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*The Impact of Abusive Use of Article XX GATT WTO on Developing  
Countries (Latin America and Caribbean)*

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**Keywords:** Non-tariff barriers, trade, developing countries, general exceptions, national treatment, GATT, MFN, market access

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## LIST OF ABBREVIATIONS

**AB:** Appellate Body

**AC:** Andean Community

**Commission:** European Commission

**Council:** European Council of Ministers

**DC:** Developed Countries

**DSB:** Dispute Settlement Body

**DSU:** Dispute Settlement Understanding<sup>1</sup>

**EC:** European Communities (Today European Union)

**EU:** European Union

**FDI:** Foreign Direct Investment

**FTA:** Free- Trade Agreement

**GATS:** General Agreement on Trade in Service

**GATT:** General Agreement on Tariff and Trade

**GDP:** Gross Domestic Product

**HS:** Harmonized System Classification

**IC:** Inuit or other indigenous communities

**LAC:** Latin America and Caribbean

**LDCs:** Least Developing Countries

**MERCOSUR:** Southern Common Market

**MFN:** Most-Favored Nation

**NTBs:** Non-Tariff Barriers

**NTM:** Non- Tarif Measure

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<sup>1</sup> Understanding on rules and procedures governing the dispute settlement of disputes

***SDGs***: The Sustainable Development Goals

***SMEs***: Small and Medium-sized Enterprises

***SPS***: Sanitary and Phytosanitary Measures

***TBT***: Technical Barriers to Trade

***UN***: United Nations

***UNCTAD***: United Nations Conference on Trade and Development

***US***: United States of America

***WTO Agreement***: Marrakesh Agreement Establishing the World Trade Organization

***WTO***: World Trade Organization

## TABLE OF CASES

<b>SHORT TITLE</b>	<b>FULL CASE TITLE AND CITATION</b>
US- Canadian Tuna (1982)	GATT Panel Report, United States-Prohibition of Imports of Tuna and Tuna Products from Canada, L/5198.
US- Spring Assemblies (1983)	GATT Panel Report, United States-Imports of Certain Automotive Spring Assemblies, L/5333
Canada-FIRA (1984)	GATT Panel Report, Canada - Administration of the Foreign Investment Review Act, L/5504.
Japan - Restrictions on Imports of Certain Agricultural Products (1987)	GATT Panel Report, Japan Restrictions on imports of certain agricultural products, L/6253-35s/163
US- Section 337 Tariff Act (1989)	GATT Panel Report, United States Section 337 of the Tariff Act of 1930, L/6439.
Thailand- Cigarettes (1990)	GATT Panel Report, Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R.
Japan - Restrictions on Imports of Certain Agricultural Products (1990)	GATT Panel Report, Japan Restrictions on Imports of Certain Agricultural Products, L/6657
US- Tuna (Mexico) (1991)	GATT Panel Report, United States-Restrictions on Imports of Tuna, DS21/R.
US-Malt Beverages (1992)	GATT Panel Report, United States- Measures Affecting Alcoholic and Malt Beverages, DS23/R.
US- Restrictions on Imports of Tuna (1994)	GATT Panel Report, United States Restrictions on Imports of Tuna, DS29/R.
EEC- Bananas II (1994): DS38/R	GATT Panel Report, EEC-Import Regime for Bananas, DS38/R (unadopted).
US- Taxes on Automobiles (1994)	GATT Panel Report, United States-Taxes on Automobiles, DS31/R (Unadopted).
Canada- Herring and Salmon (1998)	GATT Panel Report, Canada- Measures Affecting Exports of Unprocessed Herring and Salmon, L/6268
DS2 US- Gasoline (1996)	United States- Standards for Reformulated and Conventional Gasoline, WT/DS2.
EC — Hormones (Canada) (1998)	EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, WT/DS48.
EC- Hormones (US) (1998)	EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26.

DS31 Canada — Periodicals	Canada-Certain Measures Concerning Periodicals, WT/DS31.
DS18 Australia — Salmon (1998)	Australia – Measures Affecting Importation of Salmon, WT/DS18.
DS58 US — Shrimp (1998)	United States – Import Prohibition of Certain Shrimp and Shrimp Products. WT/DS58.
DS135 EC- Asbestos (2001)	European Communities-Measures Affecting Asbestos-Containing Products, WT/DS135.
DS155 Argentina — Hides and Leather (2001)	Argentina- Measures Affecting the Export of Bovine Hides and Import of Fished Leather, WT/DS155.
DS161/ DS169 Korea — Various Measures on Beef (US & Australia)	Korea – Measure Affecting Imports of Fresh, Chilled, and Frozen Beef, WT/DS161, WT/DS169.
DS246 EC — Tariff Preferences	European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246.
DS276 Canada — Wheat Exports and Grain Imports (2004)	Canada- Measures Relating to Exports of Wheat and Treatment of Imported Grain, WT/DS276.
DS302 Dominican Republic — Import and Sale of Cigarettes	Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302.
DS174 / 290 EC — Trademarks and Geographical Indications	European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia WT/DS290; Complaint by the United States, WT/DS174.
DS308 Mexico — Taxes on Soft Drinks (2006)	Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308.
DS291/ DS292 / DS293 EC — Approval and Marketing of Biotech Products (2006)	European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291.
DS332 Brazil — Retreaded Tyres (2007)	Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332.
DS345 US — Customs Bond Directive (2008)	United States-Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS345.
DS343 US — Shrimp (Thailand)	United States – Measures Relating to Shrimp from Thailand, WT/DS343.
DS339/DS340/ DS342 China- Autoparts (2009)	China – Measures Affecting Imports of Automobile Parts, WT/DS339, WT/DS340, WT/DS342
Colombia — Ports of Entry (2009)	Colombia – Indicative Prices and Restrictions on Ports of Entry, WT/

DS363 China — Publications and Audiovisual Products (2010)	China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products, WT/DS363.
DS371 Thailand – Cigarettes (Philippines)	Thailand- Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371.
DS392 US — Poultry (China)	United States – Certain Measures Affecting Imports of Poultry from China, WT/DS392.
DS406 US- Clove Cigarettes (2012)	United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406.
DS 394/395/398 China — Raw Materials	China- Measures Related to the Exportation of Various Raw Materials, WT/DS394 / WT/DS395 / WT/DS398.
DS400/ DS401 EC — Seal Products	European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400 / WT/DS401.
China — Rare Earths	China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, WT/DS431/WT/DS432/WT/DS433.
DS447 US — Animals	United States - Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina, WT/DS447.
Argentina — Financial Services (2016)	Argentina-Measures Relating to Trade in Goods and Services, WT/DS453.
Colombia — Textiles (2016)	Colombia- Measures Relating to the Importation of Textiles, Apparel and Footwear, WT/DS461.
DS456 India —Solar Cells (2016)	India – Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456.
DS477 / DS478 Indonesia – Import Licensing Regimes	Indonesia - Importation of Horticultural Products, Animals and Animal Products, WT/DS477 / WT/DS478.
DS472 Brazil — Taxation	Brazil - Certain Measures Concerning Taxation and Charges, WT/DS472.
DS497 Brazil — Taxation (Japan)	Brazil – Taxation, Complaint by Japan, WT/DS497.
DS484 Indonesia —Chicken	Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products, WT/DS484.
DS476 EU — Energy Package	European Union and its Member States — Certain Measures Relating to the Energy Sector, WT/DS476
DS543 US — Tariff Measures	United States — Tariff Measures on Certain Goods from China, WT/DS543.

## INTRODUCTION

Throughout the years it has been evidenced that trade and globalization benefits are not equally shared by all countries.<sup>2</sup> According to UNCTAD statistics and trends, from 2009 to 2019, international trade in goods has increased dramatically.<sup>3</sup> Despite advancements and an increase in trade in the Latin America and Caribbean (LAC) region, most countries remain on the "periphery of global production networks" (OECD et al. 124). Likewise, the participation of the region in GVCs is lower than in other regions.<sup>4</sup> The problem is that, although tariffs have been significantly reduced, non-tariff measures have increased, especially restrictive non-tariff measures that are commonly known as non-tariff barriers, thus affecting market access.<sup>5</sup>

WTO market access rules play an important role on trade, since it cannot exist without access to domestic markets.<sup>6</sup> Countries need to have the assurance that access is secure and predictable.<sup>7</sup> Market Access for goods and services can be restricted by other countries in different ways.<sup>8</sup> There are two main categories of barriers to Market Access: (1) tariff barriers; and (2) non-tariff barriers.<sup>9</sup> The analysis will focus on non-tariff barriers. They are any measure other than tariffs that can impact trade flows.<sup>10</sup> Non-tariff barriers include quantitative restrictions and other non-tariff barriers like: "...lack of transparency of trade regulations, unfair and arbitrary application of trade regulation, customs formalities, technical barriers to trade, sanitary and phytosanitary measures and government procurement practices" (Van den Bossche and Zdouc 416).

The GATT drafting committee, wanting to assure equal opportunities to market access, created Non-Discrimination Rules: 1. Most-Favored-Nation (MFN) treatment obligation and 2. National Treatment Obligation. MFN treatment obligation can be found in GATT Art. I and requires that the WTO members grant the same favorable treatment to all other WTO members. Therefore, it is prohibited to discriminate between and among trading partners who import and export "like

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<sup>2</sup> OECD et al. 33

<sup>3</sup> UNCTAD. Key Statistics, 6.

<sup>4</sup> OECD et al. 124.

<sup>5</sup> Ferraz, 256

<sup>6</sup> Van den Bossche and Zdouc, 415.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., 415-416.

<sup>9</sup> Ibid.

<sup>10</sup> Staiger, 2.

products” (Van den Bossche and Zdouc 39). The MFN obligation applies to both imports and exports and not only to tariffs but also to NTBs.<sup>11</sup> The MFN obligation refers to any advantage, privilege, or immunity granted to other member countries’ goods.<sup>12</sup> The discriminatory practices can be *de facto* and *de jure*. *De jure* discrimination is clearly grasped from reading the text of the law, while *de facto* discrimination becomes apparent when analyzing the particular facts and conditions relative to the application of the measure.<sup>13</sup> This is considered the most important rule of WTO law, and without it, the multilateral trading system could and would not exist.<sup>14</sup>

On the other hand, National Treatment Obligation, found in GATT Article III, requires that WTO members do not provide a less favorable treatment to foreign products and services than that given to “like” domestic products.<sup>15</sup> For example, a foreign product in another WTO member domestic market can not be subject to less favorable taxation or different regulations than like domestic products.<sup>16</sup> The objective of this obligation is to guarantee level playing field for imports that compete with internal products in a WTO member country.<sup>17</sup> National treatment Obligation also prohibits *de facto* and *de jure* discrimination of foreign products vis-à-vis national products. These non-discrimination rules help ensure that WTO members abide by trade liberalization commitments and do not impose protectionist domestic policies that can curtail market access.<sup>18</sup>

WTO members promised to comply with GATT and WTO regulations, keeping international trade restrictions to a minimum.<sup>19</sup> Nevertheless, they can maintain their internal regulatory and policy autonomy, while they do not violate GATT provisions. The drafters of the GATT, in recognition of the need to guarantee members’ GATT commitments while respecting their regulatory autonomy for pursuing public policy objectives, created GATT Article XX on general exceptions to the aforementioned core principles. Throughout the years, the discussion has centered on whether the GATT panels, WTO, and AB have correctly balanced the members' right to market access with their right to pursue a public policy with Article XX general exceptions.<sup>20</sup> It

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<sup>11</sup> Trebilcock and Trachtman, 43.

<sup>12</sup> Van den Bossche, 311.

<sup>13</sup> *Ibid.*, 309.

<sup>14</sup> *Ibid.*, 39.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Trebilcock and Trachtman, 58.

<sup>18</sup> Hoekman and Nicita, pp. 22

<sup>19</sup> Amos.

<sup>20</sup> Moran, 3.

is of utmost importance to find a balance or equilibrium between members' obligations vis-à-vis the WTO and GATT and their right to protect and pursue their own policy objectives.<sup>21</sup> This equilibrium allows competing rights to not cancel each other and nullify or impair the balance of rights and obligations created by WTO members.<sup>22</sup> An equilibrium of competing rights serves, on the one hand to allow member states to pursue public policies, and on the other, to allow them the right to market access. One factor of major concern is that governments do not just use NTMs to guarantee that imported products meet domestic regulatory requirements but also as substitutes for tariffs and as protectionist tools. For instance, they favor domestic suppliers or impose unnecessary costs and compliance burdens, thus affecting market access.

This dissertation will analyze if there is an abusive use of GATT Article XX by developed countries and its impact on developing countries. The methodology for obtaining information will consist of analyzing WTO and GATT regulations, case law of GATT panels and panels and AB in the WTO system, UNCTAD reports, LAC region development analysis by the OECD and different organizations, and finally, an analysis of publications examining the text of Article XX, as well as case interpretations. With respect to case law, a review and analysis will be made of all the cases that went before the WTO and GATT dispute settlement system where respondents invoked article XX general exceptions to justify infringement of WTO and GATT law. The data will be analyzed chronologically to observe the change and evolution of the analysis and interpretation of Article XX. One of the objectives of this dissertation is to find the purpose and aim of GATT Article XX. This topic is especially relevant during the COVID-19 pandemic because NTMs have increased and have caused an unprecedented disruption to world trade, consumption, and production; thus affecting the global economy,<sup>23</sup> GDP growth, and causing an increase in poverty and inequality.

Key objectives are to investigate a possible abusive use of article XX, analyze the use of this article and which exceptions are more commonly invoked, reveal who invokes them more frequently: developed or developing countries, and indicate the consequences of an incorrect use of Article XX in developing countries – specially on market access and development. The analysis of developing countries will focus on Latin American and Caribbean Countries (LAC).

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<sup>21</sup> EU- Seal AB, para. 5.297.

<sup>22</sup> Ibid.

<sup>23</sup> WTO Website Covid-19 and World Trade.

Chapter 1 will focus on recent trends in LAC developing countries, their trade and development scenarios, as well as protectionism and the impact of NTMs in the mentioned region. Chapter 2 will analyze article XX, its nature, justification, scope, application, its two-tier structure and will also examine subparagraphs (a) and (d). On chapter 3 will delve into the use of the GATT article XX before the WTO and after the WTO by both panels and AB, and will analyze the invocation of article XX on quantitative restrictions, in the COVID-19 pandemic and on cases that haven't gone before the WTO system. Finally, on the conclusions, I aim to determine whether there is indeed an abusive use of GATT article XX, its impact in developing countries and some possible recommendations for solving this problem.

# CHAPTER 1: The effect of NTBs in LAC Developing Countries

## *1. Recent Trends in Latin American and Caribbean Developing Countries*

This chapter will analyze development and trade trends in Latin American and Caribbean (LAC) Developing countries and the impact of trade-restrictive measures. LAC Countries share a common history and present with similar problems regarding politics, development, rule of law and economics. Some of problems they share are: inequality in income distribution, in opportunities of entry into the labor market and in job quality, as well as the prevalence of informal labor and lack of social protection for large contingents of workers, in addition to high inflation and political instability.<sup>24</sup> Insufficient growth in the LAC region has slowed the reduction of poverty and income inequalities.<sup>25</sup> In the LAC region, 25% of the population live in poverty, while 40% have escaped it during the last 15 years but are part of a vulnerable social group of informal workers that could quickly go back to poverty.<sup>26</sup> Therefore, 65% of the population in the LAC region still live in poverty or in conditions of vulnerability, according to OECD, CLAF, and ECLAC Latin American Outlook of 2018.<sup>27</sup> The problems of LAC countries are negatively correlated with growth.<sup>28</sup> Following is a list indicating some of the problems faced by Latin America that are a deterrent to development:

1. Productivity Trap (low levels of productivity in different sectors, exports concentrated only on primary products and extractive industry, low sophistication in the production process causing low participation in regional value chains)
2. Social Vulnerability Trap (vulnerable middle class with low-quality jobs, lack of social security and volatile incomes, making it difficult to save and invest, thus leaving them vulnerable to falling back into poverty)
3. Institutional Trap (lack of trust and satisfaction in public services)
4. Environmental Trap (use of materials and natural resources that can cause an unsustainable dynamic in environmental and economic terms).<sup>29</sup>

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<sup>24</sup> ECLAC. Social Panorama of Latin America 2017, 35.

<sup>25</sup> OECD, Perspectivas económicas de America Latina 2019.

<sup>26</sup> OECD et al. 15

<sup>27</sup> Ibid.

<sup>28</sup> Dollar and Kraay, 14.

<sup>29</sup> OECD, Perspectivas económicas de America Latina 2019.

It is important to stress the effect of the COVID-19 pandemic on the LAC region, causing historically low GDP growth and increasing poverty and inequality.<sup>30</sup> The economic and social damage of the COVID-19 pandemic is more significant in DCs because of the problem of informal employment, lack of social protection, and dependence on tourism. This pandemic threatens to send millions of people into extreme poverty if the crisis persists.<sup>31</sup>

Regarding trade, the LAC region persists in its staunch defense of national sovereignty and strong protection of infant industries.<sup>32</sup> What has happened in the WTO throughout the years is that southern countries (Developing Nations) fear green protectionism and northern countries (Developed Nations) fear trade at all costs<sup>33</sup>:

*In other words, both freer trade and a healthier natural environment may be desirable, but if trade-offs arise between them, then richer and poorer countries are likely to hold different priorities. (Johnson and Urpelainen 451)*

The LAC region has experienced few changes in its trade structure in the last decades and regional economic integration is still far from reaching its potential.<sup>34</sup> Seventy percent of the region's exports are concentrated in five economies: Argentina, Brazil, Mexico, Chile, and the Bolivarian Republic of Venezuela.<sup>35</sup> According to the UNCTAD statistics and trends (2019), from 2009 to 2019, international trade in goods has increased dramatically.<sup>36</sup> Despite advancements and an increase in trade in the LAC region, most countries remain on the "periphery of global production networks."<sup>37</sup> Likewise, the participation of the region in GVCs is lower than that of other regions. Intra-regional trade in LAC global value chains is significantly lower in intermediate-final goods compared to other regions.<sup>38</sup> According to data available by OECD, CAF, and ECLAC (2018), only 16% of total LAC exports are for the regional market,<sup>39</sup> percentages well

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<sup>30</sup> OECD. Latin American Economic Outlook 2020, 17.

<sup>31</sup> UNCTAD. Transforming Trade and Development. 16-17.

<sup>32</sup> Johnson and Urpelainen, 463; 469.

<sup>33</sup> Ibid., 451.

<sup>34</sup> OECD et al. 31

<sup>35</sup> Ibid.

<sup>36</sup> UNCTAD. Key Statistics and Trends, 6.

<sup>37</sup> OECD et al. 124.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid., 129.

below those of other intra-regional trade in the world. This is a result of the region's size, geography, and transport infrastructure.<sup>40</sup>

Another problem is that even with LAC efforts the last decades to diversify their exports agriculture continues to account for a large share of their export baskets.<sup>41</sup> For developing countries, agriculture constitutes an essential source of revenue and provides income generation opportunities.<sup>42</sup> Measures implemented by developed and developing countries on agricultural products aiming to protect the environment and health can restrict market access and harm developing countries.<sup>43</sup>

## ***2. Trade and Development in Developing Countries***

There is a strong correlation between trade and development. Openness to international trade speeds up development; most economists have agreed on this.<sup>44</sup> Greater integration of Developing countries (DCs) into global markets can contribute to more rapid growth and poverty reduction.<sup>45</sup> There is no "one-size-fits-all development path" for socioeconomic progress, but some of the things that can help are political stability, well-functioning institutions, solid and productive capacities that enable the production of goods and services, and an increase in exports; thereby promoting development and boosting the economy.<sup>46</sup> Trade has some spillover effects like allowing companies in developing countries to access technologies so as to improve product quality and safety in order to have a competitive edge for entering foreign markets. This translates into greater efficiency and productivity of domestic companies as well as additional employment opportunities; ultimately benefiting consumers with lower prices.<sup>47</sup> The LAC region has been unable to garner all the benefits trade can bring; the share of trade of this region in world merchandise exports has stagnated since 1970, with minimal variations,<sup>48</sup> while developing Asian countries have shown a steady rate of growth.<sup>49</sup>

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<sup>40</sup> Ibid.

<sup>41</sup> UNCTAD. Trade Trends Under Covid 19., 17.

<sup>42</sup> Boza, Sofia, et al., 228

<sup>43</sup> Ibid.

<sup>44</sup> Dollar and Kraay, 1.

<sup>45</sup> OECD. "Analysis of Non-Tariff Barriers .", 10

<sup>46</sup> UNCTAD Productive Capacities Index., 2

<sup>47</sup> Love and Lattimore. 128-129

<sup>48</sup> OECD et al. 30-31

<sup>49</sup> Ibid.

Participation of DCs in global trade is essential; it allows them to access bigger and wealthier markets and helps their domestic industries by providing more demand for their products.<sup>50</sup> As previously mentioned the largest proportion of international trade in the LAC region corresponds to trade flows from Mexico, Argentina, and Brazil; therefore, it becomes essential that smaller countries in the region increase their participation in trade and integration in regional and GVCs.<sup>51</sup>

Contrary to a common belief held by politicians that national industries need to be protected by restricting imports, trade is essential because national economies need international markets to produce and sell things.<sup>52</sup> The defense of national industries through a reduction of imports and a handing over of government contracts to domestic firms is based on a flawed premise that countries can survive by themselves.<sup>53</sup> Furthermore, international trade is not only the goods we buy in shops but also the raw materials and components for producing goods.<sup>54</sup> Therefore, imports are even more crucial with respect to GVCs, given that products are not manufactured in only one country but in several, requiring both imports and exports.<sup>55</sup>

From a development perspective, studies have shown that it is of national interest to minimize companies' trade costs because countries need raw materials for producing goods.<sup>56</sup> Increasing the cost raw materials does not help national industries but rather produces the opposite effect, making it more expensive to manufacture goods, thereby increasing their price and rendering them more costly and less competitive in foreign markets.<sup>57</sup> This type of protectionism reduces the market size for domestic companies and impacts economic growth. Imports also allow the acquisition of crucial inputs and technology for increasing company productivity, export competitiveness and growth.<sup>58</sup> According to Love and Lattimore: "Trade liberalization is not an end in itself. It is part of a strategy to promote economic development and improve social welfare by making the world's resources more readily available to all" ( 2-3).

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<sup>50</sup> Love and Lattimore. 128-129

<sup>51</sup> OECD et al. 31.

<sup>52</sup> Love and Lattimore, 2-3

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> OECD et al. 31

<sup>56</sup> Hoekman and Nicita, 15

<sup>57</sup> Love and Lattimore, 2-3

<sup>58</sup> OECD et al. 31

### 3. *Protectionism and abusive use of NTBs*

Throughout the years, trade protectionism has been used by countries with the intent of helping them recover from economic downturns, but this has proven to be counterproductive. As previously analyzed, NTMs that restrict trade may pursue valid public policy objectives, but in many cases they are not the least restrictive available measure for protecting said policy objectives and tend to be discriminatory or bring negative effects, specially to developing countries.<sup>59</sup> Trade protectionism has been defined the following way:

*[...]as a nation, or sometimes a group of nations working in conjunction as a trade bloc, creating trade barriers with the specific goal of protecting its economy from the possible perils of international trading. This is the opposite of free trade, in which a government allows its citizenry to purchase goods and services from other countries or to sell their goods and services to other markets without any governmental restrictions, interference, or impediment. The objective of trade protectionism is to protect a nation's vital economic interests such as its key industries, commodities, and employment of workers. (Guarino, Focus Economics 2018)*

Some of the effects of trade protectionism in a nation's macroeconomy and global economy are: limited choice of products and higher prices for consumers, potential financial harm to domestic firms since they need to buy parts or components to produce goods, stunted growth of infant industries due to government trade protection policies. The problem is that governments keep protectionists measures in industries that are not infant anymore therefore, becoming difficult for domestic industry to compete in global market, because protectionism does not incentivize a better quality and efficiency.<sup>60</sup>

At the other end of the spectrum of trade protectionism is free trade, that most economists agree that it is known for promoting a higher level of domestic consumption of goods and more efficient use of resources while pursuing growth and wealth creation within a nation's borders.<sup>61</sup> The multilateral trade rules exist for ensuring that public policy objectives are not used as an excuse for protecting domestic industry and restricting foreign companies' access to the market.<sup>62</sup>

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<sup>59</sup> Guarino, Focus Economics: 2018

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Love and Lattimore, 63.

#### 4. *Impact of Non-Tariff Barriers in Developing Countries*

In recent years, tariffs have been reduced significantly, while NTMs have become more common in serving public policy objectives and protectionist purposes.<sup>63</sup> NTMs are generally defined as: "... policy measures, other than ordinary customs tariffs, that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both" (De Melo and Nicita 83, quoted: UNCTAD, 2010). Market access depends on regulations and requirements for goods, and they are referred to as NTMs; they include different policies that have direct or indirect effects on trade costs.<sup>64</sup> NTMs are more restrictive than customs duties; according to UN 2020 data, trade costs associated with these measures are estimated to account for 1.6 percent of global GDP/US\$1.4 trillion, more than double the amount of ordinary customs tariffs.<sup>65</sup> Governments use Non-Tariff measures for two purposes:

- *Pursue public policy objectives, such as health and safety for products and protection of the environment.*
- *Align trade policy with their economic policies and development objectives: for example, altering quantities traded or favoring domestic industries.(Hoekman and Nicita 18)*

These two purposes have an impact on trade, albeit not necessarily negative.<sup>66</sup> Some facilitate trade while others may affect trade indirectly. However, they pursue public policy objectives, for example, in the area of health, with restrictions or requirements for limiting the spread of infectious diseases and pests.<sup>67</sup> Some NTMs are crucial for achieving sustainable development goals.<sup>68</sup>

There are concerns that governments will not only use NTMs to guarantee that imported products meet domestic regulatory requirements but will also use them as substitutes for tariffs and as protectionist tools. An example of this would be favoring domestic suppliers or imposing unnecessary costs and compliance burdens, thus affecting market access.<sup>69</sup> In these types of cases, protectionist or restrictive NTMs are considered Non-Tariff Barriers (NTBs). Non-tariff measures by definition do not have a negative connotation, while NTBs constitute trade barriers and have a

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<sup>63</sup> UNCTAD. Non-Tariff Measures: Economic Assessment. 4

<sup>64</sup> De Melo and Nicita Ibid., 82.

<sup>65</sup> UN SDG PULSE Website.

<sup>66</sup> Hoekman and Nicita, 18.

<sup>67</sup> UNCTAD: Non-Tariff Measures in Mercosur., 37; UNCTAD: Addressing Regulations and Non-Tariff., 2.

<sup>68</sup> UNCTAD and World Bank, 2018. 1

<sup>69</sup> Cadot, et al. 5

restrictive effect.<sup>70</sup> For an NTM to be considered an NTB, we need to see how it is implemented or applied. For example, standards *per se* are not categorized as NTBs, unless applied with unreasonable stringency and with implicit intent to favor domestic producers.<sup>71</sup> The problem of NTBs is that they constitute barriers to trade through their discriminatory and protective design, and they are of particular importance to developing and least developed countries because compliance can be demanding, thereby affecting their access to markets.<sup>72</sup> According to a study conducted by Yalcin, Felbermayr, and Kinizius (2017), non-tariff barriers may be responsible for nearly 16% of the global trade slowdown.<sup>73</sup> It is important to stress that predicting and measuring the level of impact is complicated, and results may vary, but what is clear is that there is a strong correlation between NTBs and levels of trade.<sup>74</sup>

Nevertheless, NTBs distort trade to the detriment of poorer countries; econometric results have indicated that the lower a country's income per capita, the higher is the negative effect of NTBs on its exports, with the agricultural sector being more vulnerable to the presence of NTBs.<sup>75</sup> One of the effects of NTBs in developing countries is costs. Countries impose regulations in the food and agriculture sector in order to address societal interests, aiming to overcome and reduce impacts of perceived market imperfections (negative externalities) such as risks to human health, animal and plant life, and environmental problems.<sup>76</sup> They are trying to ensure that imported products meet domestic requirements.<sup>77</sup> Nevertheless, on many occasions these measures implemented by WTO member countries become a burden and increase trade and production costs.<sup>78</sup> Unlike tariff schedules that are available for each product, non-tariff barriers lack that transparency; there is a lack of information that becomes a burden for SMEs and developing countries entering new markets.<sup>79</sup> This lack of information on market access rules and regulations harms developing countries and small firms that try to access heavily regulated markets of both

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<sup>70</sup> UNCTAD, If you care about least developed countries., 7.

<sup>71</sup> De Melo and Nicita. 84

<sup>72</sup> UNCTAD, If you care about least developed countries., 7.

<sup>73</sup> Yalcin, Erdal et al, 34

<sup>74</sup> Ibid.

<sup>75</sup> UNCTAD, If you care about least developed countries., 7.

<sup>76</sup> Gourdon, J., et al. 4.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> UNCTAD. Non-Tariff Measures: Economic Assessment. 2 ; 4.

developed and developing countries.<sup>80</sup> The lack of harmonization and different standards that producers and companies need to comply with for accessing different markets affects the capacity of LAC developing countries to participate in GVCs.<sup>81</sup> Some argue that NTMs can be equivalent to a tariff of 20% for primary intermediary products and 12% for processed intermediates.<sup>82</sup> This helps to explain why developing countries that have high levels of restrictive non-tariff measures are less integrated into GVCs.<sup>83</sup>

Although the notification and availability of data on NTBs and NTMs has improved, it is still inadequate.<sup>84</sup> This creates additional costs for compliance. Exporters generally face the following costs:

*[...] identifying and processing information on relevant requirements in the target market (information costs); adjusting the product or production process to the requirements of the importing country (specification costs); and verifying and proving that these requirements are met (conformity assessment costs) (von Lampe et al., 2016; OECD, 2017). (Gourdon, Stone and Van Tingeren 5)*

These costs are high, mainly when regulations across jurisdictions differ. According to the UNCTAD and World Bank report of 2018, NTMs tend to work against low-income countries and small producers.<sup>85</sup> Exporters from developing countries are less able to comply with NTMs, either because of inexperience or higher production costs.<sup>86</sup> NTMs, by increasing costs and affecting productivity, can hurt domestic producers of the member country that implemented measure and make a country uncompetitive in export markets.<sup>87</sup> In addition to trade effects, they also impact consumers because there is an increase in prices.<sup>88</sup> NTMs carry different costs and benefits; on the other hand they can protect domestic infant industries and protect consumers from unsafe

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<sup>80</sup>Ibid. 4.

<sup>81</sup> OECD et al. 126.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid. 127

<sup>84</sup> UNCTAD. Non-Tariff Measures: Economic Assessment. 4.

<sup>85</sup> UNCTAD and World Bank, 20

<sup>86</sup> Ibid.

<sup>87</sup> UNCTAD. Assessing Cost-Effectiveness. 1

<sup>88</sup> UNCTAD. Non-Tariff Measures in Mercosur. x

ingredients, on the other hand, they are also responsible for excluding competition and depriving consumers of foreign goods.<sup>89</sup>

*i. Implemented by developed countries*

NTBs implemented by developed countries are generally for satisfying policy concerns like health or environment. Research conducted by the UNCTAD has found that the restrictiveness of measures implemented is two to three times higher than the tariffs. These regulations are mainly concentrated in developing countries' export sectors, like agriculture.<sup>90</sup> The effect of NTMs in terms of costs has been estimated to be 2% of total imports for high and middle-income countries and about 3.5% for lower-income countries. Moreover, it has been observed that the stringency of requirements is greater in higher-income countries.<sup>91</sup>

LAC countries are known for being competitive agricultural exporters, therefore, sanitary and phytosanitary standards or domestic measures aiming to protect health or the environment vis-à-vis agricultural products become a market access barrier because their main commercial partners are developed countries whose OECD markets have a strong interest in the environment and health.<sup>92</sup> In the case of LAC countries, they mainly export to the EU and USA; for example, Ecuador exports bananas, flowers, and shrimp; while Costa Rica exports fruits and coffee.

Developing countries are concerned about the regulatory measures implemented by developed countries; namely, green protectionism (environment-related trade restrictions).<sup>93</sup> They argue that environmental standards are a costly luxury they cannot cope with.<sup>94</sup> On occasions, the real problem is that, restrictive measures in favor of the environment have a protectionist or discriminatory application that puts foreign producers and developing countries' companies at a disadvantage and restricts their market access.<sup>95</sup> This becomes an issue because the participation of DCs in global trade hinges on their capacity to satisfy technical and quality standards and comply with procedures.<sup>96</sup>

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<sup>89</sup> Beghin, J. et al. 6.

<sup>90</sup> UNCTAD: Addressing Regulations and Non-Tariff Measures. 1

<sup>91</sup> UNCTAD and World Bank. 15

<sup>92</sup> OECD. Analysis of Non-Tariff Barriers. 15

<sup>93</sup> Urpelainen, 450

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> UNCTAD. Non-Tariff Measures: Economic Assessment. v.

ii. Implemented by developing countries that affect south-south trade and integration to GVCs

The LAC region has made strides in removing intra-regional trade tariffs. Nevertheless, it still faces the challenge of removing non-tariff barriers like inconsistent technical, sanitary and phytosanitary standards; discrimination against regional suppliers in government procurement, and complicated and bureaucratic customs procedures that increase costs and restrict access.<sup>97</sup> Some of the biggest problems in intra-developing country trade are: customs and administrative procedures, which are generally not automated and are often associated with inefficient customs and administrative bureaucracy; customs valuations not based on market prices, and excessive formalities.<sup>98</sup> These measures negatively impact economic growth, trade, investment, development, and affect south to south trade and integration to GVCs.<sup>99</sup> A negative effect of NTMs is that they can prevent the creation of regional value chains (RVCs), thereby restricting the economy's ability to effectively make use of the region for boosting competitiveness and producing high value-added products.<sup>100</sup>

According to data from a report prepared by the UN Conference on Trade and Development (Geneva 2019), the economic and income gap is likely to increase under the current policies, rules, market dynamics, and corporate power: "Globally, not only are levels of GDP per capita almost six times higher on average in developed countries than in developing ones, for most, the absolute income gap is growing (TDR 2016: 2)" (41).

Reducing unnecessary and protectionist trade barriers would give a "great boost to global economic welfare."<sup>101</sup> The reduction of trade costs brings down transaction costs and prices of goods in developing countries, benefiting exporters, importers, as well as households.<sup>102</sup> Three elements need to be present in NTMs to not impede economic development: "(i) trade costs should not be raised gratuitously; (ii) the playing field should not be altered in ways unfavorable to developing countries; and (iii) the measures need to be supportive of the sustainable development agenda"( UNCTAD: Non-Tariff Measures: Economic Assessment 2). There needs to be a balance

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<sup>97</sup> OECD et al. 32

<sup>98</sup> OECD. Analysis of Non-Tariff Barriers. 14

<sup>99</sup> UNCTAD: Non-Tariff Measures in Mercosur. 1

<sup>100</sup> UNCTAD. Assessing Cost-Effectiveness. 1

<sup>101</sup> Love and Lattimore, 54

<sup>102</sup>Hoekman and Nicita, 16

between achieving policy objectives and minimizing economic costs. NTMs must be practical and efficient in design and implement measures that minimize compliance costs while still meeting the desired policy goals.<sup>103</sup> The next chapter will analyze the provision that member countries use to justify NTBs that aren't GATT and WTO compliant. Member states invoke Article XX general exceptions for justifying domestic measures that constitute barriers to trade. As it was seen this measures implemented by both developed and developing countries affect developing countries market access, development, creation and integration of global and regional global value chains.

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<sup>103</sup> UNCTAD. Assessing Cost-Effectiveness. 1

## CHAPTER 2: GATT Article XX General Exceptions

### 1. *GATT Art XX: Justification/ Nature*

The drafters of the GATT, recognizing countries' domestic autonomy, sovereignty, and different policy choices, introduced exception articles to National Treatment and Most Favorable Nation principles:

- *Art. XX- → General Exceptions*
- *Art. XXI- → Security Exception*

This dissertation will focus only on the General Exceptions on Article XX used to justify non-tariff barriers. This article was drafted to safeguard member states' regulatory autonomy and policy choice on the one hand and prevent the abusive use of these exceptions on the other hand.<sup>104</sup> Consequently, acting as a balancing tool for Members, the WTO enabled them to adopt domestic measures for pursuing specific domestic policy objectives that would otherwise be considered a violation of GATT commitments.<sup>105</sup> When a trade measure adopted by a member violates the GATT commitments, the regulating member has the right to invoke the general exceptions of Art XX to justify said measure.<sup>106</sup>

Some of the policy objectives pursued in cases where GATT Article XX was invoked are in the WTO dispute settlement system:

- *US Gasoline 1996: The US's contested measure sought to regulate the effects of Gasoline on clean air.*
- *Brazil–Retreaded Tyres (2007): Contested measure was the ban on importing retreaded tyres for environmental and health reasons.*
- *European Communities–Hormones: Measure prohibited livestock farming of certain substances with hormonal action and related measures for health reasons.*

Throughout the years, the GATT, WTO Panels, and AB, encountered the arduous task of examining whether the measures implemented by member states genuinely protected the non-

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<sup>104</sup> Maruyama, 652.

<sup>105</sup> Amos; Sifonios, 158

<sup>106</sup> Sifonios, 157

economic concern of the exceptions invoked or instead protected national industry.<sup>107</sup> As the WTO outlined it in its 2009 annual report, there needs to be a balance:

*Trade agreements define rules for the conduct of trade policy. These rules must strike a balance between commitments and flexibility. Too much flexibility may undermine the value of commitments, but too little flexibility may render the rules unsustainable. (WTO Annual Report 2009)*

Likewise, the AB in the *US-Shrimp* case stated the need for a balance between members' rights to invoke the exceptions of Article XX and their duty to comply with their obligations and respect other members' rights.<sup>108</sup> The AB, in this case, found that the purpose of article XX is to prevent the abuse of exceptions."<sup>109</sup>

The debate on trade and domestic measures for achieving policy objectives has been controversial and continually discussed throughout the years, especially as relates to the environment. The problem with the environment is that measures can simultaneously defend the environment and be protectionist and trade-restrictive.<sup>110</sup> Likewise, the Panels and AB's interpretation has generated several positions and critiques in favor and against this issue. Some environmentalists portray the World Trade System as "GATTzilla," a monster at the service of unbridled multinational corporations stomping on national environmental laws and bent on ever-expanding production and consumption that would destroy the environment" (Gaines, 121). On the other hand, it is argued that the reason for stringent standards, narrow scope of exceptions, and strict two-tier test of article XX, is to avoid protectionist policies and abusive use of this article.<sup>111</sup> It is also stressed that dispute settlement institutions did not reject non-trade interests *per se*, but rather the way these measures were formulated or applied.<sup>112</sup> In many cases brought before the Panels and AB, the measures were not considered justified by article XX because of how they were applied; they usually failed to pass the chapeau and necessity tests.

Similarly, the strict interpretation of Article XX has also been criticized because only in a few cases was the defense provisionally accepted by the panel and upheld by the AB. However, it

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<sup>107</sup> Zagel, 128.

<sup>108</sup> Amos.

<sup>109</sup> Venzke, 1127: AB DS58, para. 116-117, 121

<sup>110</sup> Alquisada, 1029.

<sup>111</sup> Zagel, 126.

<sup>112</sup> *Ibid*, 128

generally failed to pass the Chapeau test, as the measure was incompatible with WTO agreements.<sup>113</sup> There are those who argue the existence of a bias in favor of trade.<sup>114</sup> Some contend that cases in which the measure is justifiable with one of the defenses, do not make it to the panel stage.<sup>115</sup> Member states requesting consultations and the establishment of a panel usually have a strong case.

The WTO's policy rigidity is also highly criticized.<sup>116</sup> Usually, member states use this article to justify protectionist measures.<sup>117</sup> That is why the WTO includes provisions that seek to balance economic and non-economic interests (public morals, environment, public health). The rigidity and strict interpretation are necessary for avoiding "system friction" vis-à-vis each country's different regulatory processes, given that norms and regulations differ from one country to another.<sup>118</sup>

The Marrakesh Agreement's preamble allows us to see how the WTO has committed to an open, non-discriminatory, and equitable multilateral trading system and to the "protection of the environment, and promotion of sustainable development"(Gaines, 738). When the countries signed the GATT Agreement in 1947<sup>119</sup> and the WTO Marrakesh agreement in 1994<sup>120</sup>, they relinquished part of their sovereignty, as often occurs in other international agreements and organizations. In this case, they renounced sovereignty in exchange for trade liberalization. The countries undertook to respect, follow, and not infringe GATT and WTO rules and principles. However, in the different exceptions articles in GATT, SPS, and TBT, we can see how members are able to maintain part of their sovereignty, being allowed to create policies and domestic guidelines for specific policy objectives and determine their level of protection. GATT Article XX is an example of policy objectives that countries can use to justify trade-restrictive measures that would otherwise be considered in violation of the aforementioned principles. These exceptions were not created as an open-ended list but rather as an exhaustive one. Therein lies the importance of a rigorous test and

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<sup>113</sup> Ciuriak and Pashkina, 8

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Gaines, 746

<sup>117</sup> Zagel, 126.

<sup>118</sup> Ciuriak and Pashkina, 6-8.

<sup>119</sup> On 1947, the General Agreement on Tariff and Trade (GATT) signed by 23 nations in Geneva.

<sup>120</sup> The Marrakesh Agreement established the WTO. It was signed in Morocco 1994.

interpretation process for avoiding the issue of states trying to adopt trade-related measures for protecting domestic industries under Article XX.<sup>121</sup>

## ***2. Scope and Application***

GATT Article XX is divided into two parts: the defenses or subparagraphs and the preamble referred to as the Chapeau. This article has ten subparagraphs – from (a) to (j) – that state which exceptions member states can invoke to justify their domestic trade-restrictive measures. These subparagraphs are an exhaustive list of specific policy exceptions that have been considered essential and legitimate and can be invoked by member states.<sup>122</sup> Some of the policy interests that member states can protect include public morals, human, animal, and plant life, health, enforcement of domestic laws and regulations, and conservation of exhaustible natural resources.

Before analyzing whether a measure is justified under Article XX, the Panel and AB must first determine if the measure is inconsistent with a GATT or WTO provision. Some of the WTO provisions violated by certain domestic measures are: Article I GATT: Most-Favored-Nation Treatment and Article III GATT: National Treatment.

### *i. Two-Tier Test*

Panels and AB have analyzed GATT article XX as a two-tier test. The two-tier test is applied once a violation of a WTO provision has been determined. The first test consists of analyzing the content of the measure through the subparagraphs.<sup>123</sup> The second test analyzes how the measure was implemented and determines if the Chapeau requirements are met.

In the first test, the inconsistent measure must meet the requirements of the exceptions listed from (a) to (j). An analysis of the measure is then carried out to see if it is within the scope or policy objective protected under the subparagraphs of GATT Article XX. The next step is to analyze if the challenged measure has a sufficient nexus with the protected interest in the subparagraph that is being invoked.<sup>124</sup> This nexus must be that the measure is "necessary" or "related to"<sup>125</sup>. Each of the subparagraphs contains a different nexus or condition that needs to be

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<sup>121</sup> Zagel, 128

<sup>122</sup> Wujira, pp. 165; Krishen Koul, 342.

<sup>123</sup> Cutfield, 10.

<sup>124</sup> Ibid.

<sup>125</sup> Subparagraphs (c), (f), (h) and (j) another nexus. However, they will not be analyzed due to the little or lack of use of these exceptions.

met. The party that invokes the exception has the burden of proof that the measure, otherwise inconsistent with WTO, is justified by the exceptions of GATT Article XX.<sup>126</sup> On *EC–Asbestos* case, the AB held that when invoking article XX (a) as a justification, the member: "...may rely, in good faith, on scientific sources which at the time represent a divergent, but qualified and respected opinion."<sup>127</sup> In addition, the AB held that the determination of the level of health protection corresponds to the member state, while simultaneously respecting the SPS Agreement.<sup>128</sup> If the nexus between the measure and the protected interest is met, the measure is provisionally justified.<sup>129</sup> Following are article XX subparagraphs that contain the necessity conditions:

*(a) necessary to protect public morals;*

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

*(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement,[...]*

The necessity test has changed over the years. Some authors believed that a measure for being considered necessary could not be just a contribution to the policy but have a indispensability requirement for its achievement.<sup>130</sup> A case with a similar necessity test interpretation is *Thailand–Restrictions on Importation of Internal Taxes on Cigarettes*.<sup>131</sup> In this case, the AB held that the measure imposed by Thailand could be considered "necessary" if there was no other alternative measure consistent with the GATT or less consistent with the achievement of its health policy objectives.<sup>132</sup>

More recent cases like *Asbestos* use a balancing test where trade-restrictive measures are considered with other factors and do not require indispensability. In the *Asbestos* case, the AB balanced and compared the trade-restrictive measure with other measures the following way:

*This "balancing test [is one] in which the 'trade restrictiveness' of a measure is weighed along with other factors, as part of a determination whether a WTO-consistent alternative measure which a*

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<sup>126</sup> Koul, 350.

<sup>127</sup> *Ibid*, 346.

<sup>128</sup> *Ibid*.

<sup>129</sup> Cutfield, 10.

<sup>130</sup> Alquisada 139: quoted Yavitz, Laura.

<sup>131</sup> Koul, 346

<sup>132</sup> *Ibid*.

*Member could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available.'" Note that to be "necessary," the government defending the measure need not show that it is better than the alternatives if any. If a complaining country avers that the defendant country should have taken one of the alternatives, the defendant country must try to prove that such an alternative was not in fact "reasonably available." To determine whether an alternative is reasonably available, it is suggested that in applying the balancing test, "the extent to which the alternative contributes to the realization of the end pursued" must first be established. (Alquisada, 1035-1036: quote: EC-Abestos para.172).*

Another case where the “necessity” condition was analyzed is *Brazil–Retreated Tyres*.<sup>133</sup> The AB interpreted the necessity test as a requirement of a “material contribution” for the achievement of “health and safety objectives under Article XX(b),” defining it the following way:<sup>134</sup>

*A genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the objective's achievement must be material, not merely marginal or insignificant, especially if the measure at issue is trade restrictive as an import ban. Thus, the measure's contribution has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. (Trebilcock and Trachtman 171: quote Brazil- Retreated Tyre, para. 210.)*

Similarly, the AB interpreted Article XX (d) and the necessity condition in *Korea–Various Measures on Beef* similar to *Brazil–Retreated Tires* as “making a contribution to.”<sup>135</sup> In this case, the AB stated the following regarding the necessity test:

*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. (Moran 12)*

In this same case, the AB stated that in addition to being the most “reasonably available” alternative measure,” it must also achieve the desired level of compliance.<sup>136</sup>

In the *US–Gambling* case, it was decided that an alternative measure is not reasonably available if “...it brings an undue burden on the responding member or if it fails to allow the

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<sup>133</sup> Trebilcock and Trachtman, 171.

<sup>134</sup> Ibid.

<sup>135</sup> Korea-Beef

<sup>136</sup> AB Korea–Beef, para. 176.

responding country its desired level of protection concerning the interest pursued”( Wujira, 171-172).

On the other hand, we have the exceptions of Article XX that need to fulfill the condition “related to”:

*(c) relating to the importations or exportation of gold or silver;*

*(e) relating to the products of prison labor;*

*(g) relating to the conservation of exhaustible natural resources [...]*

The fulfillment of the "related to" nexus is less rigorous than the necessity test; the measure only needs to be "related to" the policy goal.<sup>137</sup> The difficulty of this condition is determining what "related to" actually means.<sup>138</sup> The GATT panels interpreted "related to" as "primarily aimed," but the problem is that they are "...hardly synonymous with each other" (Alquisada 1037). In the *Shrimp–Turtle* case, the AB interpreted this condition the following way: "...reasonable relation between the means and the end was sufficient to satisfy the requirement" (Alquisada 1037).

Article XX also has subparagraphs (c), (f), (h), (i), (j), that will not be the subject of this analysis because of their limited use throughout the years.<sup>139</sup>

*ii. Subparagraphs (a) and (d) of GATT Article XX*

Two of the subparagraphs of Article XX that can lead to broader interpretations and possible abuse are: “(a) necessary to protect public morals;” and “(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...” (GATT).

The public morals exception is highly debatable.<sup>140</sup> Public morals is an indeterminate and broad term which can be interpreted in different ways. Some authors like Zegel believe the notion of public morals in Art XX (a) could include fundamental human rights.<sup>141</sup> A WTO/GATT case where the public morals exception was invoked is the *US–Gambling* case. *US–Gambling* is under

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<sup>137</sup> Alquisada, 1037

<sup>138</sup> Ibid.

<sup>139</sup> Respondents have never invoked subparagraphs (c), (e), (f), (h), and (i) since the establishment of WTO.

<sup>140</sup> Koul, 344.

<sup>141</sup> Zegel, 129.

concerns the application of GATS Article XIV.<sup>142</sup> Due to the equivalence of exceptions on GATT and GATTS, this case is relevant for analyzing the application scope of Art. XX (a).<sup>143</sup> In this case, the panel and AB stated that: "...the concept of public morals is generally a very flexible one, the content of which can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values, and it conceded considerable leeway for the Member States to apply their own systems and scales of values." (Zagel 130, quoted: US-Gambling 6.461 ) In this case, public morals are defined as: "standards of right and wrong conduct maintained by or on behalf of a community or nation." (US-Gambling paras. 6.6465)

This exception of public morals requires defining morality and balancing the cost of trade restrictions, which can be risky.<sup>144</sup> On one side, we have transnationalism that suggests the existence of universally shared values, requiring states invoking this exception to demonstrate their existence in other similar countries. Moreover, universalism requires a "near-universal practice" of these values. Both are contradicted in the *US-Gambling* statement that public morals are: "maintained by or on behalf of a community or nation." The problem with this statement in the *US-Gambling* case is that it suggests that a state can have its own unique set of public morals.<sup>145</sup> After this approach by the AB on the public morals exception, we have the viewpoint of Jeremy Marwell, a proponent of unilateralism, a doctrine that stresses that states can define what constitutes public morals unilaterally but must provide evidence to that effect.<sup>146</sup> In order to avoid protectionist measures under the guise of public morality, he stresses the relevance of the necessity test and the chapeau analysis.<sup>147</sup> Conversely, Mark Wu presents a restriction-sensitive approach.<sup>148</sup> He argues that the necessity test and Chapeau are not enough to prevent protectionism through the public morals exception, and that it could cause destabilization and politicization of the trade regime.<sup>149</sup> He states that there are three different types of restrictions on public morals:

*Type I restrictions are 'inward-directed' in that the state uses the restriction to protect the moral beliefs of its own inhabitants, for example, by banning gambling, pornography, or alcohol. Type II*

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid., 130.

<sup>144</sup> Johnston, 13

<sup>145</sup> Cutfield, 32

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid, 33

<sup>149</sup> Ibid.

*restrictions are directed at protecting those involved in the production of goods and services in the exporting state, whereas Type III restrictions concern goods or services of an exporting state whose practices are considered immoral by the importing state but which are not directly involved in the production of banned goods or services. Wu asserts that only inward-looking Type I restrictions have been accepted in the US–Gambling and the status of outward-looking Type II and III restrictions is unclear. (Cutfield 33)*

Other Authors argue that Wu's approach is flawed because it creates a rigid, three-part distinction that does not exist in Article XX jurisprudence.<sup>150</sup> Nevertheless, as stressed before, this exception interpretation is not completely clear and can be subject to abusive and discriminative use.

On the other hand, we have article XX (d) that states the conditions that countries must adhere when justifying a measure otherwise inconsistent with GATT:

- *Laws or regulations with which compliance is being secured are not inconsistent with GATT.*
- *Measures necessary to secure compliance.*
- *Measures not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction in international trade (Koul, 347: quotes GATT).*

The problem with this exception is that it is broad; member states can use it to justify protectionist measures. When this exception is invoked, it is vital to examine if it is essential for ensuring compliance or if another less trade-restrictive measure is available. It is also important that the measure the member state seeks to ensure compliance with is in keeping with WTO and GATT regulations.<sup>151</sup> The AB in the *Mexico–Soft Drinks* case stated that the term “laws or regulations” in this exception refers to rules of member countries’ domestic legal systems and rules of international agreements incorporated into domestic legal systems or that have a direct effect on the legal systems.

These two exceptions have been criticized because of their ambiguity, while other authors argue that ambiguity in GATT Art XX serves to address evolving issues.<sup>152</sup> For example, Condon

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<sup>150</sup> Ibid.

<sup>151</sup> DS155, par. 8.242

<sup>152</sup> Condon, 277.

Bradley refers to the necessity of addressing evolving environmental issues.<sup>153</sup> Likewise, the ambiguity in certain provisions can be clarified through their application to specific cases, as has occurred throughout the years with the Panels and AB.<sup>154</sup> In order to address evolving issues, the interpretation and application of this article has changed over the years.

iii. Chapeau

The second test when analyzing Article XX's invocation as a justification for trade-restrictive measures is the Chapeau. In interpreting the Chapeau, the panel focuses on the way the measure is applied.<sup>155</sup> The opinion of the DSB has been that before analyzing the Chapeau, the panel or AB must analyze the subparagraph (1<sup>st</sup> test).<sup>156</sup> One of the reasons for following this order is that the analysis of the subparagraphs sets the context for analyzing the measure under the Chapeau.<sup>157</sup> Some authors have labeled this order of the two-tier test as "arbitrary" but appropriate for judicial economy.<sup>158</sup> According to Niall Moran, the Chapeau:

*Is a flexible tool provided by the agreements that give the Appellate Body a degree of freedom in attributing weight to the parties' various concerns. 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.(Moran 6)*

The Chapeau's purpose is to prevent an abusive use of the exceptions through an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" (Cutfield, 10; Moran, 5). Authors that analyzed the AB's approach to the Chapeau stated that: "...the subparagraphs are concerned with the right to adopt measures for non-trade reasons and that the chapeau is concerned with the abuse of that right" (Bartels, 98). The importance of the Chapeau lies on the fact that if it is removed from Article XX two-tier structure, the DSB would be restricted to only looking at the nature of the measure without analyzing if there was an arbitrary and unjustifiable discriminatory treatment as a result of the measure.<sup>159</sup>

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid, 278.

<sup>155</sup> Cutfield, 10.

<sup>156</sup> Moran, 5.

<sup>157</sup> Ibid., 6

<sup>158</sup> Ibid.

<sup>159</sup> Moran, 6.

The introductory clause safeguards the integrity of the multilateral trade system.<sup>160</sup> Without the Chapeau, there would not be a limit to the use of these exceptions.<sup>161</sup> To pass this test, the domestic measure should not cause an "arbitrary discrimination, unjustifiable discrimination or disguised restriction of trade where similar conditions prevail"(GATT Article XX). The preamble of article XX (before article 32) was inserted in the ITO charter draft during the London sessions of the preparatory committee.<sup>162</sup> The committee discussed and stressed that indirect protection is undesirable and dangerous; for example, measures to protect animal or plant life or health can be misused for indirect protection purposes.<sup>163</sup> Consequently, they decided to introduce the Chapeau to prevent the abuse of exceptions in Article XX,<sup>164</sup> thereby making it the test for preventing an abusive use of exceptions.

The DSB and AB consider the *Gasoline* case relevant with respect to the interpretation of the Chapeau; the test applied is referred to as the "Gasoline rule."<sup>165</sup> Under this test, the measure must pass three other tests.<sup>166</sup> Under the Gasoline Rule, the Chapeau has two test requirements that need to be fulfilled.<sup>167</sup> In the *US–Shrimp* case, the AB determined that the term “arbitrary or unjustifiable discrimination” has three elements:

- (a) *“Application of the measure must result in discrimination.*
- (b) *Discrimination must be arbitrary or unjustifiable.*
- (c) *discrimination must occur between countries where the same conditions prevail (importing and exporting countries)”<sup>168</sup>*

The AB in the *US–Shrimp* Case stated that these three elements of the Chapeau need to be read side by side because they give meaning to one another. The first test is that the measure must constitute "arbitrary or unjustified discrimination."<sup>169</sup> Regarding the first test, "arbitrary or unjustifiable discrimination," it is important to note that in the Chapeau of GATT Article XX of

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<sup>160</sup> Wujira, 172

<sup>161</sup> Ibid.

<sup>162</sup> Analytical Index GATT, 563-564

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Johnston, 1.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid., 7-8.

<sup>169</sup> Ibid., 1

1947, the word "unjustifiable" was not present in the first draft.<sup>170</sup> It was added later; consequently, the terms "arbitrarily" and "unjustifiable" must be interpreted separately.<sup>171</sup> The interpretation given to "unjustifiable discrimination" and "arbitrary justification" is the following:

*[...]“arbitrary” discrimination could refer to discrimination for which no rationale is offered, whereas “unjustifiable” discrimination could refer to discrimination for which the proposed rationale either is illegitimate or does not justify the measure that has been adopted.<sup>172</sup> Arbitrary discrimination can be present if requirements of due process are absent in the application of the measure.(Alquisada 1039)*

It is important to stress that in the *US–Shrimp*, the AB case stated that the Chapeau needs to fulfill substantive and procedural requirements:

*Appellate Body then went on to say that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner.(Bartels 99 quotes: AB US-Shrimp para.116)*

This means that the measure is not only justified by Article XX if the measure itself is not arbitrary or unjustifiable but also by how it is applied. This first condition prohibits any measure that has a “disproportionately worse (or “disparate”) economic impact on products from certain countries when compared to its impact on competitive products from other countries”(Bartels 97). This prohibition of unjustifiable or arbitrary discrimination is for countries where "same conditions prevail."<sup>173</sup>

The second test of the Chapeau consists of analyzing if the measure constitutes a “disguised restriction on international trade.”<sup>174</sup> This condition has been ignored by panels and ABs and considered unpublished.<sup>175</sup> Nevertheless, some authors argue this interpretation misses the point and that it is more likely that:

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<sup>170</sup> Alquisada, 1039

<sup>171</sup> Ibid.

<sup>172</sup> Bartels, 122-123

<sup>173</sup> Ibid.

<sup>174</sup> Johnston, 1

<sup>175</sup> Bartels, 97.

*[...] It seems far more likely that this condition concerns illegitimate restrictions on international trade that are "disguised" by an ostensible legitimate objective. It remains to be seen what would render a restriction on international trade illegitimate for these purposes, but it might be suggested that, at a minimum, a measure that is adopted for clear protectionist reasons would be illegitimate for these purposes.(Bartels 97)*

The interpretation of this phrase has been that disguised restrictions include disguised discrimination. It also has been stressed that "unannounced restriction or discrimination" does not exhaust the meaning of "disguised restriction."<sup>176</sup> The AB determined that "disguised restriction" has a broader meaning than "arbitrary" or "unjustifiable."<sup>177</sup> Nevertheless, these three terms need to be read "side by side" because they give meaning to one another. The three of them together serve to protect from "abuse or illegitimate use of the exceptions to substantive rules available in Article XX." (Johnston 9)

The "right" to invoke Article XX exceptions is conditional, with the Chapeau being the condition for its application.<sup>178</sup> The Chapeau works as a balancing tool between members' rights to invoke exceptions and the derogation of their obligations concerning other member states.<sup>179</sup> If the Chapeau were removed from article XX, there would be a higher number of cases and measures justified by this article. If members were able to apply measures differently, the substance and purpose of the WTO agreements would be diluted, and its founding principles would be lost.<sup>180</sup> The Chapeau's purpose is avoidance of abusive use of the exceptions and maintaining an equilibrium between the GATT and the country's policy choice. Therefore, it is crucial to analyze its use throughout the years by WTO members.<sup>181</sup> The Chapeau's function is also to maintain an equilibrium between the GATT and the exceptions provided in Article XX (policy choice protection).<sup>182</sup>

Throughout the years, the key discussion has centered on whether the GATT panels, WTO, and AB have correctly balanced the members' right to market access with their right to pursue a

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<sup>176</sup> Johnston, 9

<sup>177</sup> Ibid.

<sup>178</sup> Gaines, 772

<sup>179</sup> Alquisada, 1038

<sup>180</sup> Moran, 15.

<sup>181</sup> Wujira, 172

<sup>182</sup> AB EU Seal-Canada, para. 5.301

public policy with GATT Article XX general exceptions.<sup>183</sup> It is of utmost importance to find a balance or equilibrium between members' obligations vis-à-vis the WTO and GATT and their right to protect and pursue their own policy objectives .<sup>184</sup> This equilibrium allows competing rights to not cancel each other and nullify or impair the balance of rights and obligations created by WTO members.<sup>185</sup> An equilibrium of competing rights serves to, on the one hand, allow member states to pursue public policies, and on the other, to allow them the right to market access.

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<sup>183</sup> Moran, pp.3.

<sup>184</sup> EU- Seal, para.5.297.

<sup>185</sup> Ibid.

## Chapter 3: The use of GATT article XX

### 1. Analysis of cases where Article XX was invoked.

This chapter will analyze the use of article XX by member countries and determine if there is or has been an abusive use of said article. GATT case law before the creation of the WTO is crucial because it serves as a precedent for WTO case analysis. Regarding *Japan, Alcoholic Beverages* the AB noted that adopted panel reports of GATT 1947 are an essential part of the GATT Acquis:

*They create legitimate expectations among WTO Members and should thus be taken into account when they are relevant to any dispute. (DS135 para. 8.75, quoted: Japan–Alcoholic Beverages)*

In the same case, the AB stated that unadopted panel reports under GATT 1947 have no legal status in the GATT or WTO system; nevertheless, panels can find helpful guidance in their reasoning.<sup>186</sup> Similarly, article XVI:1 of the Agreement Establishing the WTO and paragraph 1 (b) (iv) of Annex 1A incorporates GATT 1947 procedures, decisions, and customary practices to WTO, guiding contracting parties and bodies.

Since the signing of the GATT in 1947 until the WTO's establishment, members have invoked Article XX general exceptions in 12 panel proceedings.

**Table 1: Cases where Article XX GATT invoked before WTO.**

#	CASE	EXEPTION INVOKED
1	Canada- Herring and Salmon (1998) : L/6268	(g)
2	EEC- Bananas II (1994): DS38/R	(h)
3	Thailand- Cigarettes (1990): DS10/R	(b)
4	US- Canadian Tuna (1982): L/5198	(g)
5	US-Malt Bevarages (1992): DS23/R	(d)
6	US- Section 337 Tariff Act (1989): L/6439	(d)
7	US- Spring Assemblies (1983): L/5333	(d)
8	US- Taxes on Automobiles (1994): DS31/R	(g) (d)
9	US- Tuna (Mexico) (1991): DS21/R	(b) (g) (d)
10	CANADA - ADMINISTRATION OF THE FOREIGN INVESTMENT REVIEW ACT (1983) : L/5504-30S/140	(d)
11	JAPAN - RESTRICTIONS ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS (1987): L/6253-35S/163	(d)
12	EEC - REGULATION ON IMPORTS OF PARTS AND COMPONENTS (1990): L/6657 (L/6657 - 37S/132)	(d)

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<sup>186</sup>DS13 para. 875.

From the data gathered, we can observe that the only invoked subparagraphs were (b), (d), (g), and (h). Subparagraph (d) of Article XX GATT 1947 was invoked in 8 of 12 cases, being the most invoked exception. It is essential to consider that in some cases members invoked more than one subparagraph exception. In all these GATT panel cases, only once was the measure considered justified by GATT article XX; on the matter of *US-Spring Assemblies* (1983): L/5333, specifically by subparagraph (d)<sup>187</sup>.

The Marrakesh Agreement created the WTO, bringing changes to the Dispute Settlement System.<sup>188</sup> The WTO brought the possibility of AB review of Panel Reports.<sup>189</sup> Since the WTO's establishment, members have invoked Article XX subparagraph exceptions 77 times in 48 different cases in panel proceedings. Of those cases, only once did the panel and AB consider the measure justified by article XX.<sup>190</sup> These are the cases where members invoked GATT article XX since the establishment of the WTO:

**Table 2: Cases where Article XX was invoked after WTO.**

#	CASE	EXCEPTION INVOKED
1	DS2 US — Gasoline	(b), (d), (g)
2	DS18 Australia — Salmon	(b)
3	DS26 EC- Hormones (US)	(d)
4	DS31 Canada — Periodicals	(d)
5	DS48 EC — Hormones (Canada)	(b)
6	DS58 US — Shrimp	(g) (b)
7	DS135 EC- Asbestos	(b)
8	DS155 Argentina — Hides and Leather	(d)
9	DS161 Korea — Various Measures on Beef (US)	(d)
10	DS169 Korea — Various Measures on Beef (Australia)	(d)
11	DS174 EC — Trademarks and Geographical Indications	(d)
12	DS246 EC — Tariff Preferences	(b)
13	DS276 Canada — Wheat Exports and Grain Imports	(d)

<sup>187</sup> Article XX (d): necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement [...]

<sup>188</sup> Van de Bosche and Zdouc, 167; Article XXII and XXIII GATT 1947.

<sup>189</sup> The WTO Dispute Settlement system is one of the international mechanisms that have an appellate court. (Van de Bosche and Zdouc, 233.

<sup>190</sup> DS135 EC-Asbestos: The AB in para. 192 (e) reversed panel findings that it was inconsistent with Article III: 4 and in para. 192 (f) uphold panel finds that measure was “necessary” to protect human life or health.

14	DS292 EC — Approval and Marketing of Biotech Products	(b), (d), (g)
15	DS291 EC — Approval and Marketing of Biotech Products	(b), (d), (g)
16	DS293 EC — Approval and Marketing of Biotech Products	(b), (d), (g)
17	DS302 Dominican Republic — Import and Sale of Cigarettes	(d)
18	DS308 Mexico — Taxes on Soft Drinks	(d)
19	DS332 Brazil — Retreaded Tyres	(b) (d)
20	DS339 China- Autoparts (EU)	(d)
21	DS340 China- Autoparts (US)	(d)
22	DS342 China- Autoparts (Canada)	(d)
23	DS343 US — Shrimp (Thailand)	(d)
24	DS345 US — Customs Bond Directive	(d)
25	DS363 China — Publications and Audiovisual Products	(a)
26	DS371 Thailand - Cigarettes (Philippines)	(d)
27	DS366 Colombia — Ports of Entry	(d)
28	DS392 US — Poultry (China)	(b)
29	DS394 China- Raw Materials	(b) (g)
30	DS395 China- Raw Materials	(b) (g)
31	DS398 China- Raw Materials	(b) (g)
32	DS400 EC — Seal Products	(a) (b)
33	DS401 EC — Seal Products	(a) (b)
34	DS406 US — Clove Cigarettes	(a) (b)
35	DS431 China — Rare Earths	(b) (g)
36	DS432 China — Rare Earths	(b) (g)
37	DS433 China — Rare Earths	(b) (g)
38	DS447 US — Animals	(a) (b)
39	DS453 Argentina — Financial Services	(d)
40	DS456 India — Solar Cells	(d) (j)
41	DS461 Colombia — Textiles	(a) (d)
42	DS472 Brazil — Taxation	(a) (b)
43	DS476 EU — Energy Package	(j)
44	DS477 Indonesia — Import Licensing Regimes	(a) (b)
45	DS478 Indonesia — Import Licensing Regimes	(a) (b)
46	DS484 Indonesia — Chicken	(a) (b)
47	DS497 Brazil — Taxation (Japan)	(a) (b)
48	DS543 US — Tariff Measures	(a)

The following table shows the number of times members have invoked each exception on the cases that reached the WTO Dispute Settlement System. The most frequently invoked subparagraphs of GATT Article XX are (b) and (d).

**Table 3: Number of times each subparagraph has been invoked**

Exception invoked	Art. XX (a)	Art. XX(b)	Art. XX (d)	(Art. XX (g)	Art. XX (j)	TOTAL
Times	9	26	27	13	2	77

In most cases, the measures not deemed justified because they failed the chapeau, the nexus test, or both Article XX tests. It is important to note that Article XX general exceptions as explained, are contingent on successfully passing the aforementioned tests.<sup>191</sup> It is not enough for a country to only invoke the exception: "... Defending members bear the burden of proof and are required to show that the contested measure falls within one of the policy goals listed in the subparagraphs and complies with the means-ends relationship specified therein" (Sifonios 157). In the cases brought before the panels, it was determined that the measure was not justified because the respondent failed to justify one of the tests or both: test 1 (Policy objective subparagraphs and nexus requirement) and test 2 (Chapeau). The party who invokes Article XX needs to provide the necessary evidence to support its claims.<sup>192</sup> Likewise, the complaining party must supply the necessary evidence and respond to the claims of the respondent.<sup>193</sup>

An example of a case where the respondent failed to justify the measure under Article XX is *EC-Trademarks and Geographical Indications*. The contested measure was EC Council Regulation 2081/92 dated July 14, 1992. The US claimed that the regulation accords less favorable treatment to imported products because it did not allow the registration of Geographical Indications (GIs) on the same conditions as those of the EC. Instead, it imposed additional requirements.<sup>194</sup> The panel considered that the EC did not prove the measure was covered by paragraph (d) of

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<sup>191</sup> Van de Bosche and Zdouc, 547.

<sup>192</sup> DS135, par. 8.178.

<sup>193</sup> Ibid.

<sup>194</sup> DS174, para.7.220

Article XX.<sup>195</sup> The panel concluded that the contested measure of the EC was inconsistent with Article III:4 of GATT 1994 concerning:

- (i) *reciprocity and equivalence conditions, as applicable to the availability of protection for GIs;*
- (ii) *application procedures*
- (iii) *requirements of government participation in the inspection structures under Article 10, and the provision of the declaration by governments under Article 12a (2)(b)*

The case analyzed shows that sometimes respondents invoke Article XX but fail to justify the measure. This is a problem because it means that WTO members incorrectly justify their discriminatory measures with Article XX. It's also important to point out that cases brought before the WTO panels are just a small sample of all the restrictive NTMs countries implement – justified with this article – but that were never contested. This chapter, in a subsequent session, will analyze cases that failed to reach the WTO DSB.

There are different outcomes on cases that reached the panel proceedings stage where Members invoked Article XX as a defense: 1. The measure failed the 1<sup>st</sup> test: Subparagraphs and nexus, 2. The measure failed the 2<sup>nd</sup> test: Chapeau, 3. The panel considered it unnecessary to analyze the measures because it failed to analyze GATT violations due to judicial economy. (After all, in several cases, a violation of SPS had already been determined, making it unnecessary to analyze GATT violations)

*a. The measure of the Member country failed the 1<sup>st</sup> test: Subparagraph Analysis.*

As analyzed in the last chapter, the 1<sup>st</sup> test has two parts: (1.a.) Policy objective, (1.b) Nexus Requirement. The following cases failed this test:

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<sup>195</sup> Ibid., Par.7.462

**Table 4: Cases that failed 1st Test**

Cases that failed 1st Test	
1	DS472 Brazil- Taxation
2	DS497 Brazil - Taxation (Japan)
3	DS543 US- Tariff Measures
4	DS477 Indonesia — Import Licensing Regimes
5	DS478 Indonesia — Import Licensing Regimes
6	DS363 China — Publications and Audiovisual Products
7	DS2 US — Gasoline
8	DS345 US- Customs Bond Directive
9	DS246 EC — Tariff Preferences
14	DS484 Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products
15	DS394 China- Raw Materials
16	DS395 China- Raw Materials
17	DS398 China- Raw Materials
18	DS431 China — Rare Earths
19	DS432 China — Rare Earths
20	DS433 China — Rare Earths
21	DS31 Canada — Periodicals
22	DS161 Korea — Various Measures on Beef (us)
23	DS169 Korea — Various Measures on Beef (Australia)
24	DS343 US — Shrimp (Thailand)
25	DS174 EC — Trademarks and Geographical Indications
26	DS332 Brazil — Retreaded Tyres
27	DS461 Colombia — Textiles
28	DS302 Dominican Republic — Import and Sale of Cigarettes
29	DS308 Mexico — Taxes on Soft Drinks
30	DS366 Colombia — Ports of Entry
31	DS456 India — Certain Measures Relating to Solar Cells and Solar Modules
32	DS371 Thailand - Cigarettes (Philippines)
33	DS339 China- Autoparts (EU)
34	DS340 China- Autoparts (US)
35	DS342 China- Autoparts (Canada)
36	DS476 EU — Energy Package
37	DS401 EC — Seal Products
38	DS400 EC — Seal Products

An example of a case where a member invoked article XX but the measure was not justified is *Canada–Wheat Exports and Grain*. The contested measure here was Section 57 of the Canada Grain Act ("CGA") and Section 56 of the Canada Grain Regulations. Canada's grain segregation measure treated imported grain less favorably than like domestic grain.<sup>196</sup> Canada invoked Article XX(d) to justify the measure. However, Canada failed to demonstrate that its grain segregation system was "necessary to secure compliance with domestic regulations."<sup>197</sup> Here, Canada did not

<sup>196</sup> DS276 para.4.464- 4.465.

<sup>197</sup> Ibid, para.6.250

provide information on why they could not substitute the measure with the alternative available measure discussed in the panel report.<sup>198</sup> The panel identified that this alternative measure could allow Canada to secure a “very high level of compliance” with the provisions they intended to secure.<sup>199</sup> The panel concluded that Article XX could not justify the measure because it failed the 2<sup>nd</sup> part of the first test: (1. b) Nexus Requirement (“necessity”) of Article XX (d).

Another example is *Mexico–Taxes on Soft Drinks*. The US brought the case before the WTO DSB because Mexico’s tax measures on soft drinks and other beverages that used sweeteners other than cane sugar violated GATT Article III. US imported products were taxed differently than directly competitive or substitutable domestic products, thus protecting domestic industry. Mexico invoked Article XX (d) to justify its measure and claimed that the tax measure was designed to secure US compliance regarding its obligations under NAFTA.<sup>200</sup> The panel found that the challenged measure was not designed to secure compliance with laws or regulations under the terms of Article XX (d). To the panel, Mexico's argument that this measure sought to bring about a behavior change on the part of the USA seemed uncertain; likewise, it noted that Mexico failed to explain how the measure significantly contributed to securing US compliance or to generating a behavior change.<sup>201</sup> The panel concluded that the measure could not be considered as aiming to “secure compliance.”<sup>202</sup> In conclusion, the measure was not provisionally justified in the first test (1.a. policy objective), making it unnecessary for the panel to analyze the second part of the 1<sup>st</sup> test (nexus requirement) or the second test: the chapeau.<sup>203</sup>

The above-cited Canadian case demonstrates how NTMs are incorrectly used by member countries. Even though the measure pursued a public policy objective: secure compliance of laws and regulations, it gave a different treatment to foreign products vis-à-vis national products, even though there was a less restrictive measure available to protect the same policy objective. In the Mexico case, we can observe an example of an instance where article XX (d) exception is misused to justify domestic protectionist measures that violate Article III: National Treatment of WTO Law.

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<sup>198</sup> Ibid., para.6.229

<sup>199</sup> Ibid., para.6.241

<sup>200</sup> DS308, para. 8.185

<sup>201</sup> Ibid., 8.185-8.186

<sup>202</sup> Ibid.

<sup>203</sup> DS308 para.8.202

b. The measure failed 2<sup>nd</sup> test: Chapeau.

The second test of article XX analyses the chapeau (how the measure was implemented). Since 1995, member countries' measures have failed the chapeau test 19 times in 19 cases:

**Table 5: Cases that failed 2nd test: Chapeau**

Cases that failed 2nd test: chapeau	
1	DS461 Colombia - Textiles
2	DS400 EC — Seal Products
3	DS401 EC — Seal Products
4	DS58 US — Shrimp
5	DS246 EC — Tariff Preferences
6	DS332 Brazil — Retreaded Tyres
7	DS477 Indonesia — Import Licensing Regimes
8	DS478 Indonesia — Import Licensing Regimes
9	DS31 Canada — Periodicals
10	DS276 Canada — Wheat Exports and Grain Imports
11	DS461 Colombia — Textiles
12	DS155 Argentina — Hides and Leather
13	DS371 Thailand - Cigarettes (Philippines)
14	DS58 US — Shrimp
15	DS431 China — Rare Earths
16	DS432 China — Rare Earths
17	DS433 China — Rare Earths
18	DS472 Brazil Taxation
19	DS497 Brazil- Taxation (Japan)

The *EC-Seal* is an example of a case where Article XX did not justify the challenged measure because it failed the chapeau test. Canada brought the case before the WTO Dispute Settlement System regarding EC measures relative to seal products; specifically, the IC hunts<sup>204</sup> exception.<sup>205</sup> The measure violated GATT Articles I:1 and Article III:4 . In this case, the measure was provisionally justified after analyzing the necessity test. However, it failed the chapeau test.

<sup>204</sup> Inuit or other indigenous communities

<sup>205</sup> DS400, para.2.2.

The EC did not show that the “prevailing conditions in Canada and Norway are relevantly different than those in Greenland” (DS400, para.5.317). The AB analyzed the chapeau because these countries' conditions are the same.<sup>206</sup> The AB noted that the EC seal regime aims to address EC public moral concerns regarding seal welfare.<sup>207</sup> In pursuit of satisfying that aim, the EC banned the importation and marketing of seal products from commercial hunts and exempted hunts conducted by Inuit and other indigenous peoples from the ban.<sup>208</sup> The AB identified significant ambiguities and broad discretion in the application of IC requirements.<sup>209</sup> The AB found several EC Seal Regime features that indicate that they are applied in a manner that constitutes a means of “arbitrary or unjustifiable discrimination between countries where same conditions prevail.”<sup>210</sup> The first is that the EC failed to demonstrate how the EU Seal Regime that treats products differently – based on whether they are derived from IC hunts or from “commercial” hunts – can be reconciled to address EC public moral concerns of Seal Welfare.<sup>211</sup> The second feature found by the AB is ambiguity in the IC exception criteria, with its application being of a discretionary nature.<sup>212</sup> Finally, the AB found that the EC had not made “comparable efforts” to facilitate access of Canadian Inuit to the IC exception, as it had done with Greenlandic Inuit.<sup>213</sup> For the above reasons, the AB found that the EC failed to demonstrate that the EC seal regime, especially IC exception, is designed and applied in a manner that meets the requirements of the chapeau of GATT Article XX.<sup>214</sup> Therefore, EC-Seal Regime was not justified by Article XX (a).<sup>215</sup>

Another case where article XX was provisionally justified by fulfilling the first test requirements: policy aim of subparagraph (d) and necessity test is *Argentina–Hides and Leather*. Here, the EC claimed that tax rules enacted by Argentina (Value-Added Tax [IVA] and Tax on gains [IG]) imposed a higher tax burden on imported products and violated Article III:2.<sup>216</sup> The panel found discrimination between imported products and “like domestic products,” therefore,

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<sup>206</sup> Ibid., para. 5.317.

<sup>207</sup> Ibid., para. 5.319.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid., para. 5.326.

<sup>210</sup> Ibid., 5.338

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> EC-Seal, para.5.339

<sup>215</sup> Ibid.

<sup>216</sup> DS155 para.8.1

the matter was considered unjustifiable.<sup>217</sup> The panel concluded that the application of Argentina's regulation resulted in unjustifiable discrimination because it was considered that an extra tax burden on importers was not unavoidable. Nor did it agree that Argentina's commitments to the IMF justify the measure and also noted that there had not been persuasive arguments to determine that eliminating tax rate differentials would lead to tax evasion.<sup>218</sup> The panel concluded that the measures constitute unjustifiable discriminations because they impose on importers an extra tax burden in the form of interest lost or paid.<sup>219</sup> By finding that the measures are inconsistent with one of the chapeau requirements, the panel found it unnecessary to examine the other standards contained in the chapeau.<sup>220</sup>

The two cases analyzed, *EC–Seal* and *Argentina–Hides*, demonstrate how WTO members' domestic measures pursue a policy objective recognized by the GATT (the measures deemed provisionally justified by first test). However, the way the measures were implemented was not compliant with the Chapeau of Article XX. As was clearly explained in chapter 2, the purpose of the chapeau is to prevent an abusive use of the exceptions through an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade." These two cases are just a sample of all the different domestic measures that member countries implement that are trade-restrictive and discriminatory and cannot be justified under Article XX. Therefore, it is fair to say that this article has been abusively used for justifying protectionist measures.

To summarize the analysis of cases brought before the WTO and GATT panels, it is important to stress that the structure and narrow interpretation of Article XX is something essential for maintaining a balance between market access, trade commitments, regulatory autonomy, and member states' policy choice. The cases that have failed to pass Article XX two-tier tests reveal a lack of justification or incorrect invocation of Article XX by member states.

Some authors that have interpreted Article XX jurisprudence consider that the AB's strict interpretation of the Chapeau and the failure rate of article XX create a false illusion of countries'

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<sup>217</sup> Ibid., para.11.315

<sup>218</sup> Ibid.

<sup>219</sup> Ibid., 11.330

<sup>220</sup> Ibid.

regulatory autonomy.<sup>221</sup> On the other hand, authors like Moran consider that if the Chapeau were removed from this article, a compliance rate would be achieved, but this would dilute the substance of WTO Agreements, allowing measures to be applied differently to different members; quite contrary to the non-discrimination core principle of the WTO.<sup>222</sup>

## **2. Quantitative Restrictions, GATT Article XX and Covid-19**

For the analysis on the use of GATT Article XX, it is essential to consider Quantitative Restrictions (QRs). They are a type of NTBs that countries can implement to restrict market access. Quantitative restrictions are measures that limit the number of import and export products.<sup>223</sup> They are usually based on the number of units, weight, volume, or value.<sup>224</sup> There are different types of QRs like prohibitions and bans on imports or exports of a particular product. They can be in the form of import/export quotas, global or bilateral quotas allocated by countries, or licensing systems (for example, administrative procedures or submission of documents or applications other than those required for customs purposes).<sup>225</sup> QRs on exports or imports are prohibited by GATT article XI:1. Therefore, WTO members are required to notify of any QRs maintained or modified – along with their respective justifications – to the WTO Secretariat.<sup>226</sup> The subparagraphs more used for justifying QRs:

- Article XX:(b): measures necessary to protect human, animal, or plant life or health.
- Article XX:(g): measures related to the conservation of the environment.<sup>227</sup>

Below are the statistics of QRs justified by GATT Article XX:

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<sup>221</sup> Cutfield, 29

<sup>222</sup> Moran, 15.

<sup>223</sup> Van de Bosche and Zdouc, 480.

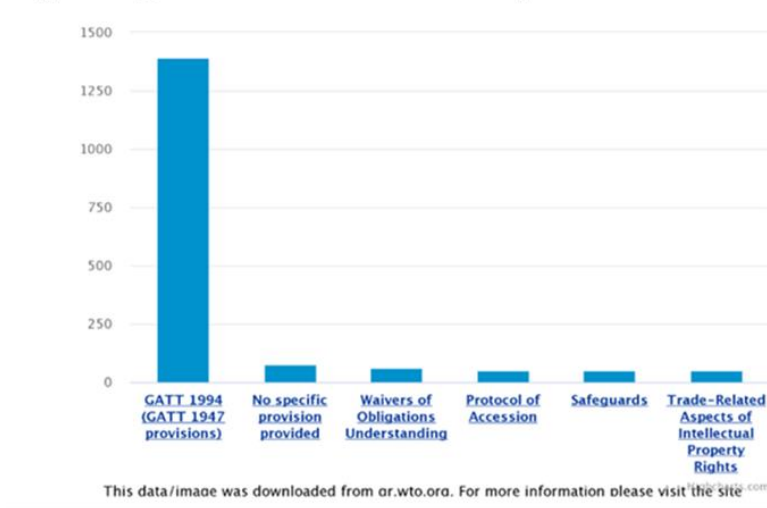
<sup>224</sup> Ibid.

<sup>225</sup> Ibid. 480 and 496.

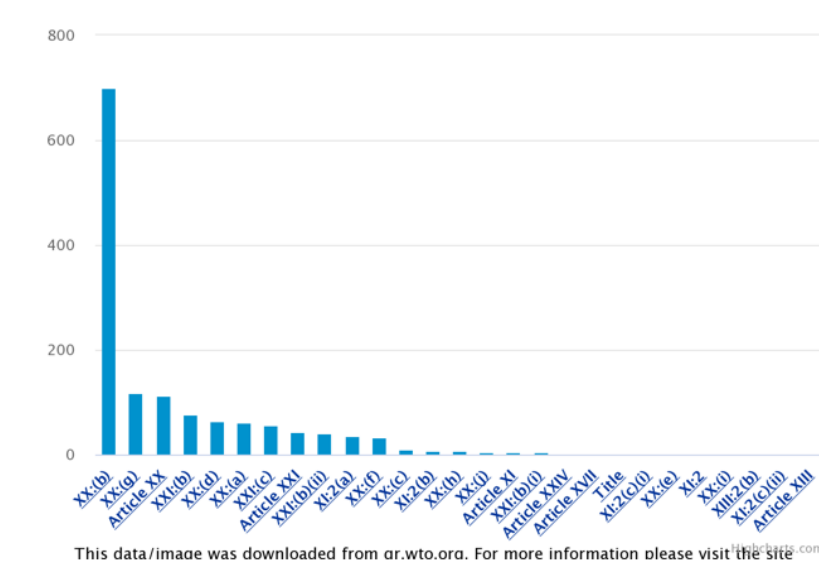
<sup>226</sup> Ibid., 481.

<sup>227</sup> WTO Webpage: Market Access: Quantitative Restrictions

**Figure 1: Quantitative Restrictions Justifications**



**Figure 2: Quantitative Restrictions Justifications GATT**



In the graphs above, we can observe that the majority of QRs are justified by the GATT Agreement, specifically by Article XX (b). QRs, like other NTBs, affect WTO members’ market access. Members could easily justify QRs with GATT Article XX and use them in a protectionist manner because they are not approved by the WTO or by other members. They are only notified along with their justification.<sup>228</sup> Therefore, there is no guarantee that all notified QRs are correctly justified by Article XX.

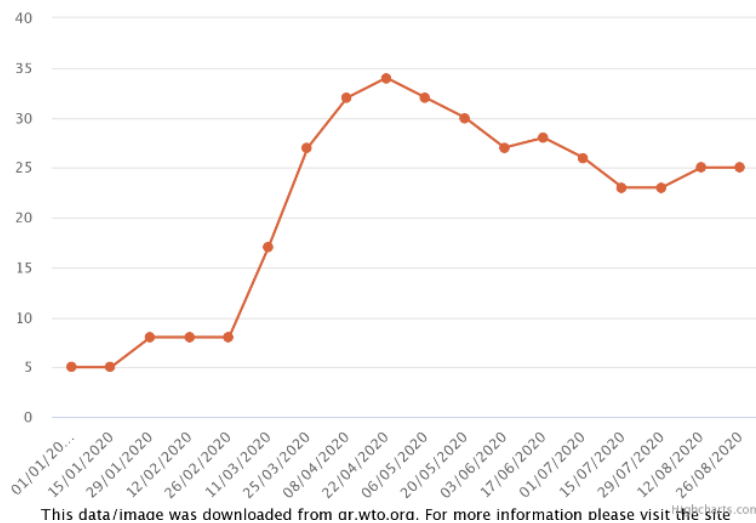
<sup>228</sup> QRs notified to WTO are discussed on Market Access Committee.

An example of a QR where Article XX was invoked as a justification and was brought before the WTO DSB is *Brazil- Retreated Tyres*. The case was about import prohibition on retreated tyres inconsistent with Article XI:1 GATT. The AB concluded that GATT Article XX(b) or (d) could not justify the measure.

Not all QRs invoking GATT Article XX are abusive. Nevertheless, not all trade-restrictive measures that are incorrectly justified with GATT Article XX make it to the WTO DSB. Due to its nature and temporality, a protectionist use of QRs justified by Article XX can cause an abusive use of these general exceptions.

It is essential to incorporate into this analysis the invocation of Article XX for COVID-19 measures. During this pandemic, observed an increase in the number of QRs. The pandemic represents an "... unprecedented disruption to the global economy and world trade, as production and consumption have scaled back across the globe" (WTO Website).

**Figure 3: Covid-19 related Quantitative Restrictions.**



GATT Articles XI:2 and XX have justified quantitative restrictions during the COVID-19 Pandemic. QRs implemented or modified during this pandemic aim to protect lives and control the situation.<sup>229</sup> Nevertheless, the question and the problem lies in the fact that not all QRs are or may be "necessary" or the least trade-restrictive measure available. In COVID-19 related QRs, it

<sup>229</sup> Aatreya. EJIL: TALK, Blog of the European Journal of International Law.

is more likely that the measures will have greater difficulty in passing the necessity test of Art. XX (b) than the chapeau, because the restrictions and bans are not applied in a discriminatory way.<sup>230</sup>

A problem with QRs is their temporal nature, discouraging members from complaining about measures that they consider not justified by Article XX. A current example of this is the Covid-19 Pandemic. On January 29, the EU implemented the regulation for the covid-19 vaccines export authorization scheme.<sup>231</sup> This measure constituted a quantitative restriction and was notified to the WTO. This restriction aims to preserve the health of European Union citizens and ensure access to COVID-19 vaccines for all EU citizens as well as tackle Vaccine transparency on the EU.<sup>232</sup> The aim is not to block the export of vaccines, unfortunately, it ended up causing the unwanted effect (vaccine blockage) as well as adverse commercial consequences for other countries. While it is not an export ban *per se*, it ends up allowing member states of the EU to restrict exports "... that are made in the bloc if they deem that the vaccine maker has not honored existing contracts with the EU" (Ellyatt). For example, many countries are not manufacturing vaccines in their territories and are not within the exception of countries where the measure does not apply, depending entirely on imported vaccines for their national inoculation strategies.<sup>233</sup> The potential effect of the measure is a mirror or cascade effect in other countries that carry out similar export bans, leading to a global supply collapse.<sup>234</sup> Which happened with India that restricted vaccines exports or US that has restricted exports of raw materials necessary for manufacturing vaccines. The problem with all this restrictive measures is their temporality and constant change that make it illogical to present a complaint even if the measure is trade-restrictive and there is a possibility of considering it unjustified under article XX (b).<sup>235</sup>

### **3. Impact of the use or abusive use of GATT Article XX**

The problem with the incorrect use of article XX is that it affects not only the claimants in WTO cases, but also:

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<sup>230</sup> Ibid.

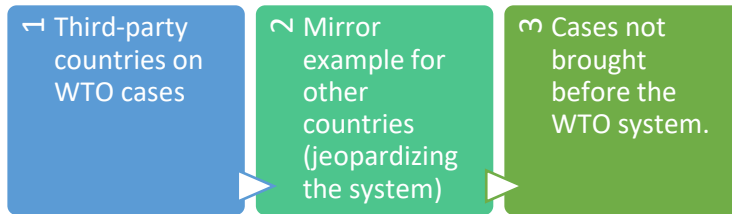
<sup>231</sup> Regulation (EU) 2021/111 of January 29, 2021.

<sup>232</sup> News Archive European Commission Website: 29 January 2021

<sup>233</sup> Article 5 subparagraph 5 of EU 2021/111 Regulation. and Tsakanakis.

<sup>234</sup> Ellyatt. CNBC

<sup>235</sup> The measure cannot be justified if there are other less trade-restrictive measures available.



i. Third-party countries on cases where Article XX was invoked.

According to article 10 of the DSU (Understanding on rules and procedures governing the settlement of disputes), any member country with a "substantial interest" in a matter on the panel can participate as a third party.<sup>236</sup> Third parties need to notify their interest. They have the right to be heard by the panel and make written submissions.<sup>237</sup> In the cases analyzed where article XX was invoked, the members participating in the panel proceedings have different types of interests:

1. Direct Effect: Measure creates a commercial advantage for some countries and harms the domestic industry of member countries who depend on market access to the country imposing the restrictive measure.
2. Interest in how WTO and GATT provisions are interpreted: For other cases that they are part of or for the implementation of local measures. (Usually, countries advocate in favor of measures in dispute and demonstrate how the general exceptions of GATT justify it because the measure benefits them).

An example of a case where a third party participated in the panel proceedings is *EC-Seal*.<sup>238</sup> Mexico participated in this case as a third party and expressed the following interest:

*[...] because they involve systemic issues relating to the proper and coherent interpretation and application of the provisions at issue in this dispute. (DS400, Annex C-4)*

Mexico stressed its concern that the EU dealt unilaterally with seal hunting issues in other members' territories when they could have searched for multilateral efforts to address those issues, since imposed unilateral measures affect international trade.<sup>239</sup> Mexico also emphasized that one member's public morals may not be the same as those of other members. According to the AB in

<sup>236</sup> Article 10 DSU

<sup>237</sup> Ibid.

<sup>238</sup> DS400

<sup>239</sup> Ibid., para. 27.

*China–Publications and Audiovisual Products*, the scope of protection of public morals is in each member's territory.<sup>240</sup> In this case, Mexico's interest was in the interpretation of WTO Law provisions.

On the other hand, a clear example of a third party being directly affected by the panel proceedings is Ecuador in the *US–Shrimp* case. Ecuador took part as a third party and in its written submission emphasized the importance of shrimp exports for its economy.<sup>241</sup> The Andean country also stressed that requirements of US section 609 for exporting shrimp had affected and created conditions of insecurity for shrimp exporters.<sup>242</sup> Ecuador stated that the measure was arbitrary and did not allow the necessary predictability to pursue their commercial operations properly, being inconsistent with US obligations under GATT articles I:1, III:4, and XI:1.<sup>243</sup> Concerning article I:1, Ecuador alleged that shrimp was treated differently according to the method used to take it, because shrimp taken without TEDs could not be imported into the United States.<sup>244</sup> The major problem was that not all countries found themselves on an equal footing because some countries had had several years to adapt their fishing practices to the dispute provision while Ecuador and others had only had a few months.<sup>245</sup> Regarding Article III:4, Ecuador alleged a different treatment because US shrimp fishing boats operating in Pacific Ocean waters were not obliged to use TEDs and marketed their catch in the US without any restrictions.<sup>246</sup> In this same case, Guatemala took part as a third party and stated its concern in its written submission:

*[...] the practice of adopting unilateral trade-restrictive measures, as a form of disguised and legalized protectionism, could become widespread especially when countries applying such measures were those with developed economies which had greatest relative weight in the trade regulatory framework" (DS 58, para. 4.36.)*

Here, Guatemala, acting as a third party, was interested in ensuring that the US import ban on shrimp and certain shrimp products did not serve as a precedent for other importing countries in

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<sup>240</sup> Ibid., para. 31.

<sup>241</sup> DS58 US- Shrimp, para. 4.19.

<sup>242</sup> Ibid. para. 4.20.

<sup>243</sup> Ibid., para. 4.24.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

the future to apply measures aimed at indirectly and unilaterally restricting market access in a manner inconsistent with the provisions of the WTO.<sup>247</sup>

ii. Cases not brought before the WTO system.

It is important to stress that not all trade-restrictive measures implemented by WTO members are disputed. Sometimes, they are clearly considered justified or accepted by other member states, therefore, they are not brought before the WTO. One example of measure that have been correctly justified is the import ban of Israel on Non-Kosher meat.<sup>248</sup> GATT Article XX (a) justified this ban: necessary to protect public morals in 1994 and justified by their religion.<sup>249</sup> With this evidence, advocates of GATT Article XX have shown that only strong cases are brought before the DSB.

Nevertheless, not all trade-restrictive measures of the WTO that violate GATT and WTO law, justified by Article XX, have been brought before the WTO Dispute Settlement System. An example of trade-restrictive measures that were not brought before the WTO Dispute settlement system are QRs – due to their temporal nature –, such as the one presented above regarding EU regulation for the export of Covid-19 Vaccines.

Another example is the EU regulation that controls maximum levels of pesticides in food (MRLs).<sup>250</sup> EU legislation harmonizes and simplifies pesticides' maximum levels, creating a common scheme for all agricultural products for food or animal feed to secure consumers' health and ensure free movement of goods inside the EU.<sup>251</sup> MRLs cover pesticides currently or formerly used in agriculture in or outside the EU.<sup>252</sup> In recent years, because of the EU Green Deal and Farm to Fork Strategy, pesticides' prohibition increased significantly from 59 in 2007 to 400 in 2018.<sup>253</sup> One of the new objectives is to reduce 50% of pesticides used by 2030. Therefore, several regulations in the past years have increased the number of prohibited pesticides. The SPS agreement for preventing or restricting the use of chemicals requires the implementation of risk

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<sup>247</sup> Ibid.

<sup>248</sup> Cutfield, 28.

<sup>249</sup> Ibid.

<sup>250</sup> Reg. EC 396/2005

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Abellán. El País

analyses.<sup>254</sup> The problem is that the EU has a new standard for analyzing chemicals: cumulative risk assessment (CRA) of pesticide residues in food. Risk analysis is only being made case by case. As a result, importers of agricultural products that use these pesticides are affected. Each year, a pesticide is banned and is replaced by others, but there will come a time when there will be no available chemicals for use. Exporters who intend to sell their products abroad must perform the risk analysis and demonstrate the lack of risk in that specific case. The problem with this is that, generally, countries that export agricultural products are developing and least-developed countries. These regulations increase the costs and affect several industries. One could also consider that they may not be receiving equal national treatment. In the EU, producers need to respect these regulations, but they can access emergency authorizations and continue using these pesticides. Similarly, in 2018, only 1 to 13% of products endorsed by national regulators were free of chemicals.<sup>255</sup> Therefore, this can be a case of a trade-restrictive measure that has not been brought before the WTO Dispute Settlement System, but in case it does one day, the EU will possibly invoke Article XX (d) and (b).

iii. *Mirror example for other countries (jeopardizing the system)*

As mentioned before, an incorrect or abusive use of Article XX can affect third countries directly or indirectly. In the *US–Tuna* case, Mexico noted that article XX allows the application of measures that would otherwise be contrary to the GATT, hence the need for an exceptional use and close supervision of contracting parties.<sup>256</sup> Here, Mexico noted that general exceptions need to be interpreted and applied restrictively to ensure that members do not evade their obligations.<sup>257</sup> The article's abusive use becomes a precedent or an example for third countries the moment they need to regulate in similar situations. In the *US–Tuna* case, the AB stressed the risk of a broad interpretation of this article:

*[...] if the broad interpretation of Article XX (b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral*

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<sup>254</sup> Article 5 SPS.

<sup>255</sup> Abellán. El País

<sup>256</sup> US- Tuna (Mexico) DS21/R, para. 3.8.

<sup>257</sup> Ibid.

*framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations. (DS21/R par. 5.27)*

The panel statement points to the risk of not providing legal security regarding trade among WTO member countries. An incorrect interpretation and the continuous abusive use of article XX can jeopardize the whole WTO system. Similarly, the *US–Shrimp* panel report stated that such abusive use could jeopardize the operation of the WTO in a way that would make it impossible to guarantee market access and non-discriminatory treatment. In the same panel report, it was noted that GATT rules protect trade and create predictability for future trade.<sup>258</sup> Moreover, the panel pointed out that even if a particular measure seems to have a minor impact on the trading system, the risk and threat are for the system itself if other members implement similar measures.<sup>259</sup>

Through an analysis of the cases and data presented, we can observe an abusive use of the exceptions and notice how the measures failed to pass the two-tier test. Article XX exceptions are used as protectionist tools for safeguarding domestic industries. From the cases analyzed and data presented, we cannot conclude that a specific group of countries (developed or developing) have invoked article XX more than others. Additionally, it is imperative to emphasize that NTMs that were justified and reached the panel proceedings stage are just a sample of all the NTBs that haven't been disputed.

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<sup>258</sup> DS58, par. 7.44.

<sup>259</sup> *Ibid.*

## CONCLUSIONS

It is of utmost importance to indicate that the structure and narrow interpretation of Article XX is essential for keeping a balance between market access, trade commitments, regulatory autonomy, member states' policy choice, and ensuring that members do not evade their obligations. This abusive use of Article XX as a justification for restrictive NTMs jeopardizes the WTO by affecting market access and not allowing the creation of or participation in regional and global value chains. It was also analyzed that even if a particular measure seems to have a minor impact on the trading system, the risk and threat may be to the system itself if other members implement similar measures.

LAC countries are part of a region where problems are correlated with its growth. Integration of developing countries into international markets can contribute to more rapid growth and poverty reduction.<sup>260</sup> Tariffs have been reduced, but protectionism continues with restrictive measures. The problem is that countries do not use them exclusively for meeting policy choices but also for protectionist purposes.

The analysis concluded that NTBs are implemented by both developed and developing countries. NTBs affect domestic industries. We live in an interconnected world where the products we buy are not made in only one country; consequently, trade barriers can have a harmful effect on domestic producers. The main problem is that agricultural products have more restrictive measures than other goods, and measures implemented by both group of countries are mainly concentrated on agricultural products as a way of protecting the environment and health.<sup>261</sup> The majority of LAC countries have not reached levels of diversification similar to those of developed countries. Agricultural products continue to represent a large share of their non-petroleum export baskets. This phenomenon points to an impact on market access and is responsible for preventing the creation of regional value chains (RVCs), thereby restricting the economy's ability to effectively make use of the region for boosting competitiveness and producing high value-added products.<sup>262</sup>

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<sup>260</sup> OECD. Analysis of Non-Tariff Barriers, 10

<sup>261</sup> Ibid.

<sup>262</sup> UNCTAD. Assessing Cost-Effectiveness of Non-Tariff, 1

WTO Member countries can exercise their right to adopt measures for non-trade purposes.<sup>263</sup> However, this right has limits because they have committed to comply with GATT and other WTO agreements. As discussed, the fundamental principle of the WTO is nondiscrimination. WTO members cannot implement domestic measures that give a discriminatory treatment to "like" domestic products. Article XX was drafted to safeguard member states' regulatory autonomy and policy choice and prevent the abusive use of these exceptions, thereby acting as a balancing tool for Members.<sup>264</sup> The WTO enabled them to adopt domestic measures to pursue specific domestic policy objectives that would otherwise be considered a violation of GATT commitments.<sup>265</sup> The aim of a strict interpretation mechanism and two-tier test is to address the problem of countries trying to fit protectionist measures on the subparagraphs' policy objectives. The problem with NTBs is that they can simultaneously pursue a public policy objective like environmental protection and be protectionist and trade restrictive.

Domestic measures can pursue valid policy objectives and successfully pass the 1<sup>st</sup> test (policy objectives and nexus) but be implemented in an arbitrary and unjustifiable discriminatory way, thus failing the chapeau test.<sup>266</sup> GATT Article XX acts as a balancing tool for allowing competing rights to not cancel each other or nullify or impair the balance of rights and obligations created by WTO members.<sup>267</sup> It was determined that Article XX was in numerous occasions abusively used for justifying domestic protectionist measures with policy objectives protected under general exceptions. The problem with the use of Article XX is that respondents who invoke the exceptions fail to justify them or the measure itself does not pass the two-tier test. It is not enough for a country to invoke the exception.

Of the cases analyzed in the last chapter, we find measures implemented by countries that pursue valid public policy objectives, however, they are not the least restrictive measures available. In the first test, the nexus is important; countries need to seek less restrictive measures or less impact on market access. The cases that have failed to pass GATT Article XX two-tier tests reveal a lack of justification or incorrect invocation of Article XX by member states. It is also essential to emphasize that NTMs that were justified and brought before panel proceedings are just a small

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<sup>263</sup> Bartels, 95

<sup>264</sup> Maruyama, pp.652.

<sup>265</sup> Amos; Sifonios, 158.

<sup>266</sup> Moran, 6.

<sup>267</sup> EU- Seal AB, para. 5.297.

sample of the different restrictive NTMs countries implement and justify by invoking this article but are never contested. In addition, it was shown that the effect of an incorrect use of Article XX by member countries is not limited to the claimant and the respondent, but rather to third-party countries who are directly impacted.

This topic is of particular importance these days, given that Covid-19 has increased inequality and lowered GDP growth, affecting strong economies worldwide. It is crucial because, in the past, countries used NTBs in an attempt to recover from economic recessions. During the Covid-19 pandemic, QR's were implemented or modified with the aim of protecting lives and controlling the situation. However, nations need to be careful when implementing or avoiding measures that are not necessary or looking for the least trade-restrictive measure available.

To address the problem of abusive use of GATT Article XX, its recommended WTO members analyze possible solutions. They will only be briefly named, they should be substantiated and a new research. The first is to address the problem of cases that fail to go before the WTO DSB because of diplomatic relations, especially in the case of DCs and LDCs that have an interest in maintaining good relations with developed countries that are generally their trading partners (For example, the US and EU are trading partners of Ecuador and other LAC countries). Another problem is that cases in the DSB take too long and, given the temporary nature of QRs, it is really not worth it to take the case before the WTO DSB. Nevertheless, this does not mean that the NTBs are not trade-restrictive and Article XX has not been abusively invoked. Consequently, an interesting solution would be for the WTO to have an infringement procedure similar to the EU; where the commission initiates infringement procedures when it considers a member state is in breach of or refusing to implement EU Law.

Following is a recommendation for addressing the problem of transparency. As previously discussed, NTMs – unlike Tariffs – are characterized by a lack of transparency. Despite the data collecting efforts aimed at making them more accessible and available to countries, NTMs still lack transparency. As of today, there is no website or database that contains all domestic measures that impact trade. While WTO members have the obligation of notifying domestic measures that affect trade, countries fail to notify all of them, generally affecting exporters and SMEs. Therefore, it would be interesting to have a provision in the GATT or the WTO law that changes the burden of proof to the country that notified the NTM. For example, if country A notifies the NTM

implemented and country B presents a complaint against that measure, country B would have the burden of proof as to why Article XX cannot justify the measure. This would not solve the problem of incorrect and abusive use of Article XX exceptions as justifications for MFN and National treatment but would allow transparency and access to domestic measures implemented that affect trade.

Another recommendation is introducing to GATT an article of reparation of damages of NTMs. This would incentivize countries to present complaints of NTMs that are discriminatory. This could also make countries more careful when implementing NTMs and ensuring they do not infringe GATT, because there is the possibility of damage reparation. The last recommendation will be specifically for subparagraphs (a) and (d) of GATT Article XX that justify policies seeking to protect public morals and secure compliance of laws and regulations. As was analyzed, there are two subparagraphs of Article XX that can be more prone to an abusive use. The first one is subparagraph (a), necessary for protecting public morals. This subparagraph requires defining and determining what public morals are. The problem is that the concept of public morals differs substantially from one country to another, and determining what this policy objective seeks to accomplish can be quite a challenge. Countries trying to justify their measures with subparagraph (a) can be subject to a possible abusive and discriminatory use. The second is subparagraph (d) that allows countries to implement measures that violate GATT principles if they secure compliance with laws and regulations. It was analyzed cases in which the measures seeking compliance failed to comply with the GATT. A problem with this article is that it is too broad, and countries have used it to justify protectionist measures. Recommend members discuss a possible reform of the letter of both of those exceptions.

The aim should be for balancing members' right to implement measures to secure compliance with other regulations and protect public morals while not restricting and creating unnecessary trade barriers. It is essential to find a balance between the right to pursue public policies and members' right to market access, and nondiscrimination for allowing a correct functioning of the International Trade System.

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&Open=True](https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/MAQRN/AUS3.pdf&Open=True)
- Covid-19 and World Trade:  
[https://www.wto.org/english/tratop\\_e/covid19\\_e/covid19\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm)
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## ANEXES

### ANNEX 1: CRONOLOGICAL ORDER CASES

- i. BEFORE WTO
  - a. 1982
    - i. US- Canadian Tuna (1982): L/5198
  - b. 1983
    - i. US- Spring Assemblies (1983): L/5333
    - ii. Canada - Administration of the Foreign Investment Review Act (1983) : L/5504-30S/140
  - c. 1987
    - i. Japan - Restrictions on Imports of Certain Agricultural Products (1987): L/6253-35S/163
  - d. 1989
    - i. US- Section 337 Tariff Act (1989): L/6439
  - e. 1990
    - i. Thailand- Cigarettes (1990): DS10/R
    - ii. Japan - Restrictions on Imports of Certain Agricultural Products (1990): L/6657
  - f. 1991
    - i. US- Tuna (Mexico) (1991): DS21/R
  - g. 1992
    - i. US-Malt Beverages (1992): DS23/R
  - h. 1994
    - i. US- Restrictions on Imports of Tuna (1994): (DS29/R)
    - ii. EEC- Bananas II (1994): DS38/R
    - iii. US- Taxes on Automobiles (1994): DS31/R
  - i. 1998
    - i. Canada- Herring and Salmon (1998) : L/6268
- ii. AFTER WTO CREATION
  - a. 1996
    - i. DS2 US — Gasoline
  - b. 1997
    - i. DS48 EC — Hormones (Canada)
    - ii. DS26 EC- Hormones (US)
    - iii. DS31 Canada — Periodicals
  - c. 1998
    - i. DS18 Australia — Salmon

- ii. DSU panel report 2000
- iii. DS58 US — Shrimp
- iv. DSU panel report 2001
- v. DSU AP Body 2001
- d. 2000**
  - i. DS135 EC- Abestos
  - ii. DS155 Argentina — Hides and Leather
  - iii. DS169 Korea — Various Measures on Beef (Australia)
  - iv. DS161 Korea — Various Measures on Beef (US)
- e. 2003**
  - i. DS246 EC — Tariff Preferences
- f. 2004**
  - i. DS276 Canada — Wheat Exports and Grain Imports
  - ii. DS302 Dominican Republic — Import and Sale of Cigarettes
- g. 2005**
  - i. DS174 EC — Trademarks and Geographical Indications
  - ii. DS308 Mexico — Taxes on Soft Drinks
- h. 2006**
  - i. DS292/ DS291/ DS293 EC — Approval and Marketing of Biotech Products
- i. 2007**
  - i. DS332 Brazil — Retreaded Tyres
- j. 2008**
  - i. DS345 US — Customs Bond Directive
  - ii. DS343 US — Shrimp (Thailand)
  - iii. DS339/340/342 China- Autoparts
- k. 2009**
  - i. DS366 Colombia — Ports of Entry
  - ii. DS363 China — Publications and Audiovisual Products
  - iii. DS371 Thailand – Cigarettes (Philippines)
- l. 2010**
  - i. DS392 US — Poultry (China)
- m. 2011**
  - i. DS406 US — Clove Cigarettes
  - ii. DS 394/395/398 China — Raw Materials
- n. 2012**
  - i. DS400 EC — Seal Products
- o. 2013**
  - i. DS401 EC — Seal Products
- p. 2014**
  - i. DS431/432/433 China — Rare Earths
- q. 2015**
  - i. DS447 US — Animals

- ii. DS453 Argentina — Financial Services
  - iii. DS461 Colombia — Textiles
- r. 2016**
  - i. DS456 India — Certain Measures Relating to Solar Cells and Solar Modules
  - ii. DS477 / DS478 Indonesia Importation of Horticultural Products, Animals and Animal Products
- s. 2017**
  - i. DS472 Brazil — Taxation
  - ii. DS497 Brazil — Taxation (Japan)
  - iii. DS484 Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products
- t. 2018**
  - i. DS476 EU — Energy Package
- u. 2020**
  - i. DS543 US — Tariff Measures

ANNEX 2: Data Gathered of Cases where GATT was invoked

**Table 1: Cases where Article XX GATT invoked before WTO.**

#	CASE	EXEPTION INVOKED
1	Canada- Herring and Salmon (1998) : L/6268	(g)
2	EEC- Bananas II (1994): DS38/R	(h)
3	Thailand- Cigarettes (1990): DS10/R	(b)
4	US- Canadian Tuna (1982): L/5198	(g)
5	US-Malt Bevarages (1992): DS23/R	(d)
6	US- Section 337 Tariff Act (1989): L/6439	(d)
7	US- Spring Assemblies (1983): L/5333	(d)
8	US- Taxes on Automobiles (1994): DS31/R	(g) (d)
9	US- Tuna (Mexico) (1991): DS21/R	(b) (g) (d)
10	CANADA - ADMINISTRATION OF THE FOREIGN INVESTMENT REVIEW ACT (1983) : L/5504-30S/140	(d)
11	JAPAN - RESTRICTIONS ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS (1987): L/6253-35S/163	(d)
12	EEC - REGULATION ON IMPORTS OF PARTS AND COMPONENTS (1990): L/6657 (L/6657 - 37S/132)	(d)

**Table 2: Cases where Article XX GATT was invoked after WTO.**

#	CASE	EXCEPTION INVOKED
1	DS2 US - Gasoline	(b), (d), (g)
2	DS18 Australia – Salmon	(b)
3	DS26 EC- Hormones (US)	(b)
4	DS31 Canada - Periodicals	(d)
5	DS48 EC - Hormones (Canada)	(b)
6	DS58 US - Shrimp	(g) (b)
7	DS135 EC- Asbestos	(b)
8	DS155 Argentina - Hides and Leather	(d)
9	DS161 Korea - Various Measures on Beef (US)	(d)
10	DS169 Korea - Various Measures on Beef (Australia)	(d)
11	DS174 EC - Trademarks and Geographical Indications	(d)
12	DS246 EC - Tariff Preferences	(b)
13	DS276 Canada - Wheat Exports and Grain Imports	(d)
14	DS292 EC - Approval and Marketing of Biotech Products	(b), (d), (g)
15	DS291 EC - Approval and Marketing of Biotech Products	(b), (d), (g)
16	DS293 EC — Approval and Marketing of Biotech Products	(b), (d), (g)

17	DS302 Dominican Republic — Import and Sale of Cigarettes	(d)
18	DS308 Mexico — Taxes on Soft Drinks	(d)
19	DS332 Brazil — Retreaded Tyres	(b) (d)
20	DS339 China- Autoparts (EU)	(d)
21	DS340 China- Autoparts (US)	(d)
22	DS342 China- Autoparts (Canada)	(d)
23	DS343 US — Shrimp (Thailand)	(d)
24	DS345 US — Customs Bond Directive	(d)
25	DS363 China — Publications and Audiovisual Products	(a)
26	DS371 Thailand - Cigarettes (Philippines)	(d)
27	DS366 Colombia — Ports of Entry	(d)
28	DS392 US — Poultry (China)	(b)
29	DS394 China- Raw Materials	(b) (g)
30	DS395 China- Raw Materials	(b) (g)
31	DS398 China- Raw Materials	(b) (g)
32	DS400 EC — Seal Products	(a) (b)
33	DS401 EC — Seal Products	(a) (b)
34	DS406 US — Clove Cigarettes	(b)
35	DS431 China — Rare Earths	(b) (g)
36	DS432 China — Rare Earths	(b) (g)
37	DS433 China — Rare Earths	(b) (g)
38	DS447 US — Animals	(b)
39	DS453 Argentina — Financial Services	(d)
40	DS456 India - Solar Cells	(d) (j)
41	DS461 Colombia — Textiles	(a) (d)
42	DS472 Brazil — Taxation	(a) (b) (g)
43	DS476 EU — Energy Package	(j)
44	DS477 Indonesia — Import Licensing Regimes	(a) (b) (d)
45	DS478 Indonesia — Import Licensing Regimes	(a) (b) (d)
46	DS484 Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products	(b) (d)
47	DS497 Brazil — Taxation (Japan)	(a) (b) (g)
48	DS543 US — Tariff Measures	(a)

Exception Invoked	Art. XX (a)	Art. XX(b)	Art. XX ( c)	Art. XX (d)	Art. XX ( e)	Art. XX (f)	(Art. XX (g)	Art. XX (h)	Art. XX (i)	Art. XX (j)
Times	9	26	0	27	0	0	13	0	0	2

**ANNEX 3: Analysis of cases where Article XX (a) was invoked.**

Case Number	Case Title (Respondent-Subject)	Claimant	Stage	Resolution and Analysis of Panel and Appellate Body ( P= Panel, AB= Appellate Body)					
				Violated Provision	(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)	(2) Chapeau (Satisfied requirements?)	Measure Justified?	TEST THAT FAILED
DS400	Ec- Seal Products (Canada)	Canada	P	yes: Article I:1 and III:4 GATT	yes	yes	no	not justified	2nd Test: Chapeau
			AB	yes: Article I:1 and III:4 GATT	yes	yes	no	not justified	
DS401	EC- Seal Products (Norway)	Norway	P	yes: Article I:1 and III:4 GATT	yes	yes	no	not justified	2nd Test: Chapeau
			AB	yes: Article I:1 and III:4 GATT	yes	yes	no	not justified	
DS472	Brazil- Taxation	EU	p	YES: Article I: 1 of GATT, article III:2 , Article III:4	yes	no	no	not justified	1st Test and 2nd test: chapeau
			AB	N/A	N/A	N/A	N/A	N/A	
DS497	Brazil - Taxation (Japan)	Japan	P	YES: Article I: 1 of GATT, article III:2 , Article III:4	yes	no	no	not justified	1st Test and 2nd test: chapeau
			AB	N/A	N/A	N/A	N/A	N/A	
DS461	Colombia- textiles	Panama	P	Yes: Article II GATT	no	no	no	not justified	
			AB	Yes	yes	no	n/a	not justified	1st Test and 2nd test: chapeau
			DSU Arbitration	n/a	n/a	n/a	n/a	n/a	
DS543	US — Tariff Measures	CHINA	P	YES: 8.1. c. the challenged measures are prima facie inconsistent with Articles I:1, II:1(a) and II:1(b) of the GATT 1994;	yes	no	N-A	not justified	1st Test
DS477	INDONESIA Importation of Horticultural Products, Animals and Animal Products (new Zealand)	NEW ZELAND	P	yes	no	n/a		not justified	1st Test
			AB	N/A	N/A	N/A	N/A	N/A	
DS478	INDONESIA Importation of Horticultural Products, Animals and Animal Products (USA)	USA	P	yes	no	n/a		not justified	1st Test
			AB	N/A	N/A	N/A	N/A	N/A	
DS363	China — Publications and Audiovisual Products	USA	P	YES: Accession Protocol	yes	no	n/a	not justified	1st Test
			AB	YES	yes	no	n/a	not justified	

Article XX (a) GATT invoked			
	Failed 1st Test: Necessity Test	Failed 2nd test: Chapeau	both test fail
Number of times	4	2	3

Fail Necessity Test	
(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)
2	4

**ANNEX 4: Analysis of cases where subparagraph (b) Article XX GATT**

Case Number	Case Title	Claimant	Stage	Resolution and Analysis of Panel and Appellate Body ( P= Panel, AB= Appellate Body)					
				Violation	(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)	(2) Chapeau	Measure Justified?	test that failed
DS2	US — Gasoline	Venezuela	P	YES: ART III:4	yes	no	n/a	not justified	1st test: Necessity test
			AB	n/a	n/a	n/a	n/a	not justified	
DS18	Australia - Measures Affecting Importation of Salmon	Canada	P	YES: didn't analyze violation XI, because measure inconsistent with SPS Agreement.	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
			AB	n/a	n/a	n/a	n/a	n/a	n/a
			Arbitration	n/a	n/a	n/a	n/a	n/a	n/a
DS48	EC- Hormones (Canada)	Canada	P	Measure inconsistent with SPS panel saw no need to examine whether EC measure also inconsistent with Art. I and III GATT	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
			AB	N/A	N/A	N/A	N/A	N/A	N/A
			P	Measure inconsistent with SPS panel saw no need to examine whether EC measure also inconsistent with Art. I and III GATT	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
DS26	EC-Hormones (US)	USA	AB	N/A	N/A	N/A	N/A	N/A	
DS58	US — Shrimp	Malaysia, India, Pakistan, Thailand	P	N/A	n/a	n/a	no	not justified	2nd test: chapeau
			AB	N/A	N/A	N/A	N/A	N/A	
DS135	EC- Asbestos	CANADA	P	yes	yes	yes	yes	justified	
			AB	no	yes	yes	N/A	NO: BECAUSE AB FOUND THAT MEASURE WAS NOT INCONSISTENT	Panel concluded measure did not violate GATT (Analyzed article XX and it didn't fail any test)

DS246	EC- Tariff Preferences	India	p	YES: Article I:1 GATT	no	no	no	not justified	2nd test: chapeau and 1st test: Necessity
			AB	n/a	n/a	n/a	n/a	n/a	
			DSU Arbitration	n/a	n/a	n/a	n/a	n/a	
DS291	EC — Approval and Marketing of Biotech Products	USA	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
DS292	EC — Approval and Marketing of Biotech Products	Canada	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
DS293	EC — Approval and Marketing of Biotech Products	Argentina	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
DS392	US — Poultry (China)	China	P	A SPS measure inconsistent with SPS cant be justified by article XX GATT	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
DS406	US — Clove Cigarettes	Indonesia	P	panel decided not to examine Indonesia's alternative claim under Article III:4 of the GATT, therefore no need to analyze Article XX(b) of the GATT 1994 (AND US didn't invoke art. XX (b) to justify violation of TBT provision	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
			AB	n/a	n/a	n/a	n/a	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
DS447	US — Animals	Argentina	P	didn't analyze XX GATT for judicial economy because US measures already inconsistent with SPS	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze
			AB	N/A	N/A	N/A	N/A	no	
DS332	Brazil — Retreaded Tyres	EU	p	YES: Article III:4 and Art. XI:1	yes	yes	no	not justified	2nd test: chapeau
			AB	yes	yes	yes	no	not justified	
			DSU Arbitration	n/a	n/a	n/a	n/a	n/a	
DS472	Brazil- Taxation	EU	P	yes	yes	no	N/A	no	1st test: Necessity test
			AB	N/A	N/A	N/A	N/A	N/A	
DS497	Brazil - Taxation (Japan)	Japan	P	yes	yes	no	N/A	no	1st test: Necessity test
			AB	N/A	N/A	N/A	N/A	N/A	

DS477	INDONESIA Importation of Horticultural Products, Animals and Animal Products (new Zealand)	NEW ZELAND	P	yes	no	no	no	not justified	1st test: Necessity and 2nd test: chapeau
			AB	n/a	N/A	N/A	N/A	N/A	
DS478	INDONESIA Importation of Horticultural Products, Animals and Animal Products (USA)	USA	P	yes	no	no	no	not justified	1st test: Necessity and 2nd test: chapeau
			AB	N/A	N/A	N/A	N/A	N/A	

DS484	Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products	BRAZIL	P	YES	yes	no	N/A	not justified	1st test: Necessity test
DS394	China- Raw Materials	USA	P	yes	yes	no	n/a	not justified	1st test: Necessity test
			AB	n/a	n/a	n/a	n/a	n/a	
DS395	China- Raw Materials	EU	P	yes	yes	no	n/a	not justified	1st test: Necessity test
			AB	n/a	n/a	n/a	n/a	n/a	
DS398	China- Raw Materials	Mexico	P	yes	yes	no	n/a	not justified	1st test: Necessity test
			AB	n/a	n/a	n/a	n/a	n/a	
DS431	China — Rare Earths	USA	p	YES	NO	N/A	N/A	not justified	1st test: Necessity test
			AB	n/a	n/a	n/a	n/a	not justified	
DS432	China — Rare Earths	EU	P	YES	NO	N/A	N/A	not justified	1st test: Necessity test
			AB	n/a	n/a	n/a	n/a	not justified	
DS433	China — Rare Earths	Japan	P	YES	NO	N/A	N/A	not justified	1st test: Necessity test
			AB	n/a	n/a	n/a	n/a	not justified	
DS400	Ec- Seal Products (Canada)	Canada	P	yes: Article I:1 and III:4 GATT	no	n/a	n/a	not justified	1st test: Necessity test
			AB	yes: Article I:1 and III:4 GATT	n/a	n/a	n/a	not justified	
DS401	EC- Seal Products (Norway)	Norway	P	yes: Article I:1 and III:4 GATT	no	n/a	n/a	not justified	1st test: Necessity test
			AB	yes: Article I:1 and III:4 GATT	n/a	n/a	n/a	not justified	

Article XX (b) GATT invoked					Failed 1st Test	
	Failed 1st Test: Necessity Test	Failed 2nd test: Chapeau	Measure not analyzed	both failed	(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)
Number of times	12	2	10	3	8	10

**ANNEX 5: Analysis of cases where subparagraph (d) Article XX GATT**

Case Number	Case Title	Claimant	Stage	Resolution and Analysis of Panel and Appellate Body ( P= Panel, AB= Appellate Body)					
				Violated Provision	(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)	Chapeau	Justified?	
DS31	Canada — Periodicals	US	P	YES: Article XI:1 GATT	no	no	no	not justified	1st Test: necessity and 2nd test:
			AB	n/a	n/a	n/a	N/a	n/a	
DS276	Canada — Wheat Exports and Grain Imports	US	P	yes	yes	no	N/a	not justified	2nd test: chapeau
			AB	N/A	N/A	N/A	N/a	N/A	
DS169	Korea — Various Measures on Beef	Australia	P	yes: Art. III:4	yes	no	n/a	not justified	
			AB	yes	yes	no	n/a	not justified	1st test: Necessity
DS161	Korea — Various Measures on Beef	US	P	yes: Art III:4	yes	no	n/a	not justified	
			AB	yes	yes	no	n/a	not justified	1st test: Necessity
DS345	US — Customs Bond Directive	INDIA	P	YES	YES	no	n/a	Not justified	
			AB	yes	yes	no	n/a	not justified	1st test: Necessity
DS343	US — Shrimp (Thailand)	Thailand	P	yes	yes	no	n/a	not justified	
			AB	yes	yes	no	n/a	not justified	1st test: Necessity
DS2	US — Gasoline	Venezuela	P	yes: Art. III:4	no	n/a	n/a	not justified	1st test: Necessity
			AB	n/a	n/a	n/a	n/a	not justified	

DS174	EC — Trademarks and Geographical Indications	United States and Australia	P	Art. III:4 GATT	no	n/a	N/a	not justified	1st test: Necessity
DS291	EC — Approval and Marketing of Biotech Products	USA	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	
DS292	EC — Approval and Marketing of Biotech Products	Canada	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	
DS293	EC — Approval and Marketing of Biotech Products	Argentina	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	
DS453	Argentina- Financial Services	Panama	P	NO: Dismisses claims under Art. I, Art. III, Art. XI GATT	n/a	n/a	n/a	Panel Considered Irrelevant to Analyze	
			AB	n/a	n/a	n/a	n/a	n/a	

DS332	Brazil — Retreaded Tyres	EU	P	Article XI:1	no	n/a	n/a	not justified	1st test: Necessity
			AB	n/a	n/a	n/a	n/a		
			DSU	n/a	n/a	n/a	n/a		
DS461	Colombia- textiles	Panama	P	Yes: Article II GATT	no	no	no	not justified	1st test: necessity and 2nd test: chapeau
			AB	yes	yes	no	N/a	not justified	
			Arbitration	n/a	n/a	n/a	N/a	n/a	
DS155	Argentina — Hides and Leather	EC	P	yes: Article III:2 GATT	YES	YES: Provisionally justified by Article XX(d)	no	not justified	2nd test: chapeau
			Arbitration	n/a	n/a	n/a	N/a	n/a	
DS302	Dominican Republic — Import and Sale of Cigarettes	Honduras	P	YES: Art. III:4	yes	no	N/a	not justified	1st test: Necessity
			AB	YES: Art. III:4	yes	no	N/a	not justified	
DS308	Mexico — Taxes on Soft Drinks	USA	P	YES: Art. III:2	no: Mexico has not established that challenged measures are designed to secure compliance with laws or regulations under the terms of Article XX (d)	n/a	N/a	not justified	1st test: Necessity
			AB	YES: Art. III:2	no	n/a	N/a	not justified	
DS366	Colombia — Ports of Entry	Panama	P	Yes: Article I:1	yes	no	N/a	not justified	1st test: necessity
DS456	India — Certain Measures Relating to Solar Cells and Solar Modules	United states	P	Yes	no	Not enough information	N/a	not justified	1st test: Necessity
			AB	yes	no	n/a	N/a	not justified	
DS371	Thailand - Cigarettes (Philippines)	Philippines	P	YES: Art. III:4	no	n/a	N/a	Panel Considered Irrelevant to Analyze	
			AB	YES: Art. III:4	no	no	no	Not Justified	1st test: necessity and 2nd test: chapeau

DS477	Indonesia- Importation of Horticultural Products, Animals and Animal Products (New Zealand)	New Zealand	P	Yes	no	n/a	n/a	not justified	1st test: Necessity
			AB	N/A	N/A	N/A	N/A	N/A	
DS478	Indonesia- Importation of Horticultural Products, Animals and Animal Products (New Zealand)	USA	P	Yes	no	n/a	n/a	not justified	1st test: Necessity
			AB	N/A	N/A	N/A	N/A	N/A	

DS339	China- Auto parts (EU)	EU	P	YES: Article III:2 and Article III:4	NO	NO	N/A	not justified	1st test: Necessity
			AB	N/A	N/A	N/A	N/A	N/A	
DS340	China- Auto parts (US)	USA	P	YES: Article III:2 and Article III:5	NO	NO	N/A	not justified	1st test: Necessity
			AB	N/A	N/A	N/A	N/A	N/A	
DS342	China- Auto parts (Canada)	Canada	P	YES: Article III:2 and Article III:6	NO	NO	N/A	not justified	1st test: Necessity
			AB	N/A	N/A	N/A	N/A	N/A	
DS484	Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products		P	YES	YES	NO	N/A	not justified	1st test: Necessity

Article XX (d) GATT invoked				
	Failed 1st Test:	Failed 2nd test: Chapeau	Measure not analyzed	both tests
Number of times	17	2	5	3

Fail 1st test	
(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)
12	17

## ANNEX 6: Analysis of cases where subparagraph (g) Article XX GATT

Case Number	Case Title	Claimant	Stage	Resolution and Analysis of Panel and Appellate Body ( P= Panel, AB= Appellate Body)					
				Violated Provision	(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)	(2) Chapeau (Satisfied requirements?)	Measure Justified?	Test Failed
DS2	US — Gasoline	Venezuela	P	Yes: Art. III:4	no	no	n/a	not justified	1st test: Related to
			AB	yes	yes	no	no	not justified	
DS58	US — Shrimp	Malaysia, India, Pakistan, Thailand	P	YES	n/a	n/a	no	No	2nd test: chapeau
			AB	YES	Provisionally justified	Yes	no	NO	
DS291	EC — Approval and Marketing of Biotech Products	USA	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	
DS292	EC — Approval and Marketing of Biotech Products	Canada	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	
DS293	EC — Approval and Marketing of Biotech Products	Argentina	P		Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	Panel Considered Irrelevant to Analyze	
DS472	Brazil- Taxation	EU	P	YES	NO	NO	N/A	NO	1st test: Related to
			AB	N/A	N/A	N/A	N/A	N/A	
DS497	Brazil - Taxation (Japan)	Japan	P	YES	NO	NO	N/A	NO	1st test: Related to
			AB	N/A	N/A	N/A	N/A	N/A	
DS394	China- Raw Materials	USA	P	Yes: Art. XI	no	no	n/a	not justified	1st test: Related to
			AB	N/A	N/A	no	N/A	not justified	

DS395	China- Raw Materials	EU	P	Yes: Art. XI	no	no	n/a	not justified	1st test: Related to
			AB	N/A	N/A	no	N/A	not justified	
DS398	China- Raw Materials	Mexico	P	Yes: Art. XI	no	no	n/a	not justified	1st test: Related to
			AB	N/A	N/A	no	N/A	not justified	
DS431	China — Rare Earths	USA	P	YES	YES	NO	NO	not justified	1st test: Related to and 2nd test: chapeau
			AB	YES	YES	no	n/a	not justified	
DS432	China — Rare Earths	EU	P	YES	YES	NO	NO	not justified	1st test: Related to and 2nd test: chapeau
			AB	YES	YES	no	n/a	not justified	
DS433	China — Rare Earths	Japan	P	YES	YES	NO	NO	not justified	1st test: Related to and 2nd test: chapeau
			AB	YES	YES	no	n/a	not justified	

Article XX (g) GATT invoked				
	Failed 1st Test: Related to	Failed 2nd test: Chapeau	Measure not analyzed	both
Number of times	6	1	3	3

Fail 1st Test	
(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)
6	9

**ANNEX 7:** Analysis of cases where subparagraph (j) Article XX GATT

Resolution and Analysis of Panel and Appellate Body ( P= Panel, AB= Appellate Body)									
Case Number	Case Title	Claimant	Stage	Violated Provision	(a) (1) Policy Objective	(a) (2) Nexus	Chapeau	Justified?	Test Failed
DS476	EU- Energy Package	RUSSIAN FEDERATION	P	YES: Articles I:1 and III:4 of the GATT 1994	NO	NO	N-A	NOT JUSTIFIED	1st Test
DS456	India — Certain Measures Relating to Solar Cells and Solar Modules	USA	P	YES	no	no	n/a	NOT JUSTIFIED	1st Test
			AB	YES	no	n/a	n/a	NOT JUSTIFIED	

Fail 1st Test	
(1.a) Policy Objective (Satisfied requirements?)	(1.b) Nexus (Satisfied requirements?)
2	2

Article XX (j) GATT invoked		
	Failed 1st Test	Failed 2nd test: Chapeau
Number of times	2	0

## ANNEX 8: Date LAC countries entered WTO

- Argentina — 1 January 1995
- Barbados — 1 January 1995
- Belize — 1 January 1995
- Bolivia, Plurinational State of — 12 September 1995
- Brazil — 1 January 1995
- Chile — 1 January 1995
- Colombia — 30 April 1995
- Costa Rica — 1 January 1995
- Cuba — 20 April 1995
- Dominica — 1 January 1995
- Dominican Republic — 9 March 1995
- Ecuador — 21 January 1996
- El Salvador — 7 May 1995
- Grenada — 22 February 1996
- Guatemala — 21 July 1995
- Guyana — 1 January 1995
- Honduras — 1 January 1995
- Jamaica — 9 March 1995
- Mexico — 1 January 1995
- Nicaragua — 3 September 1995
- Panama — 6 September 1997
- Paraguay — 1 January 1995
- Peru — 1 January 1995
- Saint Kitts and Nevis — 21 February 1996
- Saint Lucia — 1 January 1995
- Saint Vincent and the Grenadines — 1 January 1995
- Suriname — 1 January 1995
- Trinidad and Tobago — 1 March 1995
- Uruguay — 1 January 1995
- Venezuela, Bolivarian Republic of — 1 January 1995

**Source:** Members Information in WTO webpage

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)