Volume 24 Number 1 2023/pp. 28-49 www.usask.ca/esteyjournal

The Estey

Journal of International Law and Trade Policy

Interpreting "Necessary": Balancing Trade Liberalization and Regulatory Autonomy

Rohan Pillai

LL.M. Candidate, National University of Juridical Sciences, Kolkata

Abstract

The GATT, GATS, SPS, and TBT Agreements use the term "necessary" to demarcate the limits of permissible treaty inconsistent Member State measures, in the form of positive or negative obligations. A balance is struck between the pursuit of trade liberalization and the maintenance of regulatory autonomy in the treaty text itself. Judicial interpretation by the Dispute Settlement Body of these provisions appears to have evolved and struck a different balance than that which was originally envisaged. This paper attempts to verify if the evolution of the interpretation of "necessary" maintains the balance between trade liberalization and regulatory autonomy originally envisioned in the WTO Agreements. First, through determination by examination of the supposed original balance in the treaty text itself, and thereafter by examination of the evolution of the interpretation of provisions which have received judicial attention of the DSB panel and Appellate Body.

Keywords: Exceptions, Least Restrictive Alternative, Necessary, Regulatory Autonomy, Trade Liberalization

Introduction

As a nexus tool, "necessary" is used to demarcate the limits of permissible treaty inconsistent Member State measures. The existence of provisions incorporating it to do the same, points to the recognition that certain policy objectives trump the objective of trade liberalization. The bargain, thus, is already struck in the text of agreements of what these trumping objectives are. However, the means of pursuing these objectives is always going to be State action. Thus, a point of contention is always going to arise on the question of whether certain State actions are in the legitimate pursuit of these objectives. The measures and the Member may explicitly state certain measures to be taken in pursuit of these objectives. A state may even, later on, assert that the pursuit of these objectives is implicit in the measures themselves, as it is advantageous for a Member to gain the protection of allegations of treaty obligation inconsistency. However, if one were to take the Member's assertion at face value, the Agreements brought to fruition by strenuous labour will lose their teeth. Any instance of a finding of treaty inconsistency would be justified by the offending Member as being in pursuit of protected objectives. Thus, it is imperative that only bonafide and legitimate measures gain this protection, which inescapably would require deeper scrutiny of the measure, its effects and its relationship with the stated objectives. However, if this scrutiny is flavoured with a bias towards the objective of trade liberalization, then even measures legitimately working towards protected objectives would be defeated, harming these exalted ends which are protected under the agreements. The question would also tend to turn towards scrutinizing the wisdom of the State regulators in their own domain; questions about what the required level of protection for a particular objective for a particular Member State, if entered into, would result in the DSB stepping into the shoes of the State regulators which the DSB is not only incompetent to undertake but is also intrusive of State Sovereignty. Thus, there is a need to strike some balance between the competing interest of trade liberalization and maintaining regulatory autonomy.

"Necessary" provisions are one of the tools that have been used by the drafters to strike this balance in the covered agreements; however, as the meaning of the term "necessary" changes through judicial interpretation, so does the nature of this balance.

Regulatory Autonomy

The covered agreements themselves do not make explicit mention of the term "regulatory Autonomy", which makes it essential to understand its meaning before venturing into verifying the degrees of its presence.

One of the merits of non-discriminatory obligations such as those that are seen in the covered agreements is that they avoid micro-managing the domestic policies of the Member States; they come into play only when the policy or policy measure results in discrimination.[1] This deference to the regulators in their field is what in the present study is referred to as Regulatory autonomy. However, that said, violation of the non-discrimination obligations requires adjustment of policy measures to bring them into conformity with the agreement's provisions. This limitation of the regulators' scope of operation is lifted when the policy objectives the regulators are pursuing are one of those listed within clauses such as Art. XX (a) of the GATT.[2] It can be said that in the context of the present discussion, there is unfettered deference paid to the domestic regulators provided they fulfil other precedent and subsequent conditions, as mentioned under Article XX and similar provisions if the measure fulfils the test of "necessary". Thus, regulatory autonomy in its fullest form can be said to be the freedom to pursue policy objectives irrespective of the erstwhile agreement violation a measure commits and whether its value hierarchy conforms to international preference.[3]

Answering whether the evolved jurisprudence on "necessary" maintains a balance that was supposedly struck in the text of the agreements would first call for an examination determining the nature of this original balance if it was there at all.

The Balance Struck in the Agreements

Starting with the Marrakesh Agreement, the very first recital, which is in the form of recognition, stresses the need to conduct relations between the Parties to the Agreement in a manner which serves the ends of trade liberalization, which it inter alia recognizes to be raising the standard of living, availability of employment and expansion in production. In the same breath, it asserts that such conduct, however, must allow optimal use of resources in accordance with objectives of sustainable development, protection of the environment and the means of doing so in a manner consistent with the respective needs and concerns of parties at a different level of economic development.[4] It is evident that the recital thus asserts the importance of both sets of ends. Where the former is in the form of an overarching principle and the latter in the form of an allowance. It is pertinent to note that the recital does not assert the importance of trade liberalization itself; instead, it enumerates the ends that it desires to achieve, which are the ends trade liberalization is generally understood to achieve.

The recognition of the 'respective' needs and concerns of the parties at different levels of economic development can be interpreted in two ways. One is that there exists a uniform set of needs and concerns to be made allowance for, for parties at the same level of economic development. However, such an interpretation would make the use of the term "respective" redundant. A more suitable interpretation would be that even amongst parties at the same level of economic development, their needs and concerns can be different and should be addressed keeping in view the relative extent of economic development of the Parties while making space for such allowances. This point at a consideration of the concerns of individual parties in the expectation of trade liberalizing conduct between them.

The Marrakesh Agreement and subsequently the GATT both commit to multilateral arrangements aimed at the reduction of trade and non-trade barriers and the elimination of discrimination in international trade relations.[5] Interestingly in the GATT recital, which is similar in the wording of its commitment to the above-mentioned objectives, the allowance as mentioned in the Marrakesh Agreement and highlighted above are conspicuous in their absence. Nevertheless, what seems common in both of them is their primary objective being non-discrimination in international commerce and trade liberalization.

Moving on to the GATS recitals, a more explicit commitment to "progressively higher levels of liberalization of trade" can be observed, providing for "due respect" for the Member State's policy objectives. Significantly, the recitals also explicitly recognize the right of the Members to maintain regulatory autonomy to achieve their policy objectives.[6]

A noticeable shift from the GATT to the GATS is seen where the former alludes to deference to policy objectives; the latter not only expresses this deference but also recognizes the regulatory autonomy required to achieve these objectives explicitly in the form of a right, a right which it recognizes as pre-existing. Thus, the GATS call for an evaluation of how much respect to regulatory autonomy is due.

The SPS Agreement opens with a reaffirmation of deference to regulatory autonomy in cases where it is necessary to protect listed policy objectives and subjects it to requirements of non-discrimination.[7]

Finally, the TBT Agreement not only focuses on trade liberalization and the need for regulatory autonomy for achieving a number of policy objectives, but it also explicitly states that the level of protection to be achieved must be what is considered by the Member State to be appropriate.[8]

It must be noted that the SPS and TBT Agreement came after the GATT[9]; the GATT did not contain standardizing provisions and merely contained trade liberalizing non-

discrimination obligations. Thus, it gave wide latitude to Member states to set their standards in accordance with its policy objectives; however, perhaps as a reaction to excessive deference given to the Members under GATT, the drafters of the latter agreements being conscious of the felt need to limit this deference, introduced international standards along with non-discrimination obligations that curtailed regulatory autonomy. However, regulatory autonomy was not dispensed with, and such a dispensation being naturally undesirable from the perspective of the Member State's sovereign concerns, these agreements again employed the "necessary" provisions as tools for creating a space for regulatory autonomy.[10] Thus there is a marked difference in the language and apparent intent of the drafters between the agreements under consideration, raising questions as to how far cross-fertilization between them in their necessary analysis, which forms the heart of this balance sought to be ascertained, is prudent.

The question of balance arises while establishing what is 'necessary'; the elements of the determination of 'necessary' would determine how much deference is actually paid. Take, for example, the element of the desired level of protection. Whether the level of protection set by the Member State is to be taken at its face value or it is to be culled out from examination of the effects of the measure is a frontier where the extent of regulatory influence would be considered.

Examination of the Balance Arrived at Through Jurisprudential Development

GATT and GATS

The necessary provisions in Article XX of the GATT and Article XIV of the GATS form part of the two-tier system set up thereunder, whereupon satisfaction of the provision's particular sub-clauses, the second tier of the test rests in the chapeau of Articles.[11] In both cases, they are in the form of exceptions to the general obligations. In the listings under article XX, only three of the listings employ the term "necessary" as their nexus requirement; other devices such as "relating to" and "essential to" have been used elsewhere. Thus, the use of different terms to serve the nexus requirement suggests a variable degree of nexus requirement within Article XX listings; Article XIV of the GATS follow a similar trend. Apart from the chapeau requirements and the nexus requirements, there is no material impediment for regulators to impose measures to pursue a policy objective, provided the end sought indeed in pursuance of the listed objectives.[12] Without venturing into the judicial interpretation, the comparative

threshold for these measures, which are allowed only when 'necessary', appears higher than their counterparts elsewhere in the provisions.

Early rulings on 'necessary' employ a means-end approach; the means-end interpretation simply requires the measure to be directed at the goal the Member State asserts to be pursuing. This approach would appear to pay the maximum deference to a Member's autonomy, as it requires nothing more than a face-value examination. If one looks at the traditional LRM test before *Korea-Beef*, it asks whether the Member State chose the most efficient means to get the job done. This makes the characterization of the end determinative.[13] This gives power to the DSB to review the measure and determine whether it can be legitimately pursued.

In the early cases such as *US-Section 337* and *Thailand-Cigarettes*, where the traditional LRM test was employed, without much consideration paid to the securement of the level of protection the Member State sought, the DSB went on to accept the alternatives that were proposed; additionally, it's assessment lacked consideration of the socio-economic conditions of the states.[14] Thus the traditional LRM test was significantly intrusive in the regulatory wisdom of the Members without full consideration of factors which made those alternatives unfeasible or ineffective. Without consideration of reasonable availability and other above-mentioned factors, these reports thus gave little weight to maintaining the original balance and tilted the scales heavily towards trade liberalizing and anti-regulatory tendencies. Dismissal of such concerns was again continued in the *US-gasoline* dispute, where the Panel characterized the alternative proposed as 'would often be feasible'.[15] Implying its acceptance of circumstances where it would not be feasible, meaning either the Member State[16] bears the unreasonably high costs for securing its level of protection or owing to them not secure those levels of protection at all.

When one compares the Text of Article XX with the objective of GATT as discussed above, there appears to be an even balance between trade liberalization and regulatory autonomy; the text does not suggest a preference to trade liberalization but rather attempts to delineate the areas where the Members have retained autonomy and where they have conceded it. The LRM test, as applied in the above two cases, shifts this balance to be in favour of trade liberalization. Even though the DSB affirmed that its task under Article XX of the GATT is to address whether an inconsistent measure was necessary to achieve the policy goal[17], it has in practice rather become a process of analyzing to what extent an inconsistent can be justified in light of its trade cost, i.e., whether the inconsistency is a necessary departure from the trade agreement.[18]

Questions also arise regarding the propriety of the interpretation of the LRM test in the GATT, given its textual absence here and presence in the SPS measures and the TBT

agreement.[19] However, such a textual presence can also be a nod in the latter agreements to the GATT jurisprudence, although such an inference becomes dubious owing to the absence of the LRM test in the text of the GATS, which entered into force at the same time as the other two agreements after the Uruguay Round.[20]

The balancing of competing interests under Article XX can also be appreciated by examining other nexus devices used in article XX; terms such as 'relating to' and 'involving' suggests a lower degree of connection between the measure and the policy goal than 'necessary' does. Finally, the LRM test is ill-suited for 'necessary' interpretation under the GATT and GATS as it ignores the nature of Article XX, which is a provision providing for exceptions. Involving the degree of inconsistency in it defeats the purpose of the exceptional nature of the provisions and brings in an affinity towards obligations consistency which is unsupported by the text.

The *Korea-Beef* dispute introduced the weighing and balancing of factors; it established the ease of acceptance of necessity based on the importance of the policy objective being pursued and emphasized the right of the Member State to choose its level of protection.[21]

Interestingly, Korea in its submissions, states the level of protection it sought to achieve was the 'elimination' of fraud in the retail beef market.[22] The AB, however, went on to consider the level of protection sought by Korea to not be "total elimination" but "considerable reduction", as total elimination would require a total ban on imports.[23] This lowering of the level of protection has a number of implications; even though the DSB continues to assert that the Members have a right to determine the level of protection, patently in deference to regulatory autonomy. In practice, what exactly is this level in a particular dispute, is not left to the characterization of the Member State, not only the DSB took a stretched interpretation of the word 'elimination' to mean 'reduction' which Korea could have simply stated if it intended so, it also examined the nature of the measure to determine what is the level of protection it affords. This 'objective' determination of the level of protection further becomes muddy when the level of protection afforded is not readily visible, which results in the alternatives being tested at a lower threshold. This further makes the DSB's characterization of Members' sought level of protection' determinative, which the report itself supposedly put beyond reproach.

EC- Asbestos imported *Korea-Beef*'s interpretation of necessary under XX(d) to XX(b).[24] In this report, the AB clarified that the alternatives affording a lower level of protection than the contested measure could not be considered as available alternatives.[25] The AB here can be considered more regulator friendly as it stated that the regulators need not be bounded by the prevailing scientific consensus while

formulating its health policy. Even though there were some exceptions in France's ban, the AB accepted its assertion of its pursued level of protection to be a 'halt'[26], in a clear departure from the *Korea-Beef* precedence, which, if applied here, would have resulted in the level of protection sought by France's ban to be a 'reduction' and not a halt.[27]

Value judgment and issues arising out of it are also visible in an examination of the *US-Gambling* decision. The dispute related to Article XIV(a) and protecting 'public morals'.[28] Even though the Panel there recognized that public morals are subjective and highly variable among the Member States inter se[29] and that the Member State is entitled to choose a level of protection commensurate with how it values them,[30] it refused to pay complete deference to the Member to determine what forms part of 'public morals', while the Member's characterization of what forms public morals was given *some* consideration[31], the Panel retained with itself the power to define these conceptions and apply them to the case.[32] Reliance by the Panel on foreign practices, which linked gambling with issues of morality, also appeared ill-suited for a determination of a very subjective value like morality.[33] The AB confirmed the Panel's decision.

As per the ruling, as the Members cannot solely define public morality themselves, it becomes likely the desired subjective, localized morality would often be transformed into an internationalized sense of morality by the DSB, irrespective of its significance for that particular Member State.[34] While the AB asserted that the Member's characterization of the measure would be relevant, with an objective standard of assessment, to which extent it could be relied upon was not clarified by the AB. Some suggest that as Panels have often focused on the importance of the objective and as a comparison of alternatives must be undertaken in light of that, it carries more weightage than the other factors, although no such weightage has been explicitly mentioned by the DSB.[35] Thus the interaction of the factors, the extent of weightage to individual factors and the standards of assessment being vague, sizeable discretion is left in the hands of the DSB, thereby threatening regulatory autonomy.

Thereafter the Appellate Body in the *Dominican Republic – Import and Sale of Cigarettes* linked the degree of contribution of the measure to the objective with the level of protection that is sought by the Member State; in doing so, it makes the 'choice' of the level of protection illusory. While it accepts the level of protection sought by the Member state as the chosen level of protection, it bases its least restrictive alternative analysis on the actual protection afforded by the measure, as it states the WTO consistent alternative there provided "at least" the same levels as the challenged measure.[36] This not only makes regulatory measures easier to be challenged as unnecessary but also shifts the power out of the hands of the national regulators in choosing the level of protection and makes it subject to the DSB's determination. This

also raises a question regarding the DSB's foresight as the measures it terms "ineffective"[37] may have an impact which is not easily discernable or apparent in the immediate future.

While later cases such as *Brazil-Retreaded Tyres* made the consideration more flexible with the introduction of a "possible contribution" consideration.[38] It created more contention, as it rested the degree of contribution required to be dependent on the trade restrictiveness of the measure, which again sets a highly variable threshold for the regulatory measure to meet, being unfounded in the text. That being said, the AB, in taking into consideration the possible contribution and analyzing the measure's "apt material contribution", grants greater room to the Member State to establish the legitimacy of its challenged measure.[39] Additionally, the Panel and the AB both emphasized that certain policy objectives might call for complex measures, and alternative measures here may be complementary instead of substitutes for each other, thus having an accumulative effect. In this sense, the necessity of one measure would not be undermined by the availability of another measure that will advance the same regulatory goal. However, the Panel does not clarify how complementary measures can be identified from alternative measures, which again grants substantial discretion to the DSB; on the other hand, if complementary measures are interpreted too broadly, establishing necessity would become rather easy and threaten the trade liberalizing objectives of the Agreement.[40]

In *US-COOL,* the Panel stated that the trade restrictiveness of a measure does not require a demonstration of actual trade effects or trade flow; trade restrictiveness would exist if the measure negatively affects the competitive opportunities available to imported products.[41] The AB in *China-Audiovisual Products* further developed this by affirming the Panel's approach of assessing not only the restrictive impact of the measures on imports but also their "restrictive effect [...] on those wishing to engage in importing, in particular on their right to trade".[42] This increased latitude, however, was substantially limited in the *China-Audiovisual Products* ruling as it restricted the "aptness" consideration from being taken as a general proposition which the DSB ruled to still be an "actual" contribution of the measure.[43] *China-Audiovisual Products,* in undertaking a comprehensive analysis of the measures together to adjudge their importance, allows for regulatory measures which might individually be considered as not having sufficient effect to be shown to collectively have a greater impact, which is a regulator friend move.[44] However, characterization of the public morals as a *per se* important objective and relating that to the order of its enlistment under Article XX has serious consequences.[45] As the settled position in a "necessary" analysis is that those objectives which are "less important" would be more difficult to be shown to be

"necessary",[46] it confers a detrimental presumption on objectives lower down the list under Article XX, thus making them more unlikely to be accepted as "necessary". Such an inference is especially contentious given the lack of any importance-based hierarchy in the text of Article XX.

Columbia-Textiles report in asserting that the DSB would not limit itself to analyzing whether the measure makes any contribution by also the extent of such contribution,[47] and asserting that a holistic analysis of all the factors is required to make an overall "necessary" judgment[48], not only deepens the DSB scrutiny on the regulatory measure but also makes the process of such determination more ambiguous and tilted towards DSB's discretion.

Brazil-Taxation thankfully clears the air of confusion created by *China-Audiovisual Products* by rejecting the hierarchical classification of the importance of the policy objectives with the text of the agreements.[49] It further situates the 'importance' as not a pre-determined formulation but a subjective variable dependent on the conditions in the Member State. This report thus appears to be comparatively more pro-national regulators and in line with the text of the Agreements. Finally, *US-Tariff Measures (China)* reemphasizes the need for the necessary analysis to be undertaken while keeping the needs and concerns of the Member State whose measures are challenged.[50] The Panel, in placing the degree of contribution on the continuum of indispensability and making it subject to other factors of the analysis with the ultimate goal being the establishment of a means-end relationship, strikes a fair balance for preserving trade liberalization and regulatory autonomy.

The problem with weighing and balancing

Weighing and balancing factors, when taken together in a holistic manner, present a more balanced approach than proportionality and cost-benefit analysis *strictu-sensu.* As it recognizes that a formalized analysis is difficult to be arrived at and tries to balance all factors holistically in a less stringent manner. That being said, it still has its own set of issues. It requires the DSB to determine the importance of the policy objective; the *Korea-Beef* report doesn't elaborate on this; however, the incorporation of the idea that a more important goal is more easily necessary and, conversely, a less important goal is more difficult to being accepted as necessary, added with the rejection of the DSB of a pre-determined level of importance of an objective which would differ on a case by case basis means that the DSB has wide latitudes of power to determine the importance of the policy objective for the Member State, it strips away the regulator's power.

Even though proportionality does not find explicit mention in the "necessary" jurisprudence, a similar proportionate weighing does find a place in the necessary

analysis, though not as strictly as in the EU context[51]. Firstly, with the WTO likely being partial to the goal of minimizing trade barriers[52] and with trade restrictiveness being taken into consideration, a strict proportionality test would result in the disqualification of a measure if it has a great trade cost even though the policy objective sought to be protected is not unimportant. Even with a holistic analysis and consideration of other factors, as seen in the WTO jurisprudence, such a result is quite possible. Determination of how important a measure is can still be highly contentious; *EC-Asbestos* might be taken as a counterargument here as the trade-restrictive effect of the ban in *EC-Asbestos* was of the highest order, and that it was nevertheless found 'necessary'. However, this was owing to risk to health which was also universally easily considered to be of the highest importance; however, in cases where such a high universally accepted value isn't present, tension between policy objective and trade cost is bound to arise, resting entirely on DSB's characterization of the importance of the measures.[53]

The jurisprudence also requires alternative measures which are not "unreasonably available" to be preferred, which also is a nod to proportionality.[54] While it includes an evaluation of whether the measures are practically feasible in the form of their administrative or enforcement cost, which must not be "unreasonably high".[55] The use of reasonability as a trading-off device brings in an imbalance in the system; even if an alternative measure has a higher administrative/enforcement cost, the DSB can still rule it to be reasonably available.[56] In essence, a less trade-restrictive measure still ought to be preferred even if it has a higher enforcement cost and must only be abandoned when the enforcement cost becomes unreasonably high; thus the weighing and balancing test actually shifts in favour of trade cost and devalues natural regulatory interests. It also appears inescapable that the reasonable availability would then be flavoured by another 'importance' analysis. If the trade cost, which is difficult to quantify in the first place, is deemed to be too high or too important and is deemed crucial to be dodged, then an administrative cost, however high, would possibly be considered to be reasonably available in order to prevent the trade cost. Cost-benefit analysis, as traditionally understood in the context of the covered agreements, would imply weighing the benefit the impugned measure brings against the loss of trade liberalizing effect of the breached obligations. Some argue that weighing and balancing imports a cost-benefit balancing which juxtaposes the benefits of the measure with the trade cost, and it gives greater deference to regulatory autonomy as the benefit does not necessarily need to be higher than the trade cost and thus, a regulator-friendly standard.[57] However, in light of our previous discussion on the cost-benefit analysis and its true nature being a trade-off between trade cost and enforcement cost, here the benefit appears to be avoidance of

trade cost, with the trade-off device being "unreasonably" high enforcement cost, thus disfavoring regulatory measures.

It further then also raises questions on the determination and evaluation of the trade costs themselves, what does trade cost mean, given that trade-restrictive effect isn't necessarily quantifiable and comparable and at times foreseeable then, should the DSB go back to the 'least degree of inconsistency', question galore lies there too as degrees of inconsistency also cannot be easily determined. This also imports questions on the principles of judicial economy as not only all violations would have to be considered, but a possible violation that the alternative may cause would also have to be considered so that their degrees of inconsistency with agreements are not greater than the challenged measure.

The GATT and GATS jurisprudence thus points to a value judgment of the 'worthiness' of the policy objective for the Member State, which the DSB is often ill-equipped to do[58]. The Member States are in the best position to make a determination of what policy objective is important to be secured in a given State and needs protection; however, weighing and balancing puts the DSB in a position to determine the desirability of a policy objective.

TBT and SPS Agreements

The TBT and SPS Agreements differ from the above two agreements in incorporating the 'necessary' provisions as positive obligations. Under Article XX of the GATT, the AB interpreted and evolved the 'least restrictive alternative' test; however, in the case of Article 2.2 of the TBT agreement, there is the textual presence of the least restrictive alternative approach, which is where its "necessary" provision is situated. It includes a non-exhaustive list of policy objectives similar to the GATT exception, except for the GATT listings being exhaustive.[59] The mention of the LRM test, in addition to the use of necessary in the TBT agreement, also suggests that 'necessary' does not within itself inherently carry the LRM test. On the other hand, a look at the SPS agreement reveals that Article 2.2 also consists of an exhaustive listing protecting "human, animal or plant life or health" by restricting the application of the SPS measures only to the extent necessary.[60] A difference, however, under article 2.2 of the SPS agreement, is instead of being a provision allowing a prohibited measure, it requires all SPS measures to be applied only to the extent necessary to protect the listed objectives. In keeping with the *US-Tuna II (Mexico)* ratio and reading articles 2.2 and 5.6 together, article 5.6 also imports an LRM test in its text; in addition, it takes into consideration not only the technical and economic feasibility but also the reasonable availability of the alternative measures in the text itself.[61]

TBT Agreement

The TBT agreement accords a degree of deference to the policy objectives that the Member state chooses to pursue, which is evident in the non-exhaustive list of objectives Article 2.2 allows. However, a lesser degree of deference is paid to the means of achieving those objectives.[62] A number of disputes have involved claims under Article 2.2, with none of them being successful; however, they still are instrumental in the balance the present study seeks to evaluate.

The Panel in *US-Clove Cigarettes* asserted that the first sentence of Article 2.2 does not contain a distinct and separate obligation from the second sentence; instead, it sets out a general principle which is crystallized in the second sentence.[63] However, unlike in the SPS agreement, the TBT Article 2.2 does not carry a presumption that the measure is necessary.[64]

The Panel in *US-Clove Cigarettes* in order to determine whether the technical regulation was "more trade restrictive than necessary" considered it pertinent to examine the level of protection sought by the United States, the contribution of the technical regulation to the objective, and the existence of less trade-restrictive technical regulation that would make an equivalent contribution to the achievement of the objective at the level of protection sought.[65] The Panel asserted that consideration of whether a technical regulation is "more trade-restrictive than necessary" includes the question of what is the "level of protection" sought by the Member State; it equated the insignificance of the absence of explicit text to that effect with similar circumstances under Article XX(b) of the GATT. It underlined the connection between Article 2.2 of the TBT Agreement and its 6th recital, which states that "states should not be prevented from taking measures for the protection of human life or health… At levels it considers necessary".[66]

US-Clove Cigarettes opens up the question of how the "level of protection sought" is determined. In the dispute, Indonesia asserted that the level of protection sought was exceeded, for which it relied upon the Federal Act under challenge and interpreted the said Act to ascertain the level of protection sought. Both parties to the disputes agreed that if a technical regulation exceeds the level of protection sought, then it may not be the least restrictive alternative. However, there was no express statement under the US law regarding the level of protection it sought to achieve. Additionally, the law could be interpreted in a way which aligned with the level of protection afforded by the disputed technical regulation; in light of these considerations, the Panel refused to infer a level of protection from the US Law. The Panel also underlined the redundancy in determining compliance with the level of protection sought by inferring the level of protection sought from the technical regulation itself. In the absence of an express

statement, an inference of the level of protection from the technical regulation itself would necessarily be exactly the level it affords, thus making a compliance analysis redundant.[67]

US-Clove Cigarettes further relies on the GATT jurisprudence to locate a "material contribution" requirement in Article 2.2 based on the facts of the dispute based on the extent of trade restrictiveness of the technical regulation.[68] It then embarks upon the determination of less trade-restrictive alternatives. *US-Clove Cigarettes,* on the one hand, provides for greater deference to the Member State owing to its reliance upon the Member's characterization of the technical regulation. However, its use of the degree of contribution based on trade restrictiveness appears to be unfounded in the text of Article 2.2; this is of significance as where the DSB considers trade restrictiveness to be severe, the degree of contribution required would resultantly increase, which may at its extreme reach the heights of indispensability or very high degree of contribution which may become a threshold too high for a technical regulation to reach, thus deeming it "more trade restrictive than necessary" even though there might be no other alternative technical regulation which can contribute as much as the challenged technical regulation. This Problem, however, can be resolved by taking into consideration the "risk non-fulfilment would create" in the determination of the level of contribution of the technical regulation but to what extent such risk would affect the required degree of contribution remains questionable. Thus, the jurisprudence evolved in *US-Clove Cigarettes* favours trade liberalization by making it difficult for a technical regulation to fulfil the demands of Article 2.2.

The Panel in *US-Tuna II (Mexico),* to determine the level of protection, undertook a mixed consideration of the characterization of the measures of all the parties to the dispute and its own assessment of the design, structure and characteristics of the measure in the issue. The AB affirmed the applicability of the weighing and balancing of factors as seen in the GATT and GATS jurisprudence, in Article 2.2 "necessary". The AB's rejection of the co-existence of two labels, in that case, is an implicit recognition that a WTO Member cannot be required to accept a trade-off between the fulfilments of two different objectives that the Member itself has not chosen, which is an important nod towards understanding regulatory necessities.[69]

While discussing the notion of necessity, the AB asserted upon a relational analysis of trade-restrictiveness of the technical regulation, degree of contribution to the achievement of legitimate objective and risk upon non-fulfilment. While asserting so, the AB describes these as elements of a necessity assessment under Article 2.2 and goes on to state that all these factors provide the basis for the determination of what is "necessary" in the sense of Article 2.2.[70] However, this blurring of the distinction

between necessity and qualification as "necessary" is ambiguous. As the elements laid down by the AB include "risk of non-fulfilment", which has a textual presence in Article 2.2, it then would not form part of the necessary interpretation but rather the broader necessity analysis of the provision. The same is the case with trade restrictiveness of the technical regulation, which would suggest the interpretation of "necessary" by the Panel only relates to its degree of contribution, which is consistent with the panel finding of "necessary" meaning "required" in the context of article 2.2.[71] The AB also states that a necessary determination would also generally require a comparison of the disputed measure and possible alternative measures; taking into consideration whether the alternative is less trade restrictive and whether it makes an equivalent contribution to the objective taking into account the risk of non-fulfilment would create and its reasonable availability.[72]

Thus, even though the "necessary" nature of the technical measures includes elements that are located in the text itself, the same elements are interpreted within the term 'necessary' in the case of alternative measures. Thus, while the source of the relational analysis is rested in the text itself, the source of the comparative analysis appears to be found in the interpretation of 'necessary' itself.[73] The mixed consideration of measure which involves the DSB's own assessment continues the trend of shifting tendency to limit regulatory autonomy. The interpretation of the Panel to read "necessary" as "required" in the TBT agreement dramatically reduced its role in balancing liberalization with regulatory autonomy as that function there lies upon the textualized LRM test.

Even though the analysis in *US-COOL (article 21.5)* stopped before coming to the "necessary" element, the analytical framework set by the Panel merits a mention. The Panel here noted that prima fascia necessity is not required to be established before the panel ventures into comparison with alternative measures.[74] A contrast can be drawn here between the GATT and GATS approaches. Under the GATT jurisprudence, the Defendant, as the party invoking the exception, has to establish a prima fascia necessity, failure of which the measure is deemed as unnecessary, and thus finding the measure to be in violation of the GATT. In comparison, such a failure does not result in a similar result under the TBT agreement, in effect allowing the measure to continue. The same bargain is struck in the text of the TBT agreement by making Article 2.2 a positive obligation, and the AB's interpretation of it is in line with this deference towards respecting the legitimacy of regulatory wisdom.

The Panel in *EC-Seal Products* found that the technical regulation must be capable of making a contribution and must actually make a contribution. However, the required degree of contributions was not determined. It drew a comparison with Article XX (a)

of the GATT, which requires material or significant contribution, whereas Article 2.2 only calls for an examination of the degree of contribution.[75] Its final conclusion was based on the measure making "some" contribution to the objective, among other things. Even in *US-COOL(Aritcle21.5),* the AB asserted that determining the contribution with precision might not always be possible.[76] This ambiguity in not establishing with clarity the extent of contribution creates difficulties in the comparative analysis as the alternatives must achieve the same degree of contribution as the challenged measures[77] and reposes great discretion in the hand of the DSB to determine the appropriate level of contribution in a given case. Thus, it would be difficult for a complainant to establish that an alternative can provide a similar degree of contribution to the legitimate objective. However, to its merit, while analyzing 'reasonable availability', the AB refused to exclude the possibility that an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry and is not necessarily limited to the Member State, which allows for more room for a Member State to establish unreasonableness.[78]

SPS Agreement

While no judicial consideration has been received by Article 2.1's incarnation of "necessary"[79], the AB has in some cases discussed the relationship between Article 2.2 and Article 5.6, although it has never ruled what a "necessary" measure under Article 2.2 of the SPS Agreement means.[80] The Agreement does recognize the two competing objectives that this study sets out to examine, protection of the right of members to take necessary measures apropos protection of life and health and minimization of negative trade effects.

However, the balance under the text of the SPS agreement appears to be tilted towards regulatory autonomy. Measures carry a presumption that they are necessary until proven otherwise. As discussed earlier, if one reads Articles 2.2 and 5.6 together, this tilt becomes clearer. Article 5.6 introduces an LRM test in relation to "Members appropriate level of protection", which the Agreement in its annexure clarifies to be the "level of protection deemed appropriate by the Member". Thus, removing judicial review of the level of protection is completely in stark contrast to the GATT jurisprudence. Violation of Article 5.6 creates a presumption of a violation of Article 2.2, which needs to be rebutted. Additionally, a higher threshold of (significantly less trade-restrictive alternative) gives higher deference to the Member states. Measures are presumed to be necessary, coupled with the characterization of the level of protection to be entirely subjective based on the preamble and annex to the Agreement.[81]

The difference between the GATT and SPS approaches is highlighted in the fact that measures can only be shown to be unnecessary upon demonstration of an equally

efficacious alternative. The AB in *Australia-Salmon* emphasized that generally, the DSB cannot substitute its own reasoning about the implied level of protection and has to accept the Member's expressed level of protection, irrespective of the level of protection the measure actually achieves.[82] Only when the level of protection is not formulated with precision can the panel venture into scrutinizing the actual level of protection of the measure. This could essentially result in a Member State formulating an astronomically high level of protection, and without the complainant demonstrating the alternatives that match this level that even if the imposed does not achieve the measure would necessarily be deemed "necessary". Thus, the elements that are generally employed in a necessary analysis have been given greater deference in the text of the SPS agreement, to which the nascent jurisprudence appears to adhere.

Conclusion

Thus, while the early GATT cases, especially the GATT panels, were significantly tilted in favour of trade liberalization, subsequent cases saw a shift towards a more balanced approach. However, there wasn't a uniform progression and, oftentimes, the Reports have ended up tilting the balance towards one of the two competing interests. This struggle has been evident in the DSB treatment of issues on levels of contribution, ascertaining the importance of objectives and determination of the requisite level of contribution. The TBT cases appear, however, to have maintained stronger adherence to the original balance struck in the Agreement's text right from the beginning. Admittedly these original balances themselves are different between the agreements inter se, with the SPS agreement being especially tilted towards maintaining regulatory autonomy and the sparse judicial attention to its iteration of "necessary" appears to maintain the same.

Thus, the GATT and GATS jurisprudence, even though on the face of it appears to be fair in their balancing of regulatory autonomy and objective of trade liberalization, on examination, they appear to have an anti-regulatory bias. A number of reports oftentimes appear to prescribe standards which would make it difficult for a measure to establish itself as "necessary". Even though these judgements show deference in some instances, these tendencies are hard to ignore. The standard of reasonableness requires the Members to suffer higher enforcement costs if the DSB deems them to be reasonable, which is a standard clearly espousing a pro-liberalization bias. That being said, recent reports of the AB appear to be taking a more balanced approach towards these opposing interests.

As for the TBT Agreement, the panel's approach in *US-Clove Cigarettes* to maintain the level of protection sought by the Member by borrowing from the GATT

jurisprudence and recognizing the object of TBT agreements 6th Recital is appreciable. *US-Clove Cigarettes*' reliance on the Member's characterization of its sought level of protection is pro-regulatory; however, its reliance on trade restrictiveness to determine the degree of contribution required is anti-regulatory. The *US-Tuna II* report in rejecting reasoning which would make the Member State choose between two policy objectives is a further affirmation of the regulator's autonomy in pursuing the policy goals it chooses, which are permitted by the agreement itself. Even the approach in *US-COOL (article 21.5),* which rejected the requirement of establishing that the challenged measure is prima fasciae necessary, is a pro-regulatory move, as it moves the burden onto the petitioner who is challenging the legitimacy of the measure. In requiring technical regulations to actually make a contribution, the standard of contribution was located on the higher side by the panel in *EC-Seal Products*; however, this still was lower than the material contribution threshold, and proceeding on the basis of "some" contribution appears to be a fair compromise, given the uncertainty around prescribing possible contribution as a general rule. The TBT cases are a mixed bag, the DSB in many places have shown both pro and anti-regulatory tendencies, but largely the original balance struck in the text appears to have been maintained in the present jurisprudence.

As for the SPS agreement, in light of the lack of jurisprudence on "necessary," the question of examining the balance between trade liberalization and regulatory autonomy appears to be premature in the context of the SPS Agreement. That being said, rulings on related issues such as *Australia-Salmon* allude to the probability of a high degree of deference being given to the Regulators in future cases. This would maintain the original balance struck in the text of the SPS agreement, which is highly tilted towards protecting the regulatory autonomy of the Members, by providing higher thresholds of challenge requiring a significantly less trade-restrictive alternative, a presumption in favour of the measure, and ensuring the sanctity of the Member's chosen level of protection.

Endnotes

[1] *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) ("GATT")., Art. I &III; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) ("GATS"), Art. II & XVII.

[2] GATT Art. XX provides for general exceptions which allows for a departure from general obligations.

[3] Gisele Kapterian, *A Critique Of The WTO Jurisprudence On 'Necessity',* ICLQ vol 59, January 2010 pp 89–127, at p.94.

[4] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) (Marrakesh Agreement or WTO Agreement), Preamble.
[5] GATT, Preamble.
[6] GATS, Preamble.
[7] Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493("SPS Agreement"), Preamble.
[8] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120 ("TBT Agreement"), Preamble.
[9] The SPS and TBT agreements were negotiated at the Uruguay round and entered into force in 1995, whereas the GATT entered into force on 1st January 1948, *See* https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm#:~:text=On%201%20January%201948%2C%20GATT,Kingdom%20and%20the%20United%20States last visited on 28/04/2022.
[10] *See* Article 2.1, 2.2 SPS Agreement, Article 2.2, 5.1.2 TBT Agreement.
[11] Appellate Body Report*, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p.2755 ¶ 119-120.
[12] Robert Howse, *The Boundaries of the WTO: From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, (2002) 96 AJIL 94,98–99.
[13] Joel P. Trachtman, *Trade and... Problems, Cost-Benefit Analysis and Subsidiarity,* European Journal of International Law 9 (1998), 32-85, at p. 35.
[14] GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345, GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 November 1990, BISD 37S/200.
[15] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, 6.36.
[16] *Supra* **Error! Bookmark not defined.** at p.103.
[17] Ibid 6.28.
[18] Thomas J. Schoenbaum*, International Trade and Protection of the Environment: The Continuing Search for Reconciliation,* American Journal of International Law, 91(2), 268-313 at p.277.
[19] Article 5.6 of the SPS Agreement and 2.2 of the TBT Agreement both contain the text "more trade restrictive than".
[20] GATS was negotiated at the Uruguay round and entered into force in 1995.
[21] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*,WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5, 164.
[22] *Id.* 175.
[23] *Id.* 178.
[24] Appellate Body Report*, European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243 171.
[25] *Id.* 174.

[26] Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305, 8. 204.
[27] Isabel Cristina Salinas Alcaraz, *The concept of necessity under the GATT and national regulatory autonomy*, VIeI/Vol.10, N.2, pp. 77-99, at 90.
[28] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475), 220.

[29] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005: XII, p. 5797, 6.461.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Ibid.* 6. 741.
[34] *Supra* **Error! Bookmark not defined.**, p.111.
[35] Panagiotis Delimatsis*, The Principle of Necessity in the WTO – Lessons for the GATS Negotiations on Domestic Regulation*, SSRN Electronic Journal · December 2013 , at p.8 DOI: 10.2139/ssrn.2375596.
[36] Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367, 72.
[37] Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425, 7.226.
[38] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* WT/DS332/AB/R, adopted 17 December 2007, DSR 2007: IV, p. 1527 , 151.
[39] *Id.* 150.
[40] Benn McGrady, *Necessity Exceptions In WTO Law: Retreaded Tyres, Regulatory Purpose And Cumulative Regulatory Measures*, Journal of International Economic Law 12(1), 153–173, at p.164.
[41] Ming Du, *The Necessity Test in World Trade Law: What Now?*, Chinese Journal of International Law (2016), 817–847, at p. 831.
[42] Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010: II, p. 261, 7. 817.
[43] Ming du, *The Necessity Test in World Trade Law: What Now?, Chinese JIL (2016), p.828*, p. 828.
[44] Appellate Body Report*, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010: I, p. 3, 249.
[45] *Supra* **Error! Bookmark not defined.**, 7.817.
[46] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001: I, p. 5, 162.
[47] Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear,* WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016: III, p. 1131 5. 103.
[48] *Id.* 5.70.
[49] Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R, 7.591.
[50] Panel Report, *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R and Add.1, circulated to WTO Members 15 September 2020 [appealed by the United States 26 October 2020] 7.168.
[51] Deborah A. Osiro, *GATT/WTO Necessity Analysis: Evolutionary Interpretation and its Impact on the Autonomy of Domestic Regulation*, LEGAL ISSUES OF ECONOMIC INTEGRATION 29(2): 123–141, 2002, at p. 137.
[52] *See* The WTO in Brief, available at http://www.wto.org/english/res_e/doload_e/ inbr_e.pdf last visited on 30/04/2022.

[53] *Supra* **Error! Bookmark not defined.**, at p.138.
[54] *Supra* **Error! Bookmark not defined.**, 166.
[55] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005: XII, p. 5663 (and Corr.1, DSR 2006: XII, p. 5475) 308.
[56] Joel P. Trachtman, *Trade and... Problems, Cost-Benefit Analysis and Subsidiarity,* European Journal of International Law 9 (1998), 32-85, at p. 35.
[57] DONALD H. REGAN (2007), *The meaning of 'necessary' in GATT Article XX and GATS Article XIV: the myth of cost–benefit balancing*, World Trade Review, 6, pp 347-369 doi:10.1017/S1474745607003424, at p.349, at p.3.
[58] Benn McGrady, *Necessity Exceptions In WTO Law: Retreaded Tyres, Regulatory Purpose And Cumulative Regulatory Measures*, Journal of International Economic Law 12(1), 153–173, at p.164.
[59] TBT Agreement, Art. 2.2.
[60] SPS Agreement, Art. 2.2.
[61] Appellate Body Report, India – Measures Concerning the Importation of Certain Agricultural Products, WT/DS430/AB/R, adopted 19 June 2015, DSR 2015: V, p. 2459.
[62] Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002: VIII, p. 3451 7. 121.
[63] Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865, ("US-Clove Cigarettes"), 7. 330.
[64] *Ibid.* 7. 331.
[65] *Ibid.* 7. 352.
[66] *Ibid.* 7. 370.
[67] *Ibid.* 7. 375.
[68] *Ibid.* 7. 379.
Meredith A. Crowley and Robert Howse, *Tuna – Dolphin II: A Legal and Economic Analysis of the Appellate Body Report*, 13 World Trade Review (2014), 337 as cited by Ming Du (*Supra* 134) at p.842 Meredith A. Crowley and Robert Howse, *Tuna – Dolphin II: A Legal and Economic Analysis of the Appellate Body Report*, 13 World Trade Review (2014), 337 as cited by Ming Du (*Supra* 134) at p.842 Meredith A. Crowley and Robert Howse, *Tuna – Dolphin II: A Legal and Economic Analysis of the Appellate Body Report*, 13 World Trade Review (2014), 337 as cited by Ming Du (*Supra* 134) at p.842
[70] Appellate Body Report*, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012: IV, p. 1837, 318.
[71] Panel Report*, United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865, 7. 461-7. 462.
[72] *Supra* **Error! Bookmark not defined.**, 322.
[73] *Id.*
[74] Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015: IV, p. 1725, 5. 235.
[75] Panel Reports*, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, DSR 2014: II, p. 365 7. 635; Appellate Body Reports, *European Communities – Measures*

Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014: I, p. 7, 5. 216.
[76] *Supra* 75 .208–5. 209; Alejandro Sanchez and Karyn Sandra Aneno, *Article 2.2 of the TBT Agreement: More Complicated than Necessary?,* Global Trade and Customs Journal, Volume 11, Issue 9, pp.369-377, at p. 373.
[77] *Id.*
[78] *Supra* **Error! Bookmark not defined.**, p. 834.
[79] Peter Van Den Bossche and Werner Zdouc*, The Law and Policy of the World Trade Organization*, 905 (2013).
[80] Appellate Body Report, *India — Measures Concerning the Importation of Certain Agricultural Products*, WTO Doc. WT/DS430/AB/R 5. 212; Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc. WT/DS367/AB/R, 340.
[81] Elbinsar Purba, *Necessary Measure Under the SPS Agreement,* AJWH [VOL. 13: 205], at pp.221-222.
[82] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998: VIII, p. 3327, 199.