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Giovanna Adinolfi · Freya Baetens
José Caiado · Angela Lupone
Anna G. Micara *Editors*

International Economic Law

Contemporary Issues

Springer

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Foreword

'The greatest thing about big ideas is being able to share them'. The Society of International Economic Law (SIEL) believes in fostering and sharing ideas among scholars and academically minded professionals belonging to different generations and countries, representing various disciplines within the sphere of international economic law (IEL). This is why the Postgraduate and Early Professionals/Academics Network of SIEL (PEPA/SIEL) is such an important and successful project for us and for many young scholars around the world.

PEPA/SIEL offers young academics and professionals a collaborative platform where they can find ideas to grow with and ideas that they can grow further. Among its other activities, PEPA/SIEL organizes conferences at which emerging IEL academics and professionals present and discuss their work in a welcoming and, at the same time, intellectually challenging environment. I have had the chance to witness PEPA/SIEL conference through the years, and many participants address an audience for the first time. This participation can be a defining and decisive moment for many young scholars. The supportive and welcoming environment of the PEPA/SIEL conferences encourages this younger generation of academics and professionals to share and develop further their views. For the early postgraduate participants, PEPA/SIEL conferences give them a chance to refine an idea that can take the form of a paper or a project for postgraduate studies. For other participants, in more advanced stages of research or the early stages of their profession, the discussions at PEPA/SIEL conferences provide sound reasons to revisit their findings and to 'polish' their works before submitting them for publication.

In April 2015, the 4th PEPA/SIEL conference was organized in collaboration with the Department of International, Legal, Historical and Political Studies of the University of Milan. I would like to thank José Caiado and Freya Baetens from SIEL and Giovanna Adinolfi, Anna G. Micara and Angela Lupone from Milan University for their impressive dedication in organizing the conference. I would also extend my gratitude to senior colleagues who reviewed proposals or acted as discussants and without whom the conference would not be a reality. The unique mix of young scholars and experienced IEL experts has been the hallmark of PEPA/SIEL

conferences, and we would want to continue benefiting from the enthusiasm of young participants and the wisdom of senior colleagues in the next editions of this event. SIEL is proud of the mentoring opportunities that it offers to emerging academics and professionals and of successfully kindling their intellect through mediums such as PEPA/SIEL conferences. I am very proud, as the president of SIEL, to interact with these young academics and professionals who are continuously increasing the vibrancy of the field through their nuanced ideas.

The presenters of the conference deserve a special acknowledgement. As a reviewer of proposals for the conference, I know that a remarkably high number of proposals made the selection process extremely challenging. The 4th PEPA/SIEL conference witnessed presentations from the authors of exceptional proposals, and this volume contains papers based on some of those proposals. The papers in these conference proceedings comprise only a small subset of the ideas that were expressed and discussed during the conference. This volume contains 15 papers; young academics and professionals who are studying or working in the field of IEL across four different continents have authored them. Thus, these conference proceedings also represent the globally diverse opinions that exist on the subject. As the title of the conference suggests, the papers in this volume introduce the reader to some of the most challenging IEL topics, including in the areas of trade, investment, finance and monetary law.

In the area of WTO law, the young contributors have added a new dimension to thought-provoking issues such as private standards, implementation of mutually agreed solutions in WTO disputes, energy regulations and WTO subsidy rules. There is also innovative work in the area of international investment law. Other contributions relate to interesting topics that include investor-state dispute settlement system, sovereign wealth funds and mega-regional trade and investment agreements like the Trans-Pacific Partnership Agreement, EU-Canada Comprehensive Economic and Trade Agreement and MERCOSUR.

The 4th PEPA/SIEL conference was a success, and I am sure this volume will inspire stimulating conversations among young scholars, students and practitioners. I hope that the reader will find this volume an excellent starting point for considering new problems and challenges in IEL. I am confident that SIEL will continue to fulfil its objectives of '[b]uilding links and networks between and among international economic law academics and academically-minded practitioners and officials' and '[e]ncouraging research, practice, service and teaching in the field of International Economic Law', by collaborating with various academic institutions and organizations, with a particular focus on young scholars and those from the developing countries.

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Preface

This volume consists of a selection of the papers presented at the 4th Conference of the Postgraduate and Early Professionals and Academics (PEPA) network of the Society of International Economic Law (SIEL). After the publication of the call for papers in September 2014, the Conference Committee received more than one hundred abstracts. Through a double-blind review process, more than forty emerging scholars were offered the chance to present their papers at the Conference, held on 16 and 17 April 2015 at the University of Milan. Senior economic lawyers from the academic world, the business sector and intergovernmental organizations commented on the paper presentations allowing for stimulating discussion during the Conference and offering authors thought-provoking input on their work. A further assessment of the proposals, based on the feedback of the discussants, led to the final selection of papers published in this book. The contributors are junior practitioners and academics, in line with the spirit of the PEPA network to foster 'collaboration and mentoring opportunities for emerging academics and professionals in international economic law'.

The purpose of this volume is to scrutinize the main challenges faced by states in their current international economic relations, from an interdisciplinary perspective, combining legal research with political and economic analysis. The book offers readers a series of in-depth studies on a rich variety of topics, allowing for dialogue among scientific disciplines. Its readership is aimed to encompass both academics and practitioners, those that are junior as well as those more experienced. Our hope is that all readers will find in its chapters fresh insights into international economic law issues.

The volume is divided into four parts. Part I focuses on a hotly debated topic in scientific and political circles: how to reconcile states' interest to benefit from economic liberalization with their need to pursue social goals (such as the protection of human rights or the environment) by means of measures which may be viewed as contrary to their obligations under international economic treaties. International trade law issues are specifically covered in the contributions included in Part II, where the authors analyse some of the more recent developments under WTO law and regional

integration processes. International cooperation in the energy sector is dealt with in Part III, from the perspective of bilateral (EU-Russia) relations, the Energy Charter Treaty and WTO law. Finally, Part IV is devoted to investment and finance topics, zooming in on national regulatory developments in the banking sector, sovereign wealth funds and investor-state arbitration.

The editors would like to express their gratitude to all senior scholars who have reviewed abstracts and/or participated as discussants at the Conference. Their comments encouraged the revision and the finalization of the contributions published in this volume. Thanks to the support of SIEL and the University of Milan, the 2015 PEPA Conference could be hosted in Italy. The Department of International, Legal, Historical and Political Studies of the University of Milan, inspired by its long-standing aim to facilitate the growth of young academics and professionals, financed the publication of this volume. Lastly, the editors would like to thank all participants for their enthusiastic attendance of the Conference and all contributors for their hard work, which culminated this book. *Ut vivat, crescat, floreat!*

Milan, Italy — Giovanna Adinolfi
Leiden, The Netherlands — Freya Baetens
Hamburg, Germany — José Caiado
Milan, Italy — Angela Lupone
Milan, Italy — Anna G. Micara
June 2016

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Abbreviations

Agric. Human Values	Agriculture and Human Values
AI	Arbitration International
AJP	Aktuelle Juristische Praxis
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int'l L.	American Journal of International Law
Am. J.L. & Med.	American Journal of Law and Medicine
Am. U. Int'l L. Rev.	American University International Law Review
ASIL Proceedings	ASIL Proceedings
Berkeley J. Int'l L.	Berkeley Journal of International Law
Brook. J. Int'l L.	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
CMLJ	Capital Markets Law Journal
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Cornell L. Rev.	Cornell Law Review
Dev. Policy Rev.	Development Policy Review
DUDI	Diritti umani e diritto internazionale
ECL	European Company Law
EJIL	European Journal of International Law
ESIL Reflections	ESIL Reflections
Eur. Foreign Aff. Rev.	European Foreign Affairs Review
EYIEL	European Yearbook of International Economic Law
Fed. Comm. L. J.	Federal Communications Law Journal
Fed. Reg.	Federal Register
Fordham Int'l L. J.	Fordham International Law Journal
Fordham J. Corp. & Fin.	Fordham Journal of Corporate and Financial Law
Fordham L. Rev.	Fordham Law Review
FSR	Financial Stability Review
Geo. J. Int'l L.	Georgetown Journal of International Law

Harv. Int'l L. J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Hous. J. Int'l L.	Houston Journal of International Law
ICLQ	International & Comparative Law Quarterly
ICSID Review – FILJ	ICSID Review – Foreign Investment Law Journal
IELR	International Energy Law Review
IJIEL	Indian Journal of International Economic Law
Int'l L. Pol.	International Law and Politics
Int. Latinoam.	Integración Latinoamericana
Int'l Org.	International Organization
Int. Lawyer	The International Lawyer
IPG	Internationale Politik und Gesellschaft
It. YIL	Italian Yearbook of International Law
J. Int'l Agr. Tr. & Dev.	Journal of International Agricultural Trade and Development
J. Legal Stud.	Journal of Legal Studies
JBE	Journal of Business Ethics
JCES	Journal of Contemporary European Studies
JECLAP	Journal of European Competition Law & Practice
JERL	Journal of Energy & Natural Resources Law
JFR	Journal of Financial Regulation
JIA	Journal of International Arbitration
JIDS	Journal of International Dispute Settlement
JIEL	Journal of International Economic Law
JWELB	Journal of World Energy Law & Business
JWIT	Journal of World Investment & Trade
JWT	Journal of World Trade
Kyklos	Kyklos International Review for Social Sciences
L. & Practice Int'l Courts & Tribunals	The Law and Practice of International Courts and Tribunals
Law Contemp. Probl.	Law and Contemporary Problems
LBRA	Law and Business Review of the Americas
LIEI	Legal Issues of Economic Integration
McGill L. J.	McGill Law Journal
Mich. J. Intl' L.	Michigan Journal of International Law
Mich. St. Int'l L. Rev.	Michigan State International Law Review
N.C. L. Rev.	North Carolina Law Review
New Pol. Econ.	New Political Economy
New York Univ. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
Non-State Actors and Int'l L.	Non-State Actors and International Law
N.Y.U. Envtl. L.J.	New York University Environmental Law Journal
OGEL	Oil, Gas & Energy Law Journal
Ohio St. L.J.	Ohio State Law Journal

Pol. YIL	Polish Yearbook of International Law
Renew. Sust. Energ. Rev.	Renewable and Sustainable Energy Reviews
Rev. Arb.	Revue de l'arbitrage
Rev. Bras. Pol. Int.	Revista Brasileira de Política Internacional
Rev. Gen. Dr. Int'l Public	Revue Générale de Droit International Public
RIPE	Review of International Political Economy
RIS	Review of International Studies
S. Cal. L. Rev.	Southern California Law Review
SAYIL	South African Yearbook of International Law
Seattle L. Rev.	Seattle Law Review
South Af. J. Int'l L.	South African Journal of International Law
Stan. J. Int'l L.	Stanford Journal of International Law
Stan. L. Rev.	Stanford Law Review
SZW	Schweizerischen Zeitschrift für Wirtschafts- und Finanzmarktrecht
TDM	Transnational Dispute Management
Theor. Inq. L.	Theoretical Inquiries in Law
TL & D.	Trade, Law and Development
TLCP	Transnational Law & Contemporary Problems
U. Rich. Law Rev.	University of Richmond Law Review
UCD Law Rev.	University College Dublin Law Review
VA J. Int. Law	Virginia Journal of International Law
WTR	World Trade Review
Yale J. Int. Affairs	Yale Journal of International Affairs
Yale J. Int'l L.	Yale Journal of International Law
ZBl	Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht

Acronyms

AfDB	African Development Bank
ALPDP	Areas of Law Pest or Disease Prevalence
APEC	Asia-Pacific Economic Cooperation
AsDB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CFR	Code of Federal Regulations
CIL	Customary international law
DSB	Dispute Settlement Body
DSS	Dispute settlement system
DSU	Dispute Settlement Understanding
CETA	Comprehensive Economic and Trade Agreement
EBRD	European Bank for Reconstruction and Development
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECLAC	Economic Commission for Latin America and the Caribbean
ECT	Energy Charter Treaty
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment
FIT	Feed-in tariff
FTAs	Free trade agreements
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSP	General System of Preferences
IADB	Inter-American Development Bank
IBRD	International Bank for Reconstruction and Development
ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
IFIs	International financial institutions

IIA	International investment agreement
IMF	International Monetary Fund
IMS	International minimum standard
ISSBs	International standard-setting bodies
LAIA	Latin American Integration Association
LDCs	Least Developed Countries
MAS	Mutually agreed solution
MDGs	Millennium Development Goals
MFN	Most-favoured nation
MoU	Memorandum of understanding
NAFTA	North American Free Trade Agreement
NGOs	Non-governmental organizations
NGPF-G	Norwegian Government Pension Fund Global
NRAs	National Regulatory Authorities
NT	National treatment
OECD	Organization for Economic Co-operation and Development
OPEC	Organization of the Petroleum Exporting Countries
PA	Partnership agreement
PCA	Partnership and cooperation agreement
PDFA	Pest- or disease-free areas
PEEREA	Protocol on Energy Efficiency and Related Environmental Aspects
PTAs	Preferential trade agreements
RDBs	Regional development banks
RCEP	Regional Comprehensive Economic Partnership
SACU	Southern African Customs Union
SCC	Stockholm Chamber of Commerce
SCM	Subsidies and Countervailing Measures
SDGs	Sustainable development goals
SFOE	Swiss Federal Office of Energy
SPS	Sanitary and phytosanitary measures
SRI	Socially responsible investments
SWFs	Sovereign wealth funds
TBT	Technical barriers to trade
TEP	Third Energy Package
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TiSA	Trade in Services Agreement
TP	Transit Protocol
TPP	Trans-Pacific Partnership
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Aspects of Intellectual Property Rights
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
TSO	Transmission system operator

TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UN-PRI	United Nations Principles for Responsible Investment
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WBG	World Bank Group
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Part I
International Economic Law and Other Concerns

The First Twenty Cases Under GATT Article XX: Tuna or Shrimp Dear?

Niall Moran

Contents

Abstract When the general exceptions to the GATT have been invoked before the Appellate Body, they have only been deemed a legitimate defence in two cases since the inception of the WTO and its Dispute Settlement Body in 1995. This article analyses why so many defences taken under the general exceptions to the GATT have failed and whether this low success rate is indicative of a priority being given to market access over public policy objectives at the WTO. In August 2014, the Appellate Body issued its twentieth report in a case appealed under the general exceptions. These first twenty reports are analysed to see which stage of the two-tier test measures have failed and why they have failed.

To better understand Article XX's context, this article first examines its historical evolution and recent interpretations of its two-tier test. It then turns to application of the two-tier test and why measures have failed the necessity test or failed to comply with Article XX's chapeau (the two elements of Article XX's two-tier test).

Finally, in light of Article XX's case law and how the two-tier test has been interpreted, it considers whether the Appellate Body is striking the right balance

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between Members' substantive rights and Members' rights to pursue public policy objectives under the general exceptions.

1 Introduction

Twenty years have seen twenty cases appealed under the general exceptions to GATT Article XX at the WTO. In August 2014, the Appellate Body issued its twentieth such report in the *China – Rare Earths* case.[1] When the general exceptions have been invoked under Article XX of the GATT,[2] it has only been deemed a legitimate defence in two cases since the inception of the WTO and its Dispute Settlement Body (DSB) in 1995. The general exceptions address the conflict between trade and other legitimate policy objectives of Members. There are ten such objectives including public morality, the protection of life and the conservation of exhaustible natural resources.

The aim of this paper is to analyse recent cases involving Article XX defences and whether a new interpretation of Article XX is needed in light of this low success rate of Article XX defences.[3] Is this low success rate attributable to systemic reasons at the DSB or is it indicative of a priority being given to market access over public policy objectives? This paper considers this question and whether the Appellate Body is striking the right balance between Members' rights to market access and Members' rights to pursue public policy objectives under the general exceptions.

Article XX allows the DSB to strike a balance between free trade and other public policy goals. The *US – Tuna I* and *US – Shrimp II* cases are famous in the WTO lexicon and have become symbolic of the larger trade and the environment debate. In the former, it was felt that the panel report shifted the balance in the trade and environment debate in favour of free trade. This balance was seemingly restored in the *US – Shrimp II* case in 2001 where a US measure protecting sea turtles was deemed compliant with the WTO agreements. However, since 2001, no measure defended under Article XX has been deemed compliant with the WTO Agreements. In assessing whether a revised way of interpreting Article XX is needed, this paper considers how well the Appellate Body is striking this balance.

[1] WTO doc. WT/DS431/AB/R, Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, 7 August 2014.

[2] The general exception clause is also found under Article XIV of GATS, which has an identical wording to the GATT in the parts considered here. As the vast majority of cases in this area have been taken under the GATT, for the sake of simplicity the general exceptions clauses are referred to as being under GATT Article XX throughout this paper.

[3] See Appendix 1 for a table showing the case-by-case success rate of Article XX defences.

The 2014 *EC – Seals*[4] case illustrates recent developments under Article XX. The interpretative evolution of Article XX is considered in light of this case in Sect. 3. In particular, the nature of Article XX's two-tier test, the "rational connection" test and the distinction between a measure and its application are considered.

The rest of the paper is structured as follows. Section 2 introduces Article XX and its two-tiered test for qualifying as a general exception. Section 3 looks at some of the issues raised under Article XX in the aftermath of *EC – Seals*. Section 4 examines why measures defended under the general exceptions have infringed Article XX. Section 5 considers whether or not a revised interpretation of Article XX is needed given the low success rate for defences. Finally, Sect. 6 concludes.

2 Introducing the General Exceptions

When a government measure is found to restrict trade, Article XX may be invoked as a defence. A measure is analysed in two stages under Article XX in assessing whether it qualifies for protection. Firstly, it must be capable of being provisionally justified under one of the ten policy objectives contained in subparagraphs (a)–(j) of Article XX. Secondly, a measure must comply with Article XX's chapeau, or introductory clauses. The chapeau's primary purpose is prevention of abuse of the exceptions listed in the subparagraphs.[5]

It has been the traditional view at the DSB, that before turning to the chapeau, the panel or Appellate Body must consider whether a measure is: necessary to protect public morals (let a), necessary to protect human, animal or plant life or health (let b), necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (let d), or relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (let g).

Article XX(a), (b), (d) and (g) are the only subparagraphs that have formed the basis of cases that have come before the Appellate Body. Article XX(a), (b) and (g) concern moral and environmental issues, which is where the focus of this paper lies. Article XX(d) is thematically different, dealing with measures necessary for compliance with laws in areas such as customs enforcement. For this reason, the content of these cases is not analysed in this paper.

[4]WTO doc. WT/DS401/AB/R, Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 22 May 2014.

[5]Ibid., para 5.327.

In determining whether a measure is "necessary" under Article XX(a) and (b), the Appellate Body balances factors including the contribution of a policy to its objective, the importance of the objective and its impact on international trade.[6] If confirmed as necessary preliminarily, the measure is then compared to less restrictive alternative measures. On whether a measure is "relating to the conservation of exhaustible natural resources" under Article XX(g), a "substantial relationship" must exist between the measure and the conservation effort.

To comply with the chapeau, *inter alia,* a measure must not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade". It is a flexible tool provided by the agreements that gives the Appellate Body a degree of freedom in attributing weight to the various concerns of the parties. Factors considered by the Appellate Body in its assessment have included a measure's design, flexibility, rationale and whether it has been exercised in good faith.

Article XX functions as a two-tier test, a sequence that has been deemed by the Appellate Body to be logical and fundamental to the Article.[7] Interpreting the chapeau without this sequence of investigation has been deemed by the Appellate Body to be difficult "if . . . possible at all".[8] The idea is that the specific exception should be examined first to set the context before turning to the application of a measure under the chapeau. This logic of interpreting the provisions before the chapeau has been disputed and labelled as "arbitrary" by Bartels (2014) though he cedes that a two-tier test is appropriate on the grounds of judicial economy.[9]

Whether an examination of the application of a measure under the chapeau is needed at all has been questioned. Davies believes that "the nexus requirements in the heads of provisional justification provide ample protection" against the abuse of Article XX.[10] Along this line of thinking, if something is "necessary" to protect life or "related to" the conservation of exhaustible natural resources it should automatically qualify for an Article XX exemption. The impact of removing the chapeau from Article XX's two-tier structure would be to restrict the DSB to solely looking at the nature of a measure without regard to discriminatory treatment in place resulting from the measure. The contribution of the two-tier test and interpreting the chapeau to the low success rate of Article XX defences is considered in the next sections.

[6]See https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (accessed 30th January 2016).

[7]WTO doc. WT/DS58/AB/R, Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, para 119.

[8]Ibid., para 120.

[9]Bartels (2014), p. 7.

[10]Davies (2009), p. 32.

3 The Objective of a Measure and the Two-Tier Test

One ongoing question concerning Article XX and its interpretation is whether the reasons for preliminary justification need to be the same as those provided for satisfying the chapeau. This question as to whether the reason for discriminating has to be the same as the reason for restricting trade was addressed in *EC – Seal*s.

In *Brazil – Retreaded Tyres*, the Appellate Body found that it would be difficult to find any discrimination compliant with the chapeau where it "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".[11] The same paragraph tells us that it is an abuse of the exceptions where there is "no rational connection" between the objective pursued under the first part of the two-tier test and the discrimination seeking to be justified under the chapeau.

The WTO website endorses the idea of there being a "rational connection test" for a trade restrictive measure to be justifiable under the chapeau: "WTO jurisprudence has highlighted some of the circumstances which may help to demonstrate that the measure is applied in accordance with the chapeau. These include ... an analysis of the rationale put forward to explain the existence of a discrimination (the rationale for the discrimination needs to have some connection to the stated objective of the measure at issue)".[12] Other circumstances listed include a measure's design, flexibility and coordination and cooperation activities undertaken by the defendant.

Bartels suggests that the rational connection test should be viewed as an error[13] and that it was overturned in *EC – Seals*. The Appellate Body found in *EC – Seals* that the "relationship of the discrimination to the objective" is one of the most important factors but not the sole test for compliance with the chapeau. The Appellate Body's finding in *EC – Seals* that the objective for discrimination is not the sole test but that there are additional factors that may be relevant does not necessarily run contrary to *Brazil – Retreaded Tyres* which itself acknowledges one such factor in assessing compliance with the chapeau. The additional factor considered was whether the discrimination was being applied in a manner that would "go against that objective" cited under Article XX's subparagraph. When considering the test laid down in *Brazil – Retreaded Tyres*, this second element of the analysis must be borne in mind. These two elements are; (1) that a measure may not discriminate where it is not rationally connected to the objective pursued under the subparagraph; (2) where not rationally connected, the discrimination must not run contrary to the initial objective. In Bartels's example of the medical use of narcotics, it is not necessarily an affront to public morality to allow the use of a narcotic

[11]WTO doc. WT/DS332/AB/R, Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, 3 December 2007, para 227.

[12]https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (accessed 30 January 2016).

[13]Bartels (2014), p. 15.

for public health reasons. If the two elements of the test are considered, it is difficult to find that the *Brazil – Retreaded Tyres* dictum has been overturned in *EC – Seals*.

This exception to the EU Seal Regime is for seal products derived from hunts by Inuit or indigenous communities. The assessment of whether the Inuit exception supported Inuit communities (IC) is seen by Bartels as evidence that *Brazil – Retreaded Tyres* has been overturned. Bartels deems that such an analysis would be "impossible" under it as there is no rational connection between supporting Inuit communities and the public morals objectives of the EU seal regime.[14]

Protecting traditional methods is however part of a broader public morality of upholding ethical standards even if this is not the same specific moral concern that is expressed when banning the importation of seal products. The EU submitted that IC hunts were distinguishable from commercial hunts as they contributed to the subsistence and identity of Inuit. IC hunts were of significance for Inuit "culture and tradition as well as for their livelihood".[15]

The EU contested the panel's finding that there was no rational connection between the public morals objective and the exception to it for Inuit communities.[16] The EU submitted on appeal that an integral part of legislating based on a moral standard was to have a "balancing of interests" as reflected in the IC exception, which was the outcome of "the application of that moral doctrine to the specific circumstances of seal hunting".[17]

Whether or not the rational connection test is desirable in the context of the general exceptions is another question. Considering the case in which it was laid down, if a retreaded tyre ban's objective is to protect the environment, is it unreasonable to say that the reason for discrimination should be connected to this objective or at least not run contrary to it?

While this test fits the facts of *Brazil – Retreaded Tyres* well enough, its shortcomings are more apparent in a scenario more like the *US – Shrimp* cases. Conserving sea turtles may be a conservation objective under Article XX(g) but discrimination in this measure's application could be grounded in a moral concern. E.g. a WTO Member may give a waiver of a particular fishing requirement enacted for environmental reasons to a small island if this would facilitate the sustainability of a traditional way of life. The exception is not rationally connected to the objective pursued, runs contrary to it but may be a justified form of discrimination based on the balancing of interests concerned.

While there may be some instances where an exception is not rationally connected to an objective pursued and even runs contrary to it, it is questionable whether justifications under the subparagraphs and chapeau need to be delinked in a

[14]Ibid.

[15]*European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, (AB-2014-1, 2/DS400, DS401), Other Appellant Submission by the European Union, 29 January 2014, para 142.

[16]Ibid., para 16.

[17]Ibid., paras 110–11.

general manner. As per *EC – Seals*, additional factors may be considered but the relationship of the discrimination to the objective of a measure is one of the most important factors and will be in the majority of cases.

The traditional basis for the two-tier test is the distinction between a measure and its application. Bartels claims that *EC – Seals* has abolished this distinction as regard was had to the content of a measure in considering its application. The Appellate Body cited *Japan – Alcoholic Beverages,* a national treatment case, in finding that it may be "*relevant to consider* the design, architecture and revealing structure of a measure" (para 5.302).[18]

In *EC – Asbestos*, the Appellate Body reminded the panel in its report that Articles III and XX "are distinct and independent provisions".[19] The case involved considerations of the health reasons behind an Article III measure which was not deemed to deprive Article XX(b) of its *effet utile* as different inquiries were made under the different Articles. GATT Articles III and XX are separate provisions, which require separate inquiries.

The reference to *Japan – Alcoholic Beverages* does acknowledge that the chapeau does not exclusively concern the application of a measure and that the substantive content of a measure may also be an element. Such an interpretation widens the scope for interpreting the application of a measure but while the Appellate Body may consider an element used in an Article III analysis, such a consideration does not constitute a fundamental re-evaluation of the two-tier test. As such, it is pre-emptive to say that the two-tier test's fundamental distinction has been abolished. In applying the two-tier test, regard is still fundamentally split between the consideration of a measure under the subparagraphs and the application of the measure under the chapeau albeit with a widened interpretation of the term "application", which may include additional factors. The question of whether or to what extent the reference to *Japan – Alcoholic Beverages* and the design of a measure will impact upon compliance with the chapeau in future Appellate Body reports remains to be seen.

The Appellate Body found that in considering the design, architecture and structure of a measure, its "actual or expected application" is relevant in determining whether a measure infringes the chapeau.[20] This is the first time the "expected application" of a measure was referred to in an Appellate Body report (it was repeated by reference to *EC – Seals* in *China – Rare Earths*, later in 2014).[21] Given the implications of paragraph 5.302 for future interpretations of the chapeau, the implications of each word must be considered.

Traditionally, a Member does not have to show that damage has actually occurred to satisfy the chapeau and has only needed to show a measure to be

[18]WTO doc. WT/DS401/AB/R, *supra*, n. 4 (emphasis added).

[19]WTO doc. WT/DS135/AB/R, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, 12 March 2001, para 115.

[20]Ibid.

[21]WTO doc. WT/DS431/AB/R, *supra*, n. 1, fn 625.

discriminatory. As such, the need to introduce the term "expected application" is questionable when damage does not need to be shown. Paragraph 5.302 refers to how a measure is "applied" three times before introducing this distinction between actual and expected application. It is this author's opinion that the words "actual or expected" add no value to the concept of what constitutes application under the chapeau and should be avoided in future reports.

4 Why Measures Have Failed Article XX

This section looks at the reasons why measures have failed the necessity test or failed to comply with Article XX's chapeau.[22] The success rate for all Article XX claims has been two out of twenty (10 %). However, for measures relating to public morals and the environment under Article XX(a), (b) and (g) the success rate is one in six (16.6 %).

Before the DSB, an Article XX(a) defence has failed on each of the three occasions it has been invoked. While *China – Audiovisual* failed the necessity test, *US – Gambling* and *EC – Seals* failed to satisfy the chapeau.

In relation to Article XX(b) and (g), since 1995 two defences have failed the necessity test (*China – Rare Earths, EC – Tariff Preferences*) and five have failed to comply with the chapeau (*US – Gasoline, EC – Tariff Preferences, Brazil – Retreaded Tyres, US – Shrimp (1998 & 2008)*).

The necessity test was failed because of the availability of alternatives (*China – Audiovisual*), the "piece-meal"[23] manner of its application (*China – Rare Earths*) and the fact that there was no relationship between the objectives stated and the measures put in place (*EC – Tariff Preferences*).

Reasons why measures have been deemed not to comply with Article XX's chapeau have included the application of a prohibition to foreign but not domestic service suppliers (*US – Gambling*), the lack "comparable efforts" in enabling one group to qualify for an exception to a ban (*EC – Seals*) and the existence of an exception to a ban for neighbouring countries which ran contrary to the objective invoked for provisionally justifying the measure (*Brazil – Retreaded Tyres).*

Despite the low success rate of Article XX defences, many measures designed to protect the environment and public morals have been deemed provisionally justifiable, satisfying the first part of the two-tier test. For Article XX claims, 9/20 have been deemed provisionally justifiable (45 %). This paper has excluded Article XX (d) from its analysis for thematic reasons. All eight defences under XX(d) have failed the necessity test and in the only case where an analysis of the chapeau was carried out, it was also deemed non-compliant (*US – Thai Cigarettes*). Taking Article XX(d) out of an analysis of provisional justification, 9 out of 12 of the

[22] Appendix 2 provides a more detailed outline of these decisions.

[23] WTO doc. WT/DS431/AB/R, *supra*, n. 1, para 5.116.

measures defended under Article XX(a), (b) and (g) have been found to be provisionally justifiable (75 %). Whether this represents a silver lining for public policy makers is considered in the next section.

5 Has the Right Balance Been Struck?

Section 5 asks whether the right balance has been struck in Article XX's first twenty cases. It considers whether a revised Article XX, or way of interpreting Article XX, is needed given the low success rate for defences. Areas considered include the adequacy of the two-tier test and whether *EC – Seals* has shifted the "line of equilibrium" in interpreting Article XX. In terms of the two-tier test, the necessity test is looked at before turning to the chapeau and whether there is room for improving how it operates.

The *US – Tuna* case (1991) challenged the view that an appropriate balance had been struck between trade and public policy considerations under free trade agreements when an ostensibly environmental measure taken by the US was deemed to be inconsistent with the GATT. Following the inception of the WTO in 1995, greater weight appeared to be given to environmental concerns in 2001 with the *US – Shrimp I* case. This was largely viewed as a positive development but was criticised by Bhagwati who claimed that the Appellate Body had bowed to international environmental pressure.[24] In *US – Shrimp I*, it was found that to ensure a measure is compliant with Article XX's chapeau, a Member must make efforts to find a cooperative solution to the problem. Secondly, a Member needs to consider the conditions in other territories when designing measures. This finding appeared to strike a greater balance and it seemed that in future cases, measures would be able to comply with these standards. This has not transpired and there has not been a successful Article XX defence since *US – Shrimp II*.

On the face of it, the low success rate of Article XX defences may indicate a priority being given to Members' substantive rights over concerns such as environmental protection at the DSB. Other reasons that are systemic to the functioning of the DSB may be put forward in explanation. One reason may be that the environmental measures may be acceptable under GATT Article XX by themselves, but their discriminatory application under the chapeau may not be. Thus even if it is a loss for a specific Member in a case, it may be a win for the public policy objective overall.

Other reasons may be that cases involving discriminatory measures are more likely to be resolved at the consultation stage or may not be appealed to the Appellate Body. Furthermore, for diplomatic reasons Members tend to take cases they believe they have a good chance of winning. The paper analyses Article XX defences once they come before the Appellate Body rather than the steps preceding this.

[24] Bhagwati (2001), pp. 15–29.

While successful defences have been uncommon, the two-tier test has been passed in *EC – Asbestos* and *US – Shrimp II*. This represents two of the twenty cases where an Article XX exception was invoked and the case went to the Appellate Body. In *US – Shrimp II* discrimination was not found once "similar opportunities" were provided to all exporters. This was the case regardless of the outcome of these negotiating opportunities. In *EC – Asbestos,* this decision rightly affirmed the large degree of discretion Members have when regulating public health issues. This case shows that when it comes to measures concerning a grievous potential harm to the health of Members' citizens and a measure is applied consistently, it has no difficulty being exempted under Article XX.

As seen in Sect. 4, there has been a 75 % success rate for measures under Article XX(a), (b) and (g) in terms of being found to be preliminarily justifiable. This reflects the fact that the panels and Appellate Body are often willing to deem measures necessary when the aim is to protect life, the environment and public morals. As the Appellate Body stated in its *Korea – Various Measures on Beef* report: "The more vital or important the common interests or values pursued, the easier it would be to accept as 'necessary' the measures designed to achieve those ends".[25]

Environmental, health and public moral defences have often been deemed preliminarily justifiable. However, this may not be of much consolation to a Member when the balancing of interests under the chapeau has gone against them. Perhaps some of these losses can be reframed as wins for public policy where it was far from certain whether they would constitute a permissible restriction on trade under the subparagraphs in the first place. Although the EU and Brazil's measures on the importation of seal products and retreaded tyres failed to comply with the chapeau, the fact that such measures have been deemed provisionally justifiable under WTO law shows that the Appellate Body has acknowledged a broad range of public policy concerns that permit restrictions on trade.

The *Brazil – Retreaded Tyres* case shows the Appellate Body's willingness to accept environmental and health risks as legitimate and complex concerns that can be tackled by a wide range of measures. When a measure infringes Article XX's chapeau on the basis of discriminatory treatment, it is primarily a question of fairness in the accordance of rights equally to all WTO Members than one of favouring trade over public policy interests. A concern of Members in allowing derogations from the WTO agreements in environmental matters is that these measures will become a new form of protectionism. In enacting environmental or moral measures, ensuring that these measures are not discriminatory in their application should be a starting point for Members in demonstrating that the aim of a measure is environmental rather than protectionist. Showing that a measure is non-discriminatory is a necessary but not sufficient condition for a measure to comply with Article XX.

[25]WTO doc. WT/DS161/AB/R, Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, 11 December 2000, para 162.