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“GREY ZONES”: AN ANALYSIS OF THE CHAPEAU OF ARTICLE XX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE FROM WTO CASE LAW

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ABSTRACT

Article XX of the General Agreement on Tariffs and Trade 1994 of the WTO, enshrines the possibility for Members to justify a measure that is not consistent with this agreement, under one of the general exceptions. However, it is necessary for the Members to develop a two-tier test, where one of the requirements is that Members need to demonstrate that the measure is not applied in a manner that constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and that it is not "a disguised restriction in international trade." Nevertheless, in the practice, difficulty in demonstrating the compliance with this second requirement arises. It is the purpose of this paper to determine the main problems that show up when trying to comply with the requirements of the chapeau. This analysis will address from the traditional interpretation and scope given by case law to this notion, to the most recent decisions that refer to this matter.

Key Words: WTO, GATT, International Trade, General Exceptions.

ABSTRACT

En el marco del Acuerdo General sobre Aranceles Aduaneros de la Organización Mundial Comercio, se vislumbra la posibilidad de que una medida incompatible con dicho acuerdo se justifique bajo alguna de las excepciones generales consagradas en el artículo XX. Sin embargo, es necesario que el Miembro que invoca dicha excepción, desarrolle un doble análisis done uno de los requisitos consiste en demostrar que la medida no se aplica en forma que constituya "un medio de discriminación arbitrario o injustificable entre los países en los que prevalezcan las mismas condiciones" y que tampoco es "una restricción encubierta al comercio internacional". En la práctica, existe una problemática en torno a la demostración de este último requisito. El objetivo de este trabajo es analizar desde la jurisprudencia de la OMC, las dificultades que surgen al momento de intentar dar cumplimiento a los requerimientos del chapeau. Dicho análisis abordara desde la tradicional interpretación dada por la jurisprudencia a esta noción, hasta los más recientes pronunciamientos al respecto.

Palabras clave: WTO, GATT, Comercio Internacional, excepciones generales.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AB……..... Appellate Body

ABR……..……... Appellate Body Report

Art./Arts…….……...Article/Articles

EC…….…… European Community

fn./fns……...…… footnote/footnotes

GATT……..…. General Agreement on Tariffs and Trade

para./paras……..... paragraph/paragraphs

p./ps…….……. page/pages

PR…….. Panel Report

US……...……...United States

WTO……..……...……. World Trade Organization

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INTRODUCTION

The World Trade Organization (WTO) is the most powerful organization dealing with international trade. It was established upon the conclusion of the Uruguay Round with the signing of the Marrakesh Agreement in 1994 and accounts the Membership of 153 parties. At its core, a series of principles such as transparency, predictability, non-discrimination, trade liberalization, among others, lead its philosophy, which principally seeks to promote equality between trade partners.

It is important to recall the background of this organization in order to understand the extent and significance of its agreements, through which such principles have been embodied. It is not a secret that discrimination between and against other nations has been a typical characteristic present in the different protectionist trade policies adopted by countries. The General Agreement on Tariffs and Trade (GATT) 1947 arose from the ashes of World War II, as the Cold War and other subsequent conflicts contributed to the transformation and further emergence of the WTO in 1994[1]. That been said, the enshrinement of the multilateral trading system based on such foundational principles, reflects the spirit of cooperation held by the international community on such time, which was in search of an new beginning, with different rules in the international scene.

Nevertheless, that spirit that pushed hardly for trade liberalization did not take the form of absolute norms. In that sense, the drafters of the agreements decided to include a series of exceptions that nuance and suspend the applicability of the different WTO provisions in the practice. Members recognized at that moment the necessity of creating an

[1] Van Grasstek,Craig. *The History and Future of the World Trade Organization.* WTO Publications (2013). p. 8.

instrument that could adapt to the nations' realities and that would not turn obsolete and useless over the years due to the lack of flexibility and capacity of adjustment.

That is the reason why, this flexibilization instruments were included all over the different agreements. Examples of this are the General Exceptions to the General Agreement on Tariffs and Trade. The GATT is a very important agreement in the multilateral trading system as it is in charge of the substantial reduction of tariffs and other trade barriers and it seeks the elimination of preferences, on a reciprocal and mutually beneficial basis between countries.

Furthermore, it is important to take into account that the implementation of such exceptions has a trade impact because a member may act against a provision of the GATT Agreement if it succeeds in demonstrating that its measure is justified under Article XX. However, for a measure not to become an arbitrary restriction to trade, compliance with a two-tiered test has been established. This in order to guarantee importing companies, foreign investors and governments, among others, that those trade barriers are not being raised unjustifiably and are creating unnecessary obstacles in trade flows.

The key element within the achievement of this two-tiered test is the role that the *chapeau* of article XX plays, since it is the objective parameter used to analyze whether a measure constitutes an arbitrary or unjustifiable discrimination or represents a disguised restriction to trade. However, the rules set forth within the *chapeau* in some cases are not clear, and have given rise to important debates as to their interpretation and scope. In fact, just only one of 40 attempts to apply the General Exceptions has ever succeeded. Therefore, a question arises: Is the second step of the two-tiered test of article XX so rigorous that it is almost impossible for Members to justify their actions under one of the General Exceptions?

In order to respond to the previous question, this document will analyze Article XX of the GATT, first through an overall view through its structure, which will address its subparagraphs, and then landing on the specific concern: the *chapeau*. Then the meaning and application of both "unjustifiable" and "arbitrary" will be examined. For these purposes, both Panel and Appellate Body decisions will be considered in order to arrive to a full interpretation of this provision. As follows, having this general picture, conclusions towards the difficulty of its applicability will be exposed.

Taking this into account, Chapter 1 of this document refers to the history and nature of the exceptions in the WTO agreements. Chapter 2 explores specifically the General Exceptions contained in Article XX of the GATT, in terms of their nature, structure, as well as the particular bond between the subparagraphs and the *chapeau* and specially focusing on the analysis of its introductory clause. Chapter 3 is dedicated to applicability problem of the *chapeau*. It pretends to establish and condense the conclusions drawn from the two previous chapters, regarding the ineffectiveness that this exception has in practice. Finally, Chapter 4 will include the conclusions of the analysis of the grey zones that may be identified within the *chapeau* of Article XX of the GATT.

1. The exceptions in the WTO agreements.

The WTO covered agreements encompass a wide catalogue of obligations related to matters such as agriculture, government purchases, standards and product safety, sanitary regulations, among others. Even though each of these agreements deals with the regulation of a specific subject area, there are several basic principles that permeate and constitute the basis for all the multilateral trading system. Some examples of these foundational principles may be predictability, transparency, free trade, non-discrimination and fair competition.

The Preamble of the WTO Agreement highlights the importance of these principles, for example by establishing that the *"elimination of discriminatory treatment in international trade relations"*[2] is one of the main means by which the objectives of this global trading system tend to be achieved.

Van den Bossche states in his text *The Law and Policy of the World Trade Organization* that "[h]istorians now regard these discriminatory policies as an important contributing cause of the economic and political crises that resulted in the Second World War. Discrimination in trade matters breeds resentment among the countries, manufacturers, traders and workers discriminated against. Such resentment poisons international relations and may lead to economic and political confrontation and conflict."[3] That been said, the enshrinement of this multilateral trading system based on such foundational principles, reflects the spirit of cooperation held by the international community on such time, which was in search of a new beginning. All this, in order to

[2] The third recital of the preamble of the WTO Agreement establishes the following: *Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements *directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations*. (Emphasis added).

[3] Van den Bossche, Peter. *The Law and Policy of the World Trade Organization.* Cambridge University Press (2005).p. 369.

leave behind the inconveniences experienced in the past and achieve the common objective of trade liberalization.

However, it is worth mentioning that these principles that constitute the inspiration and basis of the different agreements are not absolute. As in all legislations, there are exceptions and nuances that make their application more flexible. It is important to consider that in some cases, this flexibility responds to legal reasons and in others to political issues, but in any event justifying that the application of the principle is being suspended by the different exceptions contained in WTO law.

Exceptions have been object of wide discussions in practice, because of their permissible character under specific circumstances, which is making them evolve from being an extraordinary circumstance to almost a general rule. Professor Van den Bossche considers that "these exceptions are important in WTO law and policy because they allow for the "reconciliation" of trade liberalization with other economic and non- economic values and interests."[4]

The reason for this flexibilization is evident when materializing these foundations to the practice, where it is frequent to identify different conflicts that emerge between trade liberalization with important values and interests of Members. Some examples of these interests may be public health, consumer safety, environmental issues, economic development and national security, among others. The WTO system does not ignore this reality and therefore provides different rules in order to bring these concerns together with free trade.

[4] *Id.* at 322.

1.1 Overall View of the General Exceptions and specific exceptions in the WTO.

Doctrine has classified the exceptions contained in the different WTO agreements in six main categories that are the following: On first place the 'General Exceptions' of Article XX of the GATT 1994 and Article XIV of the GATS. Secondly, there are 'Security Exceptions' of Article XXI of the GATT 1994 and Article XIV of the GATS. Moreover, there are the 'Economic Emergency Exceptions' of Article XIX of the GATT 1994 and the Agreement on Safeguards. Also it should be considered the 'Regional Integration Exceptions' of Article XXIV of the GATT 1994 and Article V of the GATS. There are also 'Balance of Payments Exceptions' of Articles XII and XVIII:B of the GATT1994 and Article XII of the GATS; and finally the 'Economic Development Exceptions'.[5]

As such exceptions make reference to different concerns; they all differ in scope and nature. This considering that "[s]ome allow deviation from all other GATT or GATS obligations; others allow deviation from specific obligations only; some are of indefinite duration; others temporary; some can be invoked by all Members; others only by a specific category of Members.[6]"

To begin, regarding the General Exceptions, these provisions contain a list of economic and non – economic values, such as the necessity to protect public morals, human, animal or plant life or health, the necessity to protect exhaustible natural resources, and the necessity to comply with laws and regulations. Upon this basis, it is permitted for a member to act inconsistently with WTO law in order to protect such values if a two-tiered test is fulfilled. The General Exceptions are found in both GATT and GATS and share a very similar structure and nature.

[5] *Id.* at.590
[6] *Id.* at.598

As to the security exceptions, they refer to the right Members have to take measures intended to protect vital national security interests. It is well known that security matters constitute a sensible topic for nations and in many cases they prefer to deal with it at an internal level due to their domestic relevance.

It is worth mentioning, "[t]hat Article XXI has been invoked in only 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 and peace[7]".

On the other hand, the safeguards are exceptions that bring up the possibility for Members to adopt measures that restrict imports for a certain time period, in order to allow the domestic industry to adjust to the new economic scenario.

As to the of balance-of-payments exceptions, it is important to mention that some of them they may be invoked by all Members while others just by the developing countries. As follows, when invoking Article XII of the GATT a Member seeks to safeguard the external financial position and its balance of payments; when Article XVIII:B is invoked, a Member is seeking to safeguard its external financial position and ensure an adequate level of reserves for the implementation of an economic development program.

Now, considering the regional integrations exceptions, they allow Members creating free trade areas, customs unions and economic unions, among others, which may cover different economic activities, such as trade, services, and foreign investment. Currently, as

[7] *Id*. at. 628

Professor Achia considers, "this practice constitutes the recent trend to the MFN treatment being steadily marginalized."[8]

Finally, considering the economic development exception, its objective is making integration easier and less burdensome for least developed and developing countries into the world trading system and further promoting their economic development. "The WTO law provisions to this effect are called special and differential treatment provisions. It should be noted that the special and differential treatment provisions are not mandatory as such compliance in practice and success of the same is a subject of intense debate."[9]

As it has been exposed, the WTO principles constitute the pillars that structure the different provisions and seek to promote equality by granting equivalent trading opportunities to all Members and in this manner, making trade flows simpler. However, taking into account the exceptions that have been previously discussed, some consider that the purpose and philosophy of the organization seems to have been defeated and undermined. The reality is that every time it is more frequent that Members tend to justify their new regulations under such provisions, turning them into general rules.

[8] Achia, Alexander. *Exceptions to and the Fate of the Most Favored Nation Treatment Obligationunder the GATT and GATS.* MPRA Paper No. 41237 (2012). p.3
[9]Id. at. 9

2. The General Exceptions: Article XX of the GATT

As it has been introduced before, Article XX of the GATT is better known as the 'General Exceptions' in measures regulating the trade of goods between WTO Members. This means that this provision, which has the nature of an affirmative defense[10], allows a defendant party to justify a contravention of its obligations under the GATT, by demonstrating that the inconsistent measure (i) is provisionally justified under one of the subparagraphs of Article XX; and (ii) is consistent with its *chapeau*, which implies an analysis of whether a given measure is "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"[11].Consequently, Article XX of the GATT contains a wide list of exceptions that allow Members to adopt trade restrictive legislation in order to let them pursue their interests and values.

Article XX of the GATT establishes the following:

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

a) necessary to protect public morals;

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

c) relating to the importations or exportations of gold or silver;

[10] PR, *US-Gambling*, para. 6.450.
[11] ABR, *US-Gasoline*, p.22.

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

e) relating to the products of prison labor;

f) imposed for the protection of national treasures of artistic, historic or archaeological value;

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

h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved;

i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties 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. The contracting parties shall review the need for this sub-paragraph not later than 30 June 1960."[12]

The above makes clear how such exceptions seek principally the protection of societal values and interests of different nature; for example, public morals, public health, environment and other relevant issues. As the Sutherland Report states:

"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 principles and fairness. In doing so 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.*"[13] (emphasis added)

These special interests recalled by the Sutherland Report, are precisely protected in the wide catalogue of exceptions contained in Article XX. Although each of the subparagraphs might differ in scope and nature, by referring each of them to different topics that embody Members' contemporary concerns, it is possible to determine that they all have something in common. This common ground is that, in one or another manner, they "allow Members under specific conditions, to adopt and maintain legislation and measures that promote or protect other important societal values and interests, even though

[12] GATT 1994: General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
[13]Report by the Consultative Board to the Director- General Supachai Panitcpakdi, *The future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004). Para.39.

this legislation or these measures are inconsistent with substantive disciplines imposed by the GATT 1994…"[14]

So, in conclusion, there is no doubt that such exceptions have a basic common goal, which is giving the possibility to Members under certain conditions to give priority to certain interests over trade liberalization. This by recognizing that if Members want this multilateral system to work and last over the years, it is necessary to articulate general interest with the particular concerns and values of the different Members.

2.1 Nature of the General Exceptions

As introduced before, the General Exceptions of Article XX should be considered only when a measure[15] that a Member adopts has been found to be inconsistent with another GATT provision. In 1989, the Panel in the US -Section 337 of the tariff Act 1930 report[16] determined that:

> "Article XX is entitled "General Exceptions" and that the central phrase in the introductory clause reads:"nothing in this Agreement shall be construed to prevent the adoption or enforcement...of measures..."Article XX (d) thus provides for a limited and conditional exception from obligations under other provisions. The Panel therefore concluded that Article XX (d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III: 4. If

[14]Van den Bossche (2005), p.616

[15] The Appellate Body defined a measure within the WTO as: "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. (…) acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch." ABR, US – Corrosion-Resistant Steel Sunset Review, para. 81.

[16] The Appellate Body in *Japan — Alcoholic Beverages II*, highlighted the importance of GATT reports by establishing the following: "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute." (pp. 14–15),

any inconsistencies with Article III: 4 were found, the Panel would then examine whether they could be justified under Article XX (d)."[17]

The above illustrates how such article may only be invoked by a member when the measure implemented is found to be in infringement of a GATT provision. Therefore its wording opens the possibility for a country to act inconsistently with WTO law by making more flexible the application of the rules, in order to promote higher societal values and interests. This is the precise essence of Article XX, which is perfectly illustrated on the phrase of the introductory clause that sets that "Nothing in this agreement shall be construed to prevent the adoption or enforcement by any Member of measures".

That being said, as it is necessary to be in breach of one of the obligations of the GATT in order to apply Article XX, it is also worth mentioning the rule that the Appellate Body in several cases has sustained a rule which is that the party who asserts a fact, whether is the complainant or the respondent, is responsible for providing proof thereof.[18] Accordingly, it is the responding party, which invokes an exception to the allegedly violated obligation, who has the burden of proof[19]. Taking this into account, the respondent needs to show that the conditions set out in the exception contained on Article XX are met, in order to justify the infringement of a GATT provision.

Furthermore, from what has been exposed, two of the main characteristics of the nature of Article XX may be drawn: (i) this provision is not absolute, and (ii) its use is considered to be limited and conditional.

[17]GPR, *US – Section 337*, para. 5.9
[18]ABR, *US-Wool Shirts and Blouses*, p. 14.
[19] According to professor Matsushita, the burden of proof "concerns the issue of which of the disputing parties is responsible for proving the illegality or legality of the conduct under question" Matsushita, p. 125.

In 1991, on the "US –Tuna" dispute[20], this is highlighted by establishing that:

> "The Panel recalled that previous Panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself. Therefore, the practice of Panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked. Nevertheless, the Panel considered that a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible".[21]

Regarding the first characteristic, Members should in fact be contravening WTO law, because otherwise there is no reason to resort to this provision. Accordingly, "the exceptions are conditional in that Article XX only provides for justification of an otherwise illegal measure when the conditions set out in Article XX are fulfilled. While Article XX allows Members to adopt or maintain measures promoting or protecting other important societal values, it provides an exception to, or limitation of, affirmative commitments under the GATT 1994."[22]

As to the second trait, their limited character derives from the closed list contained in Article XX. Only what is included within the subparagraphs may be invoked by Members as a societal value or interest that is worthy of protection. Therefore, it is not

[20] It is important to recall that this decision is yet to be adopted.
[21] *GPR*, US –Tuna, para. 5.22.
[22] Van den Bossche (2005), p.617

possible to add new elements to such list, as it is exhaustive. This limitation supports the idea that the General Exceptions are not established for Members to abuse them and disregard the pillars of the agreements, by suspending the application of the rules without a compelling reason.

Article XX contains a two level structure, as it is comprised of an introductory clause followed by a wide list of exceptions contained in subparagraphs (a) to (j).

This two-tiered structure responds to a specific matter which is that Members first need to demonstrate the particular interest or societal value that they seek to protect within the measure they adopt. This may be identified as the specific part of this provision as each member will make use of the exception that better adapts to the circumstances. Such subparagraphs have in common that they all include two elements: (a) substantive scope and (b) relationship between measure and aim. [23]

On the other hand, the *chapeau* is the other fundamental component that structures this provision. In contrast with the subparagraphs, it has a general character as it does not matter which particular interest a member is defending, it will always be necessary for Members to demonstrate consistency with this introductory clause.

Considering this, the structure described responds to a particular reason which is that the application of an exception is such an important and delicate issue that a specific and meticulous examination must be done, which is why it is necessary to set some kind of order. In this sense, "the defending party must demonstrate that the measure (i) falls under at least one of the ten exceptions - paragraphs (a) to (j) - listed under Article XX, and (ii)

[23] Ochoa, Juan C. General Exceptions of Article XX of the GATT 1994 and Article XIV of the GATS, Norwegian Centre for Human Rights, University of Oslo. (2014). http://www.uio.no/studier/emner/jus/jus/JUS5850/h14/tekster/ochoa-gen-exception.pdf. accessed: 29 march 2015. p.4.

satisfies the requirements of the preamble, i.e. is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade". These are cumulative requirements."[24]

Taking this into account, this particular structure designed for the General Exceptions derives from the necessity of making the application of such provision more rigorous in order to protect WTO principles.

2.2. The subparagraphs

In order to cover as many as concerns as possible, Article XX enlists ten different possibilities in the subparagraphs. The role these subparagraphs play is very important as Members need to identify within them the policy goal pursued with the measure they have adopted and which not consistent with the GATT.

Upon this umbrella of possibilities found on Article XX, interests and societal values such as moral concerns, environmental issues, health and life of both humans and animals, as enforcement of domestic laws are contemplated. Although there are ten different subparagraphs, Members throughout the history of the organization have regularly made use of practically the same exceptions. Therefore, due to the topics they cover, the most frequently invoked subparagraphs by Members in order to justify their measures are subparagraphs (b), (d) and (g).

2.2.1. Specific exceptions under Article XX of the GATT 1994

[24] World Trade Organization, Committee on Trade and Environment. *GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (B), (d) and (g)*. (2002). p.6

Regarding subparagraph (b), it recognizes the need of protecting human, animal or plant life or health. This exception reflects the relevance that in the contemporary world such matters have acquired. For example, considering the *Thailand – Cigarettes* dispute, the Panel recognized that: "[s]moking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX (b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization."[25]

Another example is the *US – Gasoline* case, where it was established that "the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX (b)."[26]

As a matter of fact, Article XX (b) is such a powerful exception that it has been further developed in an independent, stand-alone covered agreement: the Agreement on the Application of Sanitary and Phytosanitary Measures (better known as the SPS).

On the other hand, subparagraph (d) makes reference to the necessity to secure compliance with domestic laws or regulations. This subparagraph principally covers all those regulations that relate to customs, legal monopolies, patents, trademarks and copyrights and the prevention of any kind deceptive practices. The main reason of the inclusion of such subparagraph is the difficulty the enforcement of this kind of laws brings together with their specificity.

With respect to this subparagraph, it is worth mentioning that in the *EC – Parts and Components* dispute, the Panel interpreted that the wording that sets "to secure compliance

[25] PR, *Thailand – Cigarettes*, para. 73.
[26] PR, *US – Gasoline*, para. 6.21.

with laws and regulations" means "to enforce obligations under laws and regulations", and not "to ensure the attainment of the objectives of the laws and regulations."[27]

Furthermore, in other decisions such as the *US – Tuna (Mexico), US – Tuna (EC), US – Gasoline and US –Automobiles* cases, it has been emphasized that subparagraph (d) covers only measures that are related to the enforcement of obligations under laws or regulations consistent with the General Agreement.

In order to illustrate this approach, it is important to consider what the Panel stated in the in the *US – Gasoline* dispute: "[a]ssuming that a system of baselines by itself were consistent with Article III:4, the US scheme might constitute, for the purposes of Article XX(d), a law or regulation 'not inconsistent' with the General Agreement. However, the Panel found that maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not 'secure compliance' with the baseline system. *These methods were not an enforcement mechanism*. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX (d) was concerned."[28](Emphasis added)

Finally, considering subparagraph (g), it deals with the conservation of exhaustible natural resources. In the *US – Shrimp* case, the Appellate Body interpreted the phrase "exhaustible natural resources" and pointed out that: "the text of Article XX (g) was *not* limited to the conservation of "mineral" or "non-living" natural resources and that living species, which are in principle "renewable", "are in certain circumstances indeed

[27] PR, *EC – Parts and Components*, para. 5.17.
[28] PR, *US – Gasoline*, para. 6.33.

susceptible of depletion, exhaustion and extinction, frequently because of human activities."[29]

In addition, it also established that: "The words of Article XX (g), 'exhaustible natural resources', were actually crafted 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."[30]

Therefore, it is important to take into consideration that Article XX (g), is very important as it reflects and materializes concerns such as sustainable development and environmental issues, recognized as relevant matter for the WTO. As follows, "[t]he 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.*'" [31]

From the subject matter that each of the cited subparagraph addresses, it is possible to understand why they are most frequently used, as they deal with the most sensible and recurrent matters from such list.

Considering both subparagraphs (b) and (g), they embody similar issues in general, having (b) a wider scope which includes animal and human health. In contrast, subparagraph (g) scope is much more restricted as it makes explicit reference to the conservation of exhaustible natural resources. The Appellate Body in the US- Shrimp dispute, interpret the terms "exhaustible natural resources", determining that it does not

[29] ABR, *US – Shrimp*, para. 128.
[30] *Id*, para. 128.
[31] *Id*, para. 129.

only refers to non renewable resources, but that it includes all kind of species which are in danger of extinction.[32]

The other exceptions are not that regularly used, therefore there is not that much case law that deals with them. However, the public morals exception contained on subparagraph (a) has been used in some cases. Regarding the expression *public morals* the Panel in *US-Gambling* defined it as "*standards of right and wrong conduct maintained by or on behalf of a community or nation.*"[33] Furthermore, several Panels have determined that the content of public morals can be characterized by a degree of variation, to give Members some freedom to define and "*apply for themselves the concept of public morals according to their own systems and scales of values.*"[34] In a recent dispute[35] the European Communities tried to invoke it without a good result overall, but achieving at least this first step of the test. This decision has opened certain discussion as morals are a relative concept and it is very difficult to determine which is the position of an entire society is towards a particular issue.

2.2.2 The tests set in the subparagraphs

Now, having explored the subject matters they deal with, it is important to consider also that each of them brings a specific test that should be complied with. Members need to demonstrate that the policy goal they are trying to achieve fits within the interest or value that a particular subparagraph enshrines and protect. This is what is known as the first step of the two – tiered test.

[32] *Id*, para. 128.
[33] PR, *US-Gambling*, para. 6.461
[34] PR, *China-Publications and Audiovisual Products*, para. 7.759.
[35] In the *EC – Seal* products dispute, the parties were Canada and Norway against European Community. The complainants disagreed with regulations implemented though they banned the importation and marketing of seal products from their countries. The EC stated that this ban responded to European moral outrage at the killing of seals. Canada and Norway challenged the regulation stating that it was not consistent with certain provisions of the Technical Barriers to Trade (TBT) Agreement and the GATT.

For example, regarding subparagraph (b), when a member makes use of such exception it is necessary to prove that the measure is designed to protect life or health of humans, animals or plants. As follows, Members should demonstrate that the measure is 'necessary' to fulfill that policy objective. Also, it is essential to analyze which is the restrictive impact of the measure on imports or exports and finally compare it with other possible available alternatives.[36]Nevertheless, in this last step of the analysis, it should also be considered that the suggested alternative must (i) be less trade-restrictive than the measure at issue, and (i) allow the Member to achieve the same desired level of protection.

The Appellate Body in the Brazil - Retreaded Tires report also highlighted the importance that the implementation of the alternative measure has. It stated that:

"In assessing whether alternative measures are 'reasonably available', "the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies' may be relevant."[37]

Taking into consideration the reference to the test under subparagraph (b), it exemplifies how even within one of the subparagraphs, it is necessary to accomplish a series of requirements. This demonstrates how difficult it is for a member to justify a measure with the General Exceptions of Article XX due to the great numbers of requisites that a member has to accomplish. Each of the subparagraph, as it protects a different interest or societal value, has its own particular conditions that shall be accomplished in order to pass to the next step of the test (compliance with the *chapeau*).

[36] Ochoa (2014). p.11.
[37]ABR, *Brazil – Retreaded Tyres*, para.171

2.3 The *chapeau.*

2.3.1 Object and purpose of the introductory clause.

Once a measure adopted by a member has satisfied the requirements of the first step of the two tiered test, which is falling within the scope of one of the subparagraphs of Article XX, it turns necessary for it to comply with the conditions of the introductory clause of this provision.

As follows, the *chapeau* requires that this measure that fits in one of the subparagraphs of Article XX is not applied in a manner that will "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". This wording reveals the precise function of the introductory clause and reflects its object and purpose. Case law has pointed it out: the prevention of the abuse of the exceptions contained in Article XX.

In the US- Gasoline dispute, the Appellate Body upheld that the fundamental purpose of the *chapeau* is avoiding the abuse or illegitimate use of the exceptions to substantive rules available in Article XX. In that report, it was specially emphasized that:

"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 misuse, 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 parties concerned. [38]

[38]Dixon, Martin. *Cases and Materials on International Law.* Oxford University Press (2011). p.479

A similar conclusion was set on the US- Shrimp dispute, where the Appellate Body established that the this clause “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 on Article XX, subparagraphs (a) to (j), on one hand and the substantive right of the other Members of the GATT 1994, on the other hand.”[39]

In that same decision, the general scope of the introductory clause was defined by establishing that "[t]he task of interpreting and applying the chapeau is (...) 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 XI) 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."[40]

With this interpretation, the scope of the *chapeau* is delimited to an expression of the principle of good faith and the instrument for achieving the aforementioned necessary balance.

In addition, it is important to take into consideration what has been identified as the function of the *chapeau*. The Appellate Body in the *US – Gasoline* dispute made reference to this, by stating the following:

[39] ABR, *US – Shrimp*, para 121.
[40] *Id.* para 159.

"It is important to underscore that the purpose and object of the introductory clauses of article XX is generally the prevention of '*abuse of the exceptions of Article XX*" [41]and that "the fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX".[42]Referring then to the negotiating history of the General Exceptions of the GATT, which establishes that, the preamble was meant "to prevent abuse of the exceptions of Article XX".[43]

2.3.2 The test set out by the *chapeau*.

According to the Appellate Body, in the US – Shrimp case, "there are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade."[44]

Taking this into account, as far as the wording of the introductory clause of Article XX makes clear, under the *chapeau* it is necessary that three requirements are satisfied. Therefore, a Panel determines whether the measure is a means of unjustifiable discrimination or constitutes a means of arbitrary discrimination and then, if none of this is found, the Panel proceeds to analyze whether the measure is a disguised restriction on international trade.

It is worth mentioning that the proof of the existence of only one of these three standards would make the measure inconsistent with the *chapeau*. When the adjudicating bodies perform this test after finding that, for example, a measure constitutes a means of unjustifiable and arbitrary discrimination between countries where the same conditions

[41] ABR, US - *Gasoline*, p. 21.
[42] *Id.*
[43]World Trade Organization *Analytical Index: Guide to GATT Law and Practice*, Vol. I (1995) p.564.
[44]ABR, *US – Shrimp*, para 150.

prevail, it is not necessary to further examine also whether the measure was applied in a manner that constitutes a disguised restriction on international trade. [45]

2.3.2.1 Unjustifiable and arbitrary discrimination where the same conditions prevail.

As it has been previously exposed, it is precisely under this second stage of the two-tier test where the words "arbitrary" and "unjustified" appear. They both play a fundamental role, since they are the first approach of the adjudicating bodies in determining if a measure is justified or not under the General Exceptions of Article XX, once the first step of the test has been accomplished.

However, as it happens to be with all the elements of the *chapeau,* the analysis of the nature and extent of these words has been ambiguous. Neither case law, nor doctrine, has been able to define in a clear and precise manner the meaning and scope of the terms "unjustifiable and arbitrary". Therefore, such ambiguity is probably one of the main reasons that explain why it is so difficult for Members to properly justify their measures under Article XX.

To illustrate this, it is important to consider that Members along time have had to be creative in the construction of the arguments that support their measure is neither unjustifiable nor arbitrary. The reason for this is that it is almost impossible for Members to guide themselves even by past Panel and Appellate Body decisions, as not even these reports contain a clear and strong explanation of the nature of these elements.

[45] That was the case for example in the US- Shrimp dispute, where after finding that the measure was unjustifiable and created arbitrary discrimination between countries where the same conditions prevail, it was not necessary to further examine also whether if the measure was applied in a manner that constitutes a disguised restriction on international trade.

For instance in the *US – Shrimp* dispute, the Appellate Body examined the conditions for a measure to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. It was noted that pursuant to the *chapeau* of Article XX, a measure may discriminate, but not in an 'arbitrary' or 'unjustifiable' manner".[46]Also, in the *EC – Asbestos* case, the Panel indicated that "if the application of the measure is found to be discriminatory, it still remains to be seen whether it is arbitrary and/or unjustifiable between countries where the same conditions prevail".[47]

As follows, the analysis of arbitrary and unjustifiable is made separately, due to the fact each has its own characteristics. For instance, in *US – Gasoline* the Appellate Body found that an unjustifiable discrimination would be one that could have been "foreseen" and that was not "merely inadvertent or unavoidable"[48] In contrast, for a measure to be arbitrary, case law[49] has concluded that the "rigidity and inflexibility" of the application of the measure should be analyzed.

However, all these definitions tend to be ambiguous and constantly change through the different reports due to varying interpretation. In response to this situation, some Members have tried to build their arguments by recalling the *chapeau*'s overall purpose and scope, trying to make possible the full comprehension of the meaning and extent of the terms "arbitrary" and "unjustifiable" according to the case law that develops this matter in general.

a. Interpreting the terms "arbitrary" and "unjustifiable" in the light of the purpose of the *chapeau*

[46] ABR, *US – Shrimp*, paras. 161-186.
[47] PR, *EC – Asbestos*, p.17.
[48] ABR, *US – Gasoline*, p.28.
[49] ABR, *US – Shrimp*, para 177.

Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) set a series of basic rules for the interpretation of treaties. Regarding Article 31, it contains the general rule of interpretation that states the following:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."

This general rule of interpretation has attained the status of a customary rule of interpretation of public international law, to which the Appellate Body has been directed, by Article 3.2 of the DSU, to apply in order to clarify the provisions of the General Agreement and the other covered agreements.[50]"Hence the important feature of the application of Article 31 VCLT in WTO is a reliance on a rule of effective interpretation. …Yet, it is essential to stretch that WTO judiciary by considering principle of effectiveness as one of the corollaries of the general rule of interpretation at the end of interpretation also applies it as a part of the textual approach."[51]

According to the Appellate body in the US – Gasoline decision, "One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[52]

Also, another statement on application of Article 31 VCLT in the WTO can be found in United States – Sections 301-310 of the Trade Act of 1974, whereas the GATT

[50]ABR, *US — Gasoline*, p. 17.
[51]Valūnas Rytis, *Sources of International Law in the Disputes Settlement of WTO*. Master Thesis,Ghent University, Faculty of Law. (2009) p. 26
<http://webcache.googleusercontent.com/search?q=cache:0r1hdF34DIgJ:vddb.library.lt/fedora/get/LT-eLABa-0001:E.02~2009~D_20090629_101745-90492/DS.005.1.01.ETD+&cd=1&hl=es-419&ct=clnk>accessed: 4 march 2015.
[52]ABR, *US — Gasoline*, p. 23

Panel established that: "Text, context and object-and-purpose correspond to well established textual, systemic and theological methodologies of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties."[53]

In addition, it is also important to consider that "Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process: "interpretation must be based above all upon the text of the treaty".[54]

Taking this into account, it is possible to suggest then that for an interpreter to understand the meaning of the analyzed terms of the *chapeau* of Article XX of the GATT, it is necessary to understand its object and purpose. In the precise case of the *chapeau,* the Appellate Body has established that it aims to prevent the abuse in the use of the exceptions contained in the subparagraphs of Article XX [55] by balancing the right of a Member to invoke an exception under this provision, and the rights of the other Members under other GATT provisions[56].

Therefore, under such grey zone that is found in the *chapeau*, it thus becomes necessary then to interpret this provision within the object and purpose of the WTO agreement in order to clarify how this provision shall be used. Specifically, how it lies upon the concept of good faith, one of the pillars of the multilateral system, and furthermore how the right of a member to invoke an exception articulates with the rights of other Members within the GATT.

[53] PR, *US – Sections* 301-310, para 7.22
[54] ABR, *Japan — Alcoholic Beverages II*, p. 105
[55] ABR, *US-Gasoline*,p.22
[56] ABR, *US- Shrimp*, para. 159.

As set by the Appellate Body in the US- Shrimp report: "It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives color, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular."[57]

(i) The *chapeau* as an expression of good faith.

The principle of good faith plays an essential role in providing a standard of conduct to be followed by WTO Members in the implementation of regulations that may affect the normal course of trade flows. Such principle has been the object of analysis in WTO case law, as Members are expected to comply with their obligations in good faith, and this element is assumed to be present in their actions.

In the EC – Sardines dispute, the AB concluded that:

"… We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of Pacta Sunt Servanda articulated in Article 26 of the Vienna Convention. And always in dispute settlement, every Member of the WTO must assume the good faith of every other Member." [58]

An expression of this principle is present on the *chapeau* of Article XX, where it controls the exercise of rights by Members. Such a traditional approach was developed by the Appellate Body in the US-Shrimp report.

In that dispute, the United States used tried to use the exception to justify any inconsistency between the US Section of Public Law 609, and its associated regulations

[57] ABR, *US- Shrimp*, para 155.

[58] ABR, *EC –Sardines*, para. 278. In this respect, it is also important to recall Chile – Taxes on Alcoholic Beverages where the AB concluded that, "Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith."

and judicial rulings, with the GATT. Thus, it submitted that the certification of shrimp import implemented, sought to protect sea turtles from being killed, was justified. When analyzing if the measure was compliant with the *chapeau,* the Appellate Body referred to the good faith principle, stating that "the *chapeau* of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states".[59]

Also, in the case of Brazil — Retreaded Tyres, "the Appellate Body recalled that the chapeau serves to ensure that Members' right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, not as a means to circumvent one member's obligations towards other WTO Members." In other words, it was stated that Article XX incorporates the recognition of the need to maintain a balance between the right of a member to invoke an exception and act inconsistently with the GATT and the rights of the other Members under such agreement.

An example of such balance pursued within the good faith, may be the necessity of coordination and cooperation at the international level, spaces for negotiation, the architecture and structure of the implemented measure and also the flexibility to adapt to different situations in other countries.

To illustrate this, it is important to consider what the Appellate Body sustained in the US- Shrimp dispute regarding the principle of good faith and negotiations:

"The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States,

[59] ABR, *US- Shrimp*, para. 158.

attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.[60]"

This shows how by requiring Members to adapt their conduct to such conditions, the *chapeau* constitutes an instrument of good faith as it demands Members to act reasonably in their dealings affected by trade treaties such as the GATT. As Kelch states: "[s]o ultimately the Article XX exceptions come down to a balancing of the good faith interests of the party asserting a strong policy interest in a regulation and the good faith interests of the offended party to conduct free trade under the "substantive" provisions of the GATT."[61]

In light of the above, it can be concluded that the purpose of the *chapeau* is to prevent defendant parties to abuse from the General Exceptions provision.

(ii) Doctrine of the Abus de Droit

The principle of good faith is structured by two basic elements, one of them doctrine of the abuse of rights and the other, the protection of legitimate expectations. These elements together, "heighten a legal system's legitimacy by placing each participant on equal ground." [62]

As follows, the analysis will center in the *abus de droit* as it is the application of this general principle which has presence in the *chapeau*. This 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,

[60] *Id.* para 171
[61] Kelch Thomas. Globalization and Animal Law: Comparative Law, International Law and International Trade. Kluwer Law International.(2011) . p. 264
[62] Thomas Cottier and Krista N. Schefer.*Good Faith and the protection of legitimate expectations in the WTO. In New Directions in International Economic Law*. Marco Bronckers & Reinhard Quick eds. (2000).p.50.

that is to say, reasonably"[63]. In other words, an abusive exercise of rights by a Member results in a breach of the treaty rights of the other Members as well as a violation of the treaty obligation of the Member who is acting.

In WTO,case law has been highlighted the importance of not abusing of rights by establishing that "[t]urning then to the chapeau of Article XX, 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 render naught the substantive treaty rights in, for example, Article XI:1, of other Members."[64]

From such statement, a conclusion arises within the application of the introductory clause: when a Member invokes one of the General Exceptions, a balance must be struck between the *right* of a Member under Article XX and the *duty* of that Member to respect the treaty rights of other Members.

In that same report, the Appellate Body made great emphasis in the importance of such balance. It was determined that: "[t]o permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates

[63] ABR, *US — Shrimp*, para. 158
[64] *Id.* para 156

altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences."[65]

In conclusion, considering the interpretation case law has made within the purpose and object of the *chapeau*, it is clear that this introductory clause requires specifically that a measure does not constitute an abuse or misuse of the provisional justification made available under one of the paragraphs of Article XX. Therefore, it aims to ensure that such exception invoked by a Member is applied in good faith and that there is no abuse within the exercise of its right contained on Article XX that may negatively affect the rights of the other Members. In other words, the *chapeau* as an expression of good faith draws limits to the way in which the General Exceptions are applied.

b. Actual meaning and extent of the terms "arbitrary" and "unjustified"

Considering both unjustified and arbitrary discrimination, they relate with the decision-making process of the defendant party of a given measure. As follows, according to Bartels, case law about the justification of a measure under the *chapeau* of Article XX is *"associated with the idea that the chapeau is about procedure, not substance,"*[66]

However, the analysis has never started from defining either term. Thus, in six cases in which an adjudicating body has analyzed the consistency of the measure at issue with the *chapeau*[67], some light has been shed as to whether a measure, either by its design or by its effects, constitutes an arbitrary or unjustified discrimination between countries where the same conditions prevail.

[65] ABR, *US- Shrimp*. Para 171
[66]Barthels, Lorand. *A new interpretation of the Chapeau. Legal Studies Research Paper Series, University of Cambridge Faculty of Law*. Paper No. 40/2014. (2014) p.17.
[67]*Id* est, US-Gasoline, US-Shrimp, EC-Asbestos, Argentina-Hides and Leather, Brazil-Retreaded Tyres and EC-Seal Products.

In the US-Shrimp dispute, the Appellate Body concluded that the way in which the US measure was applied, constituted an arbitrary discrimination, since it was unacceptable for a WTO Member to use an economic embargo to require other Members to adopt essentially the same regulatory program without taking into consideration the different conditions of the other Member states. This, due to the rigidness of the certification requirement. Additionally, there was a lack of transparency and procedural fairness in the process of certification.

Moreover, in the Brazil-Retreated Tyres dispute, the Appellate Body added that the consistency of a measure with the *chapeau* of Article XX must be seen by the contribution of the measure to the objective pursued, as they must bear a rational connection[68]. With this in mind, the Appellate Body concluded that the exemption to the measure at issue "resulted applied in a manner that constituted arbitrary or unjustifiable discrimination[69]. In that case, the exemption had no relation with the object pursued by Brazil, which was to protect the population from diseases and to protect the environment from the contamination caused by retreated tires.

Finally, in the EC-Seal Products dispute, the Appellate Body concluded that, even if the EC-Seal Regime was provisionally justified under subparagraph (a) of Article XX, it was designed and applied in a manner that constituted a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail[70]. It held this conclusion by finding (i) that the exemption to the general ban on the import of seal given to indigenous hunt, had no close relation to the main purpose pursued by the measure, which was to protect animal welfare, as a public moral concern; and (ii) that the European

[68] ABR- *Brazil Retreated Tyres,* p. 227.
[69] *Id*, at. 228.
[70] ABR, *EC-Seal Products,* para. 5.38.

Union had not made significant efforts to facilitate the access of the Canadian Inuit to the aforementioned exemption[71].

In such terms, the Appellate Body has outlined through case law the meaning of the concepts "arbitrary" and "unjustified" within the GATT context. However, it is clear that this approach is far from definitive.

c. How to identify that the manner in which a measure is applied does not constitute an "arbitrary" or "unjustified" discrimination

Having explained how the introductory clause of Article XX of the GATT constitutes an expression of the good faith principle and tends to avoid the *abus de droit*, it is now relevant to describe which specific aspects are addressed by the *chapeau* when examining the application of a measure. Bartels considers that the traditional interpretation of Article XX establishes that the analysis of justification of a measure must take into account the "difference between a 'measure' (to be appraised under the subparagraphs of Article XX) and its 'application' (to be appraised under the *chapeau*)." [72] Hence, for a measure to comply with the *chapeau* it must be applied in a manner that is not arbitrary or unjustified; and/or does not constitute a disguised restriction to trade.

This traditional view was applied for the first time by the Appellate Body in the US-Gasoline dispute, where the United States asserted that any contravention of the GATT should be found to be justified under the Article XX (g) exception. This since it aimed to regulate the composition and emission effects of gasoline to prevent air pollution.[73] The

[71] *Id.*
[72] Barthels, Lorand. *A new interpretation of the Chapeau.* Legal Studies Research Paper Series, University of Cambridge Faculty of Law. July, 2014. Paper No. 40/2014 (2014). p.4.
[73] ABR, *US-Gasoline*,p.7

Appellate Body first defined the extension of the examination that must be made under the *chapeau*, in the following terms:

"The chapeau, by its expressed terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. (…). The chapeau is animated by the principle that while the exceptions of Art. 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."[74]

This same approach was also applied in the US-Shrimp dispute [75]and in the Brazil-Retreaded Tyres report[76] in order to determine if the manner in which the import bans on both shrimp and retreaded tires were inconsistent or not with the introductory clause of Article XX.

Nevertheless, it is important to take into account the recent report in the EC-Seal Products case, where the Appellate Body suggested a different approach. To illustrate this new vision, it should be considered the following:

"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' [citing the *Japan – Alcoholic Beverages II* dispute]. It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[77]"

[74] ABR, *US-Gasoline*,p.22
[75]ABR, *US – Shrimp*, p. 115.
[76]ABR, *Brazil – Retreaded Tyres*, p 215.
[77] ABR, *EC-Seal Products*, p. 5.302.

Considering the previous quote from the EC – Seal report, this new view is much more rigid than the traditional one upheld by the dispute settlement body in past cases. In contrast, this new approach demands from the defendant party not only to demonstrate that the manner in which the measure is been applied is consistent with the *chapeau*, but also that elements such as the design and structure are coherent with it.

2.3.2.2 Disguised restriction to trade.

The wording of the *chapeau* also makes reference to "disguised restrictions on trade". However, this element has not been exempted from the grey zones and lack of clarity that characterizes the *chapeau*. This part of the introductory clause has been addressed only inconclusively in a few reports, for example in the US- Shrimp dispute and the EC- Asbestos case.[78]

In this last dispute, this ambiguity within the definition of the words "a disguised restriction to trade" was recognized as the "Panel first recalled that the scope of these words has not been clearly defined: "Under the GATT 1947, Panels seem mainly to have considered that a disguised restriction on international trade was a restriction that had not been taken in the form of a trade measure or had not been announced beforehand [footnote omitted] or formed the subject of a publication, or even had not been the subject of an investigation [reference to *US – Springs Assemblies*]"[79].

Nevertheless, a slight approach to the meaning of this phrase was made by establishing the following:

"In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb 'to disguise' implies an intention. Thus, 'to

[78]Sanford Gaines. *The WTO's Reading of the GATT Article XX Chapeau: A disguised Restriction on Envinronmental Measures.*Journal of International Law.Volume 22.Issue 4. (2001) p. 36
[79]*EC – Asbestos*, Panel Report, para. 8.233.

disguise' (déguiser) means, in particular, 'conceal beneath deceptive appearances, counterfeit', 'alter so as to deceive', 'misrepresent', 'dissimulate'. Accordingly, a restriction which formally meets the requirements of Article XX (b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives".[80]

Furthermore, it is worth mentioning that three criteria have been progressively introduced by the adjudicating bodies in different disputes in order to determine whether a measure is a disguised restriction on international trade. In first place, develop a publicity test, then the analysis of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination, and finally an examination of "the design, architecture and revealing structure" of the measure at issue.

The phrase ‘disguised restriction on international trade’ is always used with another phrase, ‘arbitrary or unjustifiable discrimination’. This turns this concept even vaguer and leads to very different interpretations. The approaches WTO case law has held have failed to offer a workable definition and furthermore to make the necessary distinction between the “disguised restricted to trade requirement” and the requirement of “arbitrary or unjustifiable discrimination”. In contrast, case law has shown a tendency of mixing up both concepts and pointing out a relation that exists between them, without offering a convincing explanation of this situation.

To illustrate this, it is important to consider what the Appellate Body determined in US- Gasoline:

“The kinds of considerations pertinent in deciding wheter the application of a particular measure amounts “to arbitrary or unjustifiable discrimination” may also be taken

[80] *Id*, para. 8.236.

into account in determining the presence of a "disguised restriction" on international trade."[81]

Hence, the clearer definition towards the second part of the *chapeau* maybe found in the report of Panel in US- Shrimp, where it upheld a similar approach to the one adopted by the AB in the EC- Asbestos case. This was that "a measure jusified under Article XX, will be considered to constitue a "disguised restriction on international trade" if the design, architecture or strcuture of the measure does not pursue the legitimate policy objective on which the provsional justification was based but, in fact, pursues trade- restrictive, i.e. protectionist objectives. Such a measure cannot be justified under Article XX."[82]

Taking the above into consideration, it is clear how also within the element of a disguised restriction to trade in the *chapeau* of the General Exceptions, the grey zone remains constant. There is not even a precise definition of this phrase.On the contrary, what it is evindeced is an entangled relation between both unjustifiable and arbitrary discrimination and the notion of disguised restriction to trade.

2.4 <u>The relation between the subparagraphs and the chapeau</u>

Having explored the structure of Article XX, concerning the relationship between the subparagraphs and the *chapeau* of the General Exceptions it is worth mentioning how these two elements articulate.

WTO case law has set that the justification of a measure under one of the General Exceptions must be analyzed by developing a 'two-tiered' test. This analysis aims to determine (i) whether the measure is provisionally justified under one of the subparagraphs

[81] ABR, *US – Gasoline*, para 25.
[82] PR, *US – Shrimp*, paras.5.138–5.144.

of Article XX, and (ii) if it is consistent with the conditions of the introductory clause of Article XX.

The Appellate Body in US – Gasoline dispute, established this by enunciating the appropriate method to be followed:

"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 XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*"[83]

This approach was upheld in US- Shrimp where the AB confirmed such interpretation by establishing that:

"The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX."

In short, the task of determining whether a measure falls within the scope of one of the subparagraphs of Article XX and furthermore of preventing the abuse of that specific exception is quite complex. As follows, reason for this order is that it is almost impossible to identify an abuse or misuse if the interpreter has not first identified and analyzed the specific exception threatened with it.

[83] ABR, *US- Shrimp*, para 118.

3. The applicability problem of the *chapeau*.

The previous chapter exposed how the use of interpretative tools in order to clarify the meaning and extent of the *chapeau* of Article XX has been incoherent and unpredictable. The adjudicating bodies through WTO case law have failed to provide the clear and uniform interpretation that should be given to the elements of the general exception

It is important to recall the role adjudicating bodies play within the decisions they adopt. The Appellate Body, in its Report in *US – Softwood Lumber V,* noted that "according to Article 3.2 of the DSU, "*the dispute settlement system is a central element in providing security and predictability to the multilateral trading system*". The Appellate Body went on that it had taken into account the reasoning and findings contained in its report in *EC – Bed Linen* "*as appropriate in considering the facts of this case and the arguments raised by the parties*".[84]

Furthermore, David in his text "The Role of Precedent in the WTO", established that "[i]n the literature it has generally been accepted that previous Panel and Appellate Body decisions, due to their "*strong persuasive power*", constitute a form of "*non-binding precedent* "According to these voices, Panels continued to take previous decisions "*into account by adopting their reasoning, in effect following precedent*". Thus, it could be argued that the result of the mentioned line of Appellate Body decisions was a form of *de facto* precedential effect."[85]

Taking this into account, this lack of uniformity within the interpretation of the introductory clause contained in Article XX is seen in defeating the possibility Members

[84]ABR, *US — Softwood Lumber V.* para 112.
[85] David, Felix. *The Role of Precedent in the WTO – New Horizons?* Maastricht Faculty of Law Working Paper No. 2009-12 *(*2009). p.6

have to invoke such exceptions in order to justify the implementation of domestic policies that are not consistent with the GATT. Consequently, the effectiveness of Article XX is been widely discussed as there is a serious applicability problem within its introductory clause that, in practice, reduces its effects to be minimal or nonexistent.

An example of this problem may be illustrated within the concept of good faith incorporated in the *chapeau*. It has been suggested in many cases, that the good faith regulation assessment that needs to be done to the measure under analysis comes too late and therefore there is no sense in this examination. For instance, "[i]f a Member has a health regulation which has been found to be inconsistent with Article II, for example, and has failed to satisfy the Panel under Article XX (b) because the risk it purports to respond to has not been properly proved, or because the measure is not particularly well suited to achieving the policy objectives set, that Member will never have the opportunity to show the Panel his good faith because it will never get as far as the chapeau.[86]"

Moreover, in case a Member arrives to the point where good faith will be considered, it is almost impossible to prove. As it was previously described, WTO case law has made very vague reference to the significance good faith has within the *chapeau*. It has been set that it is an important principle incorporated in the introductory clause which aims for a balance of rights. In addition to the analysis of specific cases, it has derived that cooperation and negotiation are elements that should be considered in order to determine the good faith, but there is not a complete and clear definition of how a member for example proves its intention. This situation turns it almost impossible for a Member to prove its good faith, because there is no reference on how to proceed.

[86] Button, Catherine. *The power to protect: Trade, health and uncertainty in the WTO*. Bloomsbury Publishing (2004).p.39

On the other hand, another issue that illustrates this applicability problem is that according to the wording of the *chapeau*, it is only possible to develop a discrimination examination in relation to countries in which the same conditions prevail.

To exemplify this, it is worth mentioning the measure in *Brazil – Retreaded Tyres* dispute, where the policy objective justifying the restrictiveness of the measure was the protection of human health in that country. "If that determines the 'conditions' in the *chapeau*, then there is only one country in which that 'condition' prevails. The question whether the *same* conditions prevail in more than one country does not even arise."[87] However, such problem disappears if the 'conditions prevailing' are seen as those relevant to the justification of the *discriminatory* effects of the measure, rather than regarding its *restrictive* effects. Accordingly, on this basis a discrimination analysis could take place."[88]

As follows, another problem arises, which is identified in the cases where measures are addressed to situations in multiple countries. It is important to consider that the 'conditions' in those countries relevant to the purposes of those measures will very often *not* be the same, which would lead to a preclusion of this analysis of discrimination. "The paradigm case is *US – Shrimp*. Here the solution of the Appellate Body was to say 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."[89]

Hence, such interpretation still does not work; for example, in the recent dispute EC- Seal products, that Appellate Body seems to be wrong in establishing that "the

[87] Barthels (2014).p.10
[88] *Id.*
[89] ABR, *US- Shrimp.* paras. 164-165.

'conditions' in the *chapeau* should be linked to the justification for the trade restrictive effects of a measure", which certainly does not seem a correct approach.

All these examples, summed up to the grey zones already identified with respect to the interpretation of the terms "unjustifiable", "arbitrary" and "disguised restriction to trade", show how in the practice the applicability of the rules of the chapeau present difficulties. Such inconvenient therefore leads to the lack of effectiveness in the practice of the General Exceptions, as it is necessary to achieve the two – tiered test but in any event a member achieves the first part of it, on the section of the *chapeau* it is most likely to fail it for the aforementioned reasons.

3.1 <u>The ineffectiveness of the exception in the practice.</u>

The ineffectiveness of the general exception contained on Article XX GATT is illustrated when considering the decisions the adjudicating bodies have adopted within the different disputes they have known.

"In WTO cases in which the respondent country has tried to use a GATT Article XX defense, the Respondent has lost both the defense and the case 97 percent of the time. That failure rate exceeds even the overall "loss" record of Respondents in WTO dispute resolution – the respondent country has lost 91 percent of the WTO cases reaching a final ruling."[90]

There is only a 3% chance that a member invoking the exception succeeds. "The single remaining WTO case to invoke GATT Article XX, EC –Asbestos, is the only

[90]Public Citizen Organization. *Only One of 40 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception (2015)* p.3 <https://www.citizen.org/documents/general-exception.pdf. >accessed: 9 April 2015.

instance in which a country's measure has been deemed to meet all of the tests to qualify for an Article XX general exception defense."[91]

However, when examining the reasons by which the Appellate Body considered the measure adopted was justified under Article XX, there was no reference made to the *chapeau*. The Appellate Body states that it upheld the Panel's findings with respect to Article XX. Hence, in the Panel report the only mention made in relation to the introductory clause, is the following:

"As the Appellate Body stated in the *United States - Shrimps* case, the conditions laid down in the chapeau of Article XX (b) are meant precisely to address situations in which a Member applies in bad faith and in an abusive manner the exceptions laid down in Article XX. In the EC's view, this means that the potential problem of abuse and bad faith, alluded to by Canada, is adequately covered by the "chapeau" of Article XX and there cannot be two sets of provisions (non-violation and the chapeau of Article XX) which address the same problem twice. The EC therefore propose that this argument of Canada also be rejected."[92]

This extract does not give any light of how a Member should proceed in order to achieve the second stage of the two- tiered test, which refers to the *chapeau*. In contrast it is just pointing out a possible error in which Canada may have incurred but not an interpretation or statement of how the requirements of the *chapeau* were complied with by the respondent.

Taking all into account, the number of decisions in which the Members have failed to demonstrate their measure complies with the requirements of Article XX and specifically

[91] *Id.* at. 5
[92] PR, *EC- Asbestos.* para 3.531

with the chapeau which is basically the last step of the two – tiered test, illustrate the problem of ineffectiveness that has been discussed.

4. CONCLUSIONS

The General Exceptions contained on Article XX of the GATT, constitute an instrument of flexibilization that aims to find a balance between trade liberalization and particular interests of Members.

Such exceptions were negotiated in order to provide effective scenarios for the adoption of domestic policies without disfiguring the essence of the multilateral trading system. That is the reason why a number of requirements must be met in order to make use of the exception. As it was exposed, several tests must be achieved along the different elements of this provision. The conditions set by the tests may be interpreted as the limits imposed to the right Members have of invoking an exception. However, the combination of rigorous and complex tests all over the application of the provision and the ambiguous and limited interpretations the adjudicating bodies have reflected in case law, have turned in practice ineffective the exception.

Principally, the vagueness and lack of clarity within the *chapeau* of Article XX is the source of the problem. As it was exposed, there is no uniformity in the definition of concepts such as good faith, arbitrary and unjustifiable discrimination and disguised restrictions to trade. Despite the pivotal importance of such notions within numerous WTO obligations, their precise scope and significance remain uncertain. WTO Panels and the Appellate Body continue to declare that measures are not justified under Article XX with little rigor or justification.

This constitutes a serious issue; especially considering the importance such elements of the *chapeau* have, as they are the ones that define whether Member misuses or abuses of its right. A Member may put great effort in complying with the complex

requirements of an invoked subparagraph, nevertheless the possibility of achieving the test set by the *chapeau* are almost minimum to none (in fact, 3%) when falling within its grey zone.

In order to respond to this situation, it has been suggested to make the analysis of the *chapeau* much more flexible. For example, more space for dialogue between the WTO, Members' representatives and scholars, may lead to a restudy of Article XX from a more neutral standpoint. This approach would be able to bring more flexibility to the interpretation of GATT Article XX by understanding the real concerns that exist at its core. In addition it would permit the understanding of the terms of the *chapeau* within real contexts, making its application likelier.

In conclusion, lessening the rigidity and complexity of the requirements of the General Exceptions without sacrificing the balance between the rights of Members, may allow for a real effectiveness of the General Exceptions and finally put an end to this grey zone that has harmed it to the point of rendering it useless.