure can be provisionally justified under one of the paragraphs of Article XX; and, if so, second, whether the application of this measure meets the requirements of the chapeau of Article XX.

Article XX(b) concerns otherwise GATT-inconsistent measures allegedly adopted or maintained for the protection of public health or the environment. For such a measure to be provisionally justified under Article XX(b), a Member must establish that: (1) the measure is designed to protect the life or health of humans, animals or plants; and (2) the measure is necessary to fulfill that policy objective. In deciding whether a measure is necessary, the following factors must be 'weighed and balanced': (a) the importance of the societal value or interest at stake; (b) the extent to which the measure at issue contributes to the objective it pursues; and (c) the impact of the measure at issue on trade, i.e. its trade-restrictiveness. It is clear that the more important the societal value pursued by the measure at issue, the more this measure contributes to the protection or promotion of this value, and the less restrictive its impact is on international trade. The more easily the measure may be considered to be 'necessary' if this 'weighing and balancing' exercise yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure at issue with possible alternative measures, which may be WTO-consistent or less trade-restrictive but provide an equivalent contribution to the achievement of the measure's objective. A measure can only be considered 'necessary' if there is no reasonably available alternative measure that achieves the policy objective of, and is WTO-consistent or less trade-restrictive than, the measure at issue. In most cases a comparison between the challenged measure and possible alternatives will have to be undertaken. A comparison with alternative measures would only not be required if, for example, the measure at issue is not trade-restrictive or makes no contribution to the objective pursued.

Article XX(d) concerns otherwise GATT-inconsistent measures allegedly adopted or maintained to secure compliance with national legislation. For such a measure to be provisionally justified under Article XX(d), a Member must establish that: (1) the measure is designed to secure compliance with national laws or regulations such as customs law, consumer protection law or intellectual property law, which are themselves not GATT-inconsistent; and (2) the measure must be necessary to secure such compliance. The 'design' requirement is not very demanding and has been found to be met when the measure at issue is not incapable of securing compliance. The 'necessity' requirement in Article XX(d) is interpreted and applied in the same way as in Article XX(b).

Article XX(g) concerns otherwise GATT-inconsistent measures allegedly adopted or maintained for the conservation of exhaustible natural resources. For such a measure to be provisionally justified under Article XX(g): (1) the measure must relate to the 'conservation of exhaustible natural resources'; (2) the measure must 'relate to' the conservation of exhaustible natural resources; and (3) the measure must be 'made effective in conjunction with' restrictions on domestic production or consumption. The concept of 'exhaustible natural resources' has been interpreted in a broad, evolutionary manner to include
also living resources and, in particular, endangered species. A measure 'relates to' the conservation of exhaustible natural resources when the relationship between the means, i.e. the measure, and the end, i.e. the conservation of exhaustible resources, is real and close, and the measure is not disproportionately wide in its scope or reach in relation to the policy objective pursued.

Finally, the requirement that the measure must be 'made effective in conjunction with restrictions on domestic production or consumption' is, in essence, a requirement of 'even-handedness' in the imposition of restrictions on imported and domestic products.

Article XX(a) concerns otherwise GATT-inconsistent measures allegedly adopted or maintained to protect public morals. For such a measure to be provisionally justified under Article XX(a), a Member must establish that: (1) the measure is 'designed' to protect public morals; and (2) the measure is 'necessary' to protect such public morals. The concept of 'public morals' has been defined as 'standards of right and wrong conduct maintained by or on behalf of a community or nation'. The 'design' requirement is not very demanding and has been found to be met when the measure at issue is not incapable of protecting public morals. The 'necessity' requirement in Article XX(a) is interpreted and applied in the same way as in Article XX(b).

Article XX(j) of the GATT 1994 concerns otherwise GATT-inconsistent measures that are allegedly 'essential' to the acquisition or distribution of products in general or local short supply. For such a measure to be provisionally justified under Article XX(j), a Member must establish that: (1) the measure is 'designed' to address the acquisition or distribution of products in general or local short supply; and (2) the measure is 'essential' to address the acquisition or distribution of such products. To determine whether a product is in 'general or local short supply', a panel should examine the extent to which a particular product is 'available', from both domestic and international sources, in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. With regard to the requirement that the measure at issue is 'essential' (rather than 'necessary'), i.e. the requirement in Articles XX(b) and (d), the Appellate Body noted that the word 'essential' is defined as '[absolutely] indispensable or necessary' and is therefore at least as close to 'indispensable' as the term 'necessary'.

Measures provisionally justified under one of the paragraphs of Article XX must subsequently meet the requirements of the chapeau of Article XX. The object and purpose of the chapeau is to avoid the application of the measure provisionally justified to constitute a misuse or abuse of the exceptions of Article XX. The interpretation and application of the chapeau in a particular case is a search for the appropriate line of equilibrium between, on the one hand, the right of Members to adopt and maintain trade-restrictive measures that pursue certain legitimate policy objectives, and, on the other hand, the right of other Members to trade. The search for this line of equilibrium is guided by the requirements set out in the chapeau that the application of the trade-restrictive measure may not constitute: (1) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on international trade.

Discrimination has been found to be 'arbitrary' when a measure is applied without any regard for the difference in conditions between countries and the measure is applied in a rigid and inflexible manner. Discrimination has been found to be 'unjustifiable' when the discrimination 'was not merely inadvertent or unavoidable'. Unjustifiable discrimination exists when a Member fails to make serious, good faith efforts to negotiate a multilateral solution before resorting to the unilateral, otherwise GATT-inconsistent measure for which justification is sought. Moreover, discrimination is arbitrary or unjustifiable when the reasons given for the discrimination bear no rational connection to the policy objective of the provisional measure or would go against that objective. A measure, which is provisionally justified under Article XX, will be considered to constitute a 'disguised restriction on international trade' if compliance with such measure is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.

The Appellate Body has repeatedly emphasised that WTO Members are free to adopt their own policies and measures aimed at protecting or promoting other societal values, such as public health or the environment, as long as, in so doing, they fulfil their obligations, and respect the rights of other Members, under the WTO Agreement.

As is the case for Article XX of the GATT 1994, Article XIV of the GATS sets out a two-tier test for determining whether a measure affecting trade in services, otherwise inconsistent with GATS obligations and commitments, can be justified under that provision. To determine whether a measure can be justified under Article XIV of the GATS, one must always examine: first, whether this measure can be provisionally justified under one of the paragraphs of Article XIV; and, if so, second, whether the application of this measure meets the requirements of Article XIV. The similarities between Article XX of the GATT 1994 and Article XIV of the GATS are striking. However, there are also differences. The specific grounds of justification for measures which are otherwise inconsistent with provisions of the GATS are set out in Article XIV(a)-(e) of the GATS. In the case law to date, there has been particular attention given to Article XIV(a) and (e) of the GATS.

Article XIV(a) concerns otherwise GATS-inconsistent measures that are 'necessary to protect public morals or to maintain public order'. To provisionally justify a measure under Article XIV(a) of the GATS, a Member must establish
that: (1) the measure is 'designed' to protect public morals or maintain public order; and (2) the measure is necessary to protect public morals or maintain public order. The concept of 'public morals' has been defined as stated above. The concept of 'public order' has been defined as the preservation of the fundamental interests of a society, as reflected in public policy and law. The 'necessity' requirement in Article XIV(a) of the GATS is, mutatis mutandis, interpreted and applied in the same way as in Articles XX(a), (b) and (d) of the GATT 1994.

Article XIV(c) concerns otherwise GATS-inconsistent measures allegedly adopted or maintained to secure compliance with national laws or regulations. For such a measure to be provisionally justified under Article XIV(c) of the GATS, a Member must establish that: (1) the measure is designed to secure compliance with national laws or regulations which are themselves not GATS-inconsistent; and (2) the measure is necessary to secure such compliance. The 'design' requirement is not very demanding and has been found to be met when the measure at issue is not incapable of securing compliance. The 'necessity' requirement in Article XIV(c) is interpreted and applied in the same way as in Article XIV(a) of the GATS.

Just as with the chapeau of Article XX of the GATT 1994, the chapeau of Article XIV of the GATS requires that the application of the measure at issue does not constitute: (1) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on trade in services.

In addition to the 'general exceptions' contained in Article XX of the GATT 1994 and Article XIV of the GATS, the GATT 1994 and the GATS provide for exceptions relating to national and international security. WTO Members take, on occasion, either unilaterally or multilaterally, trade-restrictive measures against other Members as a means to achieve national or international security. Members taking such measures may seek justification for these measures under Article XXI of the GATT 1994 or Article XIV bis of the GATS. Article XXI(b) of the GATT 1994 allows a Member to adopt or maintain: (1) measures relating to fissionable materials; (2) measures relating to trade in arms or in other materials, directly or indirectly, for military use; and (3) measures taken in time of war or other emergency in international relations. A Member may take such measures if and when that Member considers these measures to be necessary for the protection of its essential security interests. Article XIV bis of the GATS is virtually identical to Article XXI(b) of the GATT 1994. The 'justiciability' of these exceptions is not clear. Article XXI(c) of the GATT 1994 and Article XIV bis (c) of the GATS are much less problematic in this respect as they allow WTO Members to take trade and economic sanctions in compliance with UN Security Council decisions related to the maintenance of international peace and security.