GIMME SHELTER: THE "NECESSARY" ELEMENT OF GATT ARTICLE XX IN THE CONTEXT OF THE *CHINA-AUDIOVISUAL PRODUCTS* CASE

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ABSTRACT

"*The World Trade Organization is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible*."[1]

Comprised of 153 member-states, the World Trade Organization (WTO) accounts for over 97% of world trade.[2] That being the case, a state that desires competitive access to global trade cannot realistically eschew WTO membership. In keeping with the mission statement, membership requires a commitment by each member-state to minimize restrictions on international trade. Often, such a commitment is at odds with a member-state's internal policy goals. Members wish to retain a strong degree of sovereignty, and importantly, the WTO's constituent treaties provide several exceptions to WTO obligations. GATT Article XX contains ten "general exceptions" that are intended to provide member-states with flexibility in regulating sensitive areas such as conservation of natural resources, protection of human and animal health, and preservation of public morals.[3]

Although these exceptions suggest that some issues should be left to domestic regulation, it is important to determine exactly what level of trade-restrictiveness will be tolerated. The exceptions are not illusory, but for a proponent, the process can be arduous. The convoluted burden of justification under the Article XX exceptions effectively allows the WTO's judicial bodies several opportunities to curb protectionism by prohibiting measures with too great a trade-restrictive impact. For a member seeking justification under the multi-factored test, each element of the analysis is another chance to lose. The goal of this article is to clarify the current "necessity" analysis, and to demonstrate the level of difficulty it adds to the process of justification under GATT Article XX.

Part one of the article attempts to provide some background on the *China-Audiovisual Products* case as well as the current trade relationship between China and the United States. Part two introduces the "necessary" element and analyzes some of the relevant case law that has contributed to current formulation of the test. Part three discusses the "necessary" element in the context of the *China-Audiovisual Products* case. Part four compares application of the necessity test in six focal cases.

The conclusion attempts to unravel the current state of the "necessary" analysis, and to analyze its possible implications for future proponents of the Article XX exceptions.

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[1] *The WTO in Brief*, *available at* http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

[2] *Id*.

[3] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

I. INTRODUCTION

The United States and China were recently parties to a WTO dispute settlement resolution concerning several of China's measures affecting imported audiovisual entertainment products.[4] This particular dispute is only one manifestation of a broader disharmony in the current relationship between China and the United States. Although much progress has been made in recent years, the two nations have encountered several speed bumps, if not quite roadblocks, in the pursuit of mutually optimal trade relations.

Censorship by the Chinese central government has become a prominent topic on the global stage. In 2003, the Rolling Stones were famously forced to remove four songs from their album *Forty Licks* before it could be distributed in China.[5] The internet has brought its own set of challenges to censorship attempts. It is likely that China's internet censorship policies contributed to the subversive popularity of a viral video about a fictional animal called the "Grass Mud Horse."[6] The censorship controversy resurfaced recently when, in response to instances of hacking into Gmail accounts (most notably, into the accounts of Chinese human-rights activists), Google threatened to withdraw from China.[7] In March of 2010, Google began diverting users from its Chinese site to "an uncensored Chinese-language version of its service hosted in Hong Kong."[8] The Wall Street Journal called the move "a risky and dramatic act of defiance that could prove to be a pivotal moment in the history of U.S. companies' efforts to do business in China."[9]

Another seemingly endless debate involves the valuation of Chinese currency. United States officials have suggested that the Chinese

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[4] As used in the case, the term "audiovisual products" includes books, newspapers, digital and physical sound recordings, audiovisual home entertainment products, and films for theatrical release.

[5] Associated Press, *China Orders Rolling Stones to Ax Songs*, USA TODAY, Mar. 12, 2003, *available at* http://www.usatoday.com/life/music/news/2003-03-12-stones_x.htm ("The four songs, all of which include sexual references, were . . . cut from the mainland release of the band's *40 Licks* compilation album by China's culture ministry.").

[6] *See* Michael Wines, *A Dirty Pun Tweaks China's Online Censors*, N.Y. TIMES, Mar. 11, 2009, at A1 (explaining that the Chinese translation of "Grass Mud Horse," when given slightly different inflections, can sound like "an especially vile obscenity").

[7] Nicholas D. Kristof, Op-Ed., *Google Takes a Stand,* N.Y. Times, Jan. 14, 2010, at A37.

[8] Jessica E. Vascellaro & Loretta Chao, *Google Defies China on Web*, WALL ST. J., Mar. 23, 2010, at A1.

[9] *Id.*

Renminbi (RMB) may currently be undervalued.[10] Currency manipulation is one of the allegedly unfair tactics used to foster China's extraordinary trade surplus.[11] "China has become by far the largest surplus country in the world, recently passing Japan, and far ahead of all others."[12] Complaints arise mainly from the mechanism by which the RMB is valued. From September 2008 to June 2010, the Chinese RMB "remained fixed" at approximately 6.83 Yuan for every US dollar.[13] A peg to the U.S. dollar may be said to result in undervaluation of the RMB because the RMB has seen a steady increase in "purchasing power parity" relative to the USD.[14] While the Chinese government contends that this measure is intended to prevent a dangerous level of inflation,[15] a pegged currency has important side effects. An undervalued RMB means that Chinese goods are relatively less expensive to foreign buyers – resulting in an advantage over similar products with prices represented by more expensive currency. A more natural rise in RMB value would result in more expensive Chinese currency and therefore, more expensive Chinese goods. As one analyst noted, "The world's most competitive economy has become even more competitive through a deliberate policy of currency undervaluation."[16]

The United States has publicly expressed interest in leveling the trade deficit with China.[17] The most recent statistics from the Office of the United States Trade Representative (USTR) showed that in 2008, "U.S. goods and services trade with China totaled $433 billion . . . . Exports totaled $86 billion; Imports totaled $348 billion. The U.S. goods and ser-

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[10] Edward Wong & Mark Landler, *China Rejects U.S. Complaints on its Currency*, N.Y. TIMES, Feb. 4 2010, *available at* http://www.nytimes.com/2010/02/05/world/asia/05diplo.html?ref=business.

[11] *Id.*

[12] *The Dollar and the Renminbi: Statement before the Hearing on U.S. Economic Relations with China: Strategies and Options on Exchange Rates and Market Access Before the Subcomm. on Security and International Trade and Finance, Comm. on Banking, Housing and Urban Affairs,* 110th Cong. 1 (2007) [hereinafter *The Dollar and the Renminbi*] (statement of C. Fred Bergsten, Director, Peterson Institute for International Economics).

[13] William R. Cline, *Renminbi Undervaluation, China's Surplus, and the US Trade Deficit*, *available at* http://www.petersoninstitute.org/publications/pb/pb10-20.pdf.

[14] International Monetary Fund, *World Economic Outlook Database* (April 2009), *available at* http://www.imf.org/external/pubs/ft/weo/2009/01/weodata/weorept.aspx?pr.x=41&pr.y=7&sy=2006&ey=2014&scsm=1&ssd=1&sort=country&ds=.&br=1&c=924&s=PPPEX&grp=0&a=. In terms of Purchasing Power Parity, the RMB was equivalent to 3.462 USD in 2006, and by 2008, had risen to 3.798 USD. *See id.*

[15] Cline, *supra* note 13, at 1 (noting that "Chinese authorities [chose] to freeze the currency against the dollar once again, in pursuit of greater stability in the face of greater international uncertainty").

[16] *The Dollar and the Renminbi*, *supra* note 12, at 3.

[17] *China and the WTO: Let Me Entertain You*, ECONOMIST, Aug. 15, 2009, at 36.

vices trade deficit with China was $262 billion in 2008."[18] When measured in terms of goods only, the deficit with China was roughly $227 billion in 2009[19] (representing 45.38% of the total U.S. trade deficit in goods).[20] American and European governments have complained that "China is becoming increasingly nationalistic in its trade policies."[21] Many in the United States have expressed concern over the significant shift in economic leverage.[22] As Homer Simpson once quipped, "By the time Bart's eighteen, we're gonna control the world. We're China, right?"[23]

Foreign businesses dealing in books, newspapers, theatrical films, and music clearly have an interest in gaining access to the lucrative Chinese market for their products. In addition to denying access to a potentially profitable outlet, restrictive import policies have unintentionally created a black market for pirated music and film.[24] Though the market is technically illegal, Chinese consumers tend to pay relatively low prices for entertainment products.[25] Because of the developed market for dubbed albums and movies, entertainment firms fear that they will struggle to establish a market for authorized products (if and when they are granted access).[26]

For its part, China has a strong interest in regulating the content that will enter its national markets and eventually reach its citizens. Although many would not agree that a government should impose a censorship mechanism on cultural materials, the intergovernmental community has resigned itself to a somewhat relativist stance on regulating public morality.[27] The Panel in *U.S.-Gambling* noted that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation," and that WTO members "should be given

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[18] *U.S.-China Trade Facts*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Sept. 16, 2010), *available at* http://www.ustr.gov/countries-regions/china.

[19] *Id.*

[20] *Id.*

[21] Keith Bradsher, *W.T.O. Rules Against China in Media Case*, N.Y. TIMES, Aug. 13, 2009, at A1.

[22] *See generally* Michael Elliott, *The Chinese Century*, TIME, Jan. 22, 2007, at 32.

[23] *The Simpsons: G.I. (Annoyed Grunt)* – (Episode 18.05, Fox Television Broadcast Nov. 12, 2006).

[24] *China and the WTO*, *supra* note 17, at 36.

[25] *Id.*

[26] *Id.*

[27] *See, e.g.*, United Nations Educational, Scientific and Cultural Organization [UNESCO], Res. 31/1, 1, Records of the General Conference 16, 31st Sess., Oct. 15-Nov. 3, 2001, *available at* http://unesdoc.unesco.org/images/0012/001246/124687e.pdf.

some scope to define and apply for themselves the concepts of 'public morals.'"[28]

For each of these debates, the outcome of the dispute resolution will have a substantial impact. In addition, the judicial bodies to *China-Audiovisual Products* had the opportunity to shed light on several facets of international trade law. Most important for the purposes of this article is the discussion surrounding China's use of the "public morals" exception.

A. *Case Background:* China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products

In October 2007, the United States requested that the WTO assemble a dispute settlement Panel to evaluate Chinese measures affecting audiovisual entertainment products which allegedly restricted trading rights in violation of China's WTO obligations.[29] In the summer of 2008, the Panel was assembled and met with representatives from the United States and China, and also with interested third parties.[30] In June 2009, the WTO dispute resolution Panel issued a report of its findings to the parties, and in December of that year, the Appellate Body issued its report.[31]

In its complaint to the Panel, the United States claimed violations with respect to "Chinese measures that are alleged to unjustifiably restrict the right of enterprises in China and foreign enterprises and individuals to import into China reading materials, AVHE products, sound recordings, and films for theatrical release by limiting trading rights to Chinese state-owned enterprises."[32]

Specifically, the United States alleged that China's measures regarding internal sale and distribution of audiovisual entertainment products and reading materials were in violation of the GATT, GATS and China's WTO Accession Protocol.[33] In a summary of the allegations, the Office of the United States Trade Representative reported that:

> China has not yet liberalized trading rights for these products. China continues to wholly reserve the right to import these products to state trading enterprises, as reflected in a complex web of measures

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[28] Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 6.465, 6.461, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S.-Gambling Panel Report].

[29] Panel Report, *China-Measures Affecting Trading Rights and Distributional Services for Certain Publications and Audiovisual Products*, ¶¶ 1.6, 2.1, WT/DS363/R (Aug. 12, 2009) [hereinafter China-Audiovisual Panel Report].

[30] *Id.* ¶ 1.9.

[31] *Id.* ¶ 1.1.

[32] *Id.* ¶ 2.3.

[33] *Id.* ¶ 3.1.

> issued by numerous state agencies, including the State Council, the State Administration of Radio Film and Television (SARFT), [the Ministry of Foreign Commerce], the National Development and Reform Commission (NDRC), the Ministry of Culture, the General Administration of Press and Publication (GAPP) and the General Administration of Customs.[34]

Regarding the Accession Protocol, the United States claimed that China's restrictive measures were in violation of its commitment to liberalize trading rights for all enterprises in China.[35] The United States pointed to paragraphs 5.1 and 5.2 of the Accession Protocol as bases for this obligation.[36] According to paragraph 5.2, it was intended that trading rights would extend to *all* enterprises – even to "those not invested or registered in China."[37] Under this provision, the liberalization was to be implemented within three years of China's accession. That period expired on December 11, 2004.[38]

Paragraph 5.1 of China's Accession Protocol addresses "trading rights." The US conceded that the right to "trade" does not include the right to internal distribution.[39] With regard to distribution rights, the United States claimed that China's restrictive policies were in violation of GATS article XVII.[40]

In response to the claims, China characterized its regulatory measures as an integral part of "a selection process which limits the number of importation entities, *but which is justified in order to implement an effective and efficient content review*."[41] Therefore, China claimed, the measures were justifiable under Article XX(a) of the GATT – the so-called "public morals" exception.[42]

There was some question of whether the public morals exception – embodied in the GATT and in the GATS, but not expressly in the Accession Protocol – should be allowed to apply against a claim arising outside of the GATT and GATS.[43] The Panel concluded, and the Appellate Body affirmed, that the defense should be available in defense of Acces-

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[34] UNITED STATES TRADE REPRESENTATIVE, 2009 U.S.T.R. REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 23 (2009) [hereinafter U.S.T.R. REPORT].

[35] China-Audiovisual Panel Report, *supra* note 29, ¶¶ 7.227-.229.

[36] *Id.* ¶¶ 7.235, 7.237. Paragraph 5.1 provides that, "China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China . . . ." *Id.*

[37] *Id.* ¶ 7.235.

[38] *Id.* ¶ 7.247.

[39] *See* U.S.T.R. REPORT, *supra* note 34, at 22.

[40] *See id*.; s*ee also* China-Audiovisual Panel Report, *supra* note 29, ¶¶ 7.918-.924.

[41] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.331 (emphasis added).

[42] *Id.* at 275-77.

[43] *See* Dispute Settlement Commentary for Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications*

sion Protocol claims.[44] However, the reasoning behind this conclusion was somewhat unclear, and this issue is likely to incite debate in future cases.[45]

The public morals exception can be found within the GATT's Article XX "General Exceptions."[46] GATT Art. XX(a) has an analog in GATS Article XIV(a).[47] The language of the two provisions is similar, although the GATS provision contains an additional clause covering measures which are necessary "to maintain public order."[48]

For a proper interpretation of Article XX(a), it is helpful to have some general understanding of the legislative history. "The GATT was drafted by governments attending the U.N. Conference on Trade and Employment of 1946-48."[49] This conference was the site of negotiations for the charter of the International Trade Organization (also known as the Havana Charter).[50]

The original version of the public morals exception was drafted by the United States in 1945 as part of an outline for the ITO charter.[51] Interestingly, there was not much debate surrounding the inclusion of such an exception.[52] It has been suggested that this lack of deliberation is evidence that the parties to the Havana Charter already had some common understanding about the significance of a public morals exception – probably from the use of similar provisions in earlier commercial treaties.[53]

GATT Article XX provides that, "[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (*a*) necessary to protect public morals . . . ."[54] As interpreted in previous Panel disputes, there are two principal elements to a successful public morals defense.

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and Audiovisual Entertainment Products, 24, WT/DS363/AB/R (July 23, 2010) [hereinafter DSC for China-Audiovisual AB], *available at* Worldtradelaw.net.

[44] *Id.*

[45] *Id.* at 25.

[46] GATT 1947, *supra* note 3, art. XX(a).

[47] General Agreement on Trade in Services, Apr. 15, 1994, art. XIV, 1869 U.N.T.S. 196, 33 I.LM. 1167 (1994).

[48] *Id. See generally* Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT'L ECON. L. 43 (2007) (explaining the practical implications of the GATS "to maintain public order" element).

[49] Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 703 (1997).

[50] *Id.*

[51] *Id.* at 704.

[52] *Id.* at 704-05.

[53] *Id.*

[54] GATT 1947, *supra* note 3.

The first element has been described as the "link between import entities, content review and the protection of public morals."[55] Essentially, the Panel asks whether the measures at issue are actually designed to protect public morals.[56] It has been noted that an exception for measures "designed to protect public morals" will invariably give rise to ambiguity.[57]

> "Public morals" could mean anything from religious views on drinking alcohol or eating certain foods to cultural attitudes toward pornography, free expression, human rights, labor norms, women's rights, or general cultural judgments about education or social welfare. What one society defines as public morals may have little relevance for another, at least outside a certain core of religious or cultural traditions.[58]

In its assertion of the defense, China claimed that the imported products are "cultural goods" that could have a potentially harmful effect on public morals.[59]

Often, this first element is not a substantial hurdle.[60] In the dispute at hand, the United States was willing to concede that China's measures were designed to protect public morals, thus satisfying the first element of the defense.[61] Instead, the US claimed that China's measures were not sufficient under the second element of the defense. That is, the measures were allegedly not "necessary" to protect public morals within the meaning of Article XX(a).[62]

A similar "necessity" element is contained in Article XX(b) (an exception for measures that are necessary to protect human, animal or plant life or health) as well as in subsection (d) (an exception for measures that are necessary to comply with laws not inconsistent with the GATT).[63] The public morals exception has not been the subject of many WTO dispute resolutions. One commentator opined that the lack of precedent under Article XX(a) is owed to the fact that the other subsections seem to provide more concrete exceptions.[64] "For example, importation of prison-made goods is covered under article XX(e). Trade in harmful drugs is covered under article XX(b). Trade in weapons is covered under

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[55] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.751.

[56] *Id.* ¶¶ 7.757-.758.

[57] Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 N.Y.U. L. REV. 802, 815 (2006).

[58] *Id.*

[59] China-Audiovisual Panel Report, *supra* note 29, ¶¶ 7.712-.714.

[60] *See* U.S.-Gambling Panel Report, *supra* note 28 and accompanying text.

[61] *See* China-Audiovisual Panel Report, *supra* note 29, ¶ 7.756.

[62] *Id.*

[63] GATT 1947, *supra* note 3, art. XX(b), (d).

[64] *See* Charnovitz, *supra* note 49, at 726.

article XXI."[65] Subdivisions (b) and (d) have provided more case law development than subsection (a), and the Panel in *China-Audiovisual Products* made reference to precedent set under these provisions.[66]

II. The "Necessary" Element

"The term 'necessary' in GATT and WTO jurisprudence has a long and controversial history."[67] To be sure, the necessity test is complicated. A multilevel and multifactor approach makes the test susceptible to inconsistent application. Fortunately, several cases under the WTO have contributed to a clearer understanding of what it means for measures to be "necessary" for the purpose of GATT Article XX and GATS Article XIV. This section will analyze some of the major developments in "necessary" jurisprudence.

A. *General Principles*

It may be important to note that not every subsection of Article XX contains the "necessary" element. For example, subsections (c), (e), and (g) provide for a less-stringent "relating to" standard.[68] In the context of subsection (g), the "relating to" element has been interpreted to require that a measure be "primarily aimed at" the conservation of exhaustible natural resources.[69]

The term "necessary" as used in Article XX can be understood as adopting the "minimum derogation principle."[70] Under this principle, the proper inquiry is "whether there are alternative measures reasonably available that would be as effective as the one adopted" and "are either WTO consistent or, if not WTO consistent, less trade restrictive than the measure which was actually adopted."[71] If the complaining party is able to present such alternative measures, the measure at issue will fail the Article XX analysis.[72]

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[65] *Id.*

[66] *See, e.g.*, China-Audiovisual Panel Report, *supra* note 29, ¶ 7.746.

[67] Dispute Settlement Commentary for Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, 12, WT/DS332/AB/R (2007) [hereinafter DSC for Brazil-Tyres], *available at* Worldtradelaw.net.

[68] GATT 1947, *supra* note 3.

[69] Kevin C. Kennedy, International Trade Regulation 270 (Vicki Been et al. eds., Aspen 2009) (citing Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R (Nov. 6, 1998)).

[70] *Id.*

[71] *Id.*

[72] *Id.*

B. *"Necessary" in WTO Case Law*

1. *United States-Standards for Reformulated and Conventional Gasoline*

The maiden assembly of a WTO dispute resolution, *US-Standards for Reformulated and Conventional Gasoline*, involved claims that some provisions of the 1990 Clean Air Act had a discriminatory effect against importers of foreign gasoline in violation of GATT Article III:4, the "national treatment" obligation.[73] The United States claimed that its measures were justified under subsections (b), (d), and (g) of GATT Article XX.[74] Laying the groundwork for future use of Article XX defenses in WTO dispute settlements, the Panel required the US to show three preliminary elements:

> (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health; (2) that the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy objective; and (3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.[75]

As later cases would reveal, the first element is not ordinarily difficult to satisfy. The third element is referred to as the Article XX "chapeau."[76] Essentially, this is a good faith requirement, in place to prevent abuse of the Article XX exceptions.[77] It has proven to be a more significant obstacle than the first requirement, and in fact, failure to satisfy the chapeau was the demise of the United States' Article XX defense in *US-Gasoline*.[78] The second element would become a central inquiry in several future cases and is the focus of this article.

The *US-Gasoline* dispute clarified the analysis of "necessary" in at least one important way. Although the language of Article XX seems simple, there was some confusion as to *what* exactly had to be necessary.[79] The Panel determined that it was *the discriminatory aspect* of the measures

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[73] Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, ¶¶ 2.1-2.3, WT/DS2/R (Jan. 29, 1996) [hereinafter U.S.-Gasoline Panel Report].

[74] *Id.* ¶ 6.4(b).

[75] *Id.* ¶ 6.20.

[76] *See* KENNEDY, *supra* note 69.

[77] *Id.*

[78] Dispute Settlement Commentary for Appellate Body Report, *U.S.-Standards for Reformulated and Conventional Gasoline*, 5-6, WT/DS2/AB/R (2001) ("[T]he Appellate Body found that the baseline establishment rules constitute 'unjustifiable discrimination' and a 'disguised restriction on international trade' under the Article XX *chapeau*, and therefore are not justified under Article XX.").

[79] *Id.* at 7.

that had to be "necessary" to protect human health.[80] That ruling was overturned by the Appellate Body, which concluded that it is the *measure itself*, and not the discriminatory aspect of the measures, that must be necessary.[81] It seems likely that the Panel's interpretation would have made the necessity test more difficult for a proponent than under the Appellate Body's formulation.

2. *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*

Korea-Beef involved claims by Australia and the United States that Korea's "dual retail system" for sales of domestic and imported beef was inconsistent with, among others, GATT Article III:4.[82] Korea argued, pursuant to GATT Article XX(d), that its measures were justified as necessary to assure compliance with its own Unfair Competition Act.[83]

Korea's employment of subsection (d) added further depth to the "necessity" analysis. The Appellate Body noted that proving "necessity" in the Article XX context does not require the proponent to show that the measures are truly "indispensable."[84] The AB went on to note that determining whether a measure is necessary for purposes of subsection (d):

> involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[85]

Possibly concerned that it had announced too flexible a test, the Appellate Body added that "necessary" could refer to "a range of degrees of necessity," and that a "'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"[86] Because "necessary" is such an ambiguous term, it is not surprising that this brand of semantics has become a hallmark of the necessity analysis.

The Appellate Body in *Korea-Beef* made another important contribution to the necessity test by providing that "[t]he more vital or important

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[80] *Id*. at 8.

[81] *Id.*

[82] Panel Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 614, WT/DS161,169/R (July 31, 2000) [hereinafter Korea-Beef Panel Report].

[83] *Id.* ¶ 645.

[84] Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161,169/AB/R (Dec. 11, 2000) [hereinafter Korea-Beef AB Report].

[85] *Id.* ¶ 164.

[86] *Id.* ¶ 161.

[the common interests or values at stake], the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument."[87] Here, the Appellate Body effectively announced a new avenue for subjective reasoning. One can understand the Appellate Body's desire to explain its position. However, each additional element seems to cloud the analysis.

In keeping with the minimum derogation principle, the Appellate Body also noted that a "necessary" analysis would likely include "the determination of whether a WTO-consistent alternative measure which the member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available.'"[88] At this point, it was not clear what type of proposal would suffice as a reasonably available alternative. It was also unclear which party would bear the burden of demonstrating the existence of reasonably available alternative measures – or the lack thereof.

3. *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*

The central issue in *EC-Asbestos* was a French ban on the importation and domestic production of asbestos and asbestos-containing products.[89] Picking up where *Korea-Beef* left off, the Panel and Appellate Body in *EC-Asbestos* attempted to clarify two of the previously announced factors of the necessity test.

First, the judicial bodies were required to analyze the existence of "reasonably available alternative measures."[90] Canada, the complainant, argued that "controlled use" of asbestos-containing products would serve the same public health concerns, and therefore, was a "reasonably available" and "less trade restrictive" alternative to France's total ban.[91] The Appellate Body did not agree with Canada's characterization. It stated that, "[i]n our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt.'"[92] That is, France sought to protect its population from *any* exposure to asbestos, and "controlled use" of asbestos could not possibly achieve that end. Therefore, controlled use could not be considered a reasonably available alternative. This holding is consistent with the WTO's position "that members . . .

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[87] Korea-Beef AB Report, *supra* note 84, ¶ 162.

[88] *Id.* ¶ 166 (quoting Panel Report, *United States – Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989)).

[89] Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 1-3, WT/DS135/R (Mar. 12, 2001) [hereinafter EC-Asbestos AB Report].

[90] *Id.* ¶¶ 84, 86.

[91] *Id.* ¶¶ 16, 173.

[92] *Id.* ¶ 174 (emphasis in original).

have the right to determine the level of protection that they consider appropriate."[93] In order for the complainant to meet its burden, the proposed alternative measures must allow the proponent to achieve its desired level of protection.

The other factor upon which *EC-Asbestos* was able to shed light was the "relative importance" standard announced by the Appellate Body in *Korea-Beef*. The Appellate Body placed a great deal of weight on the fact that France's measures were intended to preserve human life and health – a value which was called "both vital and important in the highest degree."[94] Most would agree (especially in hindsight) that a public health risk like asbestos exposure is an extremely serious concern – serious enough to justify trade-restrictiveness. Further, it is notable that the measure at issue was a *complete ban* on asbestos. Although a policy could hardly be more trade-restrictive, the proponents were able to justify their policy in the name of public health.

Considering the importance of the interests and Canada's failure to present reasonably available alternatives, the Appellate Body upheld the Panel's finding that France's decree was "necessary" to protect human life and health under GATT Article XX(b).[95] The gravity of France's public health concerns makes *EC-Asbestos* seem like a relatively easy case. Of course, not every dispute would feature such a compelling policy goal.

4. *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

Before *China-Audiovisual Products*, *United States-Measures Affecting Cross-Border Supply of Gambling and Betting Services* was the only WTO case that saw use of the public morals exception.[96] Because the measures at issue affected services and not goods, the United States argued that its measures were justified under GATS Article XIV(a) instead of GATT Article XX(a).[97] However, the Panel suggested that this difference should not prevent the use of precedent set under GATT Article XX.[98]

The dispute involved three U.S. laws that were alleged to operate as a prohibition of Antiguan offshore gambling service providers in violation of GATS article XVI (a most-favored-nation provision).[99] The United

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[93] Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S.-Gambling Panel Report].

[94] EC-Asbestos AB Report, *supra* note 89, ¶ 172.

[95] *Id.* ¶ 175.

[96] Diebold, *supra* note 48, at 44.

[97] U.S.-Gambling Panel Report, *supra* note 93, ¶ 6.443.

[98] *Id.* ¶ 6.475.

[99] *Id.* ¶ 6.535.

States contended that its measures were necessary to protect public morals under GATS Article XIV(a).[100] The Panel determined that the U.S. measures *were* designed to protect public morals, but were not "necessary" for that purpose.[101]

As *U.S.-Gambling* was the first WTO case to consider Article XX(a), the Panel was able to consider the "relative importance" inquiry in a new light. Interestingly, the Panel described the United States' measures as serving "very important societal interests that can be characterized as 'vital and important in the highest degree.'"[102] That language is similar to the Appellate Body's characterization of measures intended to protect human life and health in *EC-Asbestos*. The similarity suggests that measures aimed at protecting public morals and measures designed to protect human life and health should be given similar weight for purposes of the "relative importance" analysis.

In further development of the "relative importance" inquiry, the Appellate Body attempted to clarify several of the factors that it suggested in *Korea-Beef*, and also commented on the relative weight that should to be accorded to each factor.[103] The Appellate Body called the necessity test "an objective standard."[104] Accordingly, the responding member's own characterization of the measures is relevant to the analysis, but not dispositive.[105] Once a Panel has determined the importance of the interests at stake, it should "then turn to other factors that are to be 'weighed and balanced.'"[106] The Appellate Body noted two primary factors to be weighed against the importance of the interests.[107] First is "the contribution of the measure to the ends pursued by it."[108] The second factor weighs "the restrictive impact of the measure on international commerce."[109]

U.S.-Gambling also contributed to the "reasonably available alternatives" analysis by clarifying the burden shifting procedure. The Panel initially concluded that the measures at issue were not "necessary" to protect public morals because, by rejecting an offer from Antigua to resolve the issue by consultation, "the United States failed to pursue in

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[100] *Id.* ¶ 6.443.

[101] *Id.* ¶ 6.535.

[102] *Id.* ¶ 6.492.

[103] Dispute Settlement Commentary for Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* 22, WT/DS363/AB/R (July 23, 2010), *available at* Worldtradelaw.net.

[104] Appellate Body Report, *United States – Measures Affecting Cross-Border Supply of Gambling and Betting Services*, ¶ 304, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S.-Gambling AB Report].

[105] *Id.*

[106] *Id.* ¶ 306.

[107] *Id.*

[108] *Id.*

[109] *Id.*

good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative."[110] Thus, in the Panel's view, the United States had failed to satisfy the "reasonably available alternatives" element.

The Appellate Body, however, overruled the Panel on that particular point – ultimately finding that the measures *were* necessary to protect public morals.[111] Correcting the Panel's understanding of the parties' respective burdens, the Appellate Body noted that "[i]t is not the responding party's burden to show in the first instance that there are *no* reasonably available alternatives to achieve its objectives."[112] Instead, the responding party should make a prima facie case that the measures are "necessary."[113] The complaining party may then present WTO-consistent alternative measures.[114] Once alternatives are presented, the burden shifts back to the responding party to demonstrate why the proposed alternatives are not "reasonably available."[115]

The Appellate Body went on to note that a suggested alternative measure might not qualify as "reasonably available" for at least two reasons. First, an alternative is not reasonably available if it is "merely theoretical in nature."[116] An alternative might be considered merely theoretical "if the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member . . . ."[117] Second, echoing the reasoning of *EC-Asbestos*, a suggested alternative will be considered "reasonably available" only if it would allow the responding party "to achieve its desired level of protection with respect to the objective pursued . . . ."[118]

Despite the fact that the "necessity" ruling favored the United States, the measures ultimately failed analysis under the Article XIV chapeau.[119]

5. *Brazil-Measures Affecting Imports of Retreaded Tyres*

The Appellate Body in *Brazil-Tyres*, a relatively recent case which included an analysis of Article XX(b) (an exception for measures necessary to protect human, animal or plant life or health), restated the "necessary" analysis as follows:

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[110] U.S.-Gambling Panel Report, *supra* note 93, ¶ 6.531.

[111] U.S.-Gambling AB Report, *supra* note 104, ¶ 373(D)(iii).

[112] *Id.* ¶ 309.

[113] *Id.* ¶ 310.

[114] *Id.* ¶ 311.

[115] *Id.*

[116] *Id.* ¶ 304.

[117] *Id.*

[118] *Id.*

[119] *Id.* ¶ 369 (noting that the Appellate Body agreed with the Panel's finding that the U.S. failed to show that the laws were not applied in a way which favored domestic suppliers of remote betting services).

> [I]n order to determine whether a measure is 'necessary' . . . a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, the result must be confirmed by comparing the measure with possible alternatives, which may be less restrictive while providing an equivalent contribution to the achievement of the objective.[120]

To recap the jurisprudence to this point, the "necessary" analysis should begin with the proponent's prima facie case. For the initial burden, the court should use the three-factored "weighing and balancing" test.[121] The first factor is the "relative importance" of the interests that the measures are designed to protect.[122] The other two factors are "contribution of the measure to the ends pursued" (a means-end analysis) and evaluation of the measures' "restrictive impact on international commerce."[123]

The second element of the analysis should be the complainant's opportunity to present "reasonably available" alternatives.[124] Although the *U.S.-Gambling* Appellate Body made an effort to clarify this analysis, some uncertainty remained for the parties in *Brazil-Tyres*.

The increasing complexity of the necessity analysis was apparent in *Brazil-Tyres*. During argument before the Appellate Body, there was some uncertainty with regard to the Panel's "weighing and balancing" analysis.[125] One problem is that the dynamics of the "weighing and balancing" inquiry are somewhat obscure. It is yet to be seen exactly how "trade restrictiveness" should cut against "relative importance," or how a tight means-end relationship should add to the proponent's case. There is also a question of whether "weighing and balancing" and "reasonably available alternatives" are truly distinct inquiries. It has been suggested that there is some amount of "overlap" between the two elements.[126]

In the previously discussed cases, *Korea-Beef* and *U.S.-Gambling*, the Appellate Body discussed the "means-end" and "restrictive impact" factors in terms of the "extent" of their contribution to, or detraction from, the responding party's case.[127] However, the Panel in *Brazil-Tyres* analyzed these factors as all-or-nothing tests.[128] That is, the Panel only asked

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[120] Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Brazil-Tyres AB Report].

[121] DSC for Brazil-Tyres, *supra* note 67, at 13.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 13-14.

[128] *Id.* at 13.

"*whether* the import ban on retreaded tyres *contributes to* the realization of the policy pursued."[129] On appeal, the European Communities argued that analyzing these two factors in absolute terms went against the formulations announced in *Korea-Beef* and *US-Gambling*.[130] Perhaps surprisingly, the Appellate Body found that the Panel did not err in its "weighing and balancing" analysis.[131]

By the time *Brazil-Tyres* was decided, the "necessary" analysis had shown its truly convoluted nature. With vague, interrelated, and overlapping elements, the analysis had become almost free-form. For the Panel and Appellate Body, there exists a fundamental problem of establishing a clear and consistent standard for use in future cases.[132]

III. "Necessary" As Applied in *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*

As previously discussed, the success of China's use of the public morals exception in this case turned mainly on whether the measures could be considered "necessary" within the meaning of Article XX(a). China argued that it was necessary for government actors to review the content of audiovisual entertainment products in order to avoid importing products that could have a negative effect on public morals in China.[133] Further, China stated that the particular measures were "essential" for avoiding the importation of inappropriate materials.[134] On this point, the United States argued that China failed to show that the measures prohibiting foreign importers were connected to the goal of preventing inappropriate material.[135] Allowing only a selective group of importers, the U.S. asserted, was not necessary to achieve adequate content review.[136] The United States placed emphasis on the fact that the present measures called for state-ownership of the import entities.[137]

The Appellate Body examined several aspects of the Panel's interpretation of the "necessary" element.

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[129] Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.115, WT/DS332/R (June 12, 2007) [hereinafter Brazil-Tyres Panel Report] (emphasis added).

[130] Brazil-Tyres AB Report, *supra* note 120, ¶¶ 11, 137.

[131] Brazil-Tyres AB Report, *supra* note 120, ¶¶ 155, 182.

[132] DSC for Brazil-Tyres, *supra* note 67, at 12-13.

[133] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.790.

[134] *Id.* ¶ 7.796.

[135] *Id.* ¶¶ 7.808-.809.

[136] *Id.* ¶ 7.809.

[137] *Id.* ¶ 7.811.

A. *The Panel's Overall "Analytical Approach"*

In proceedings before the Appellate Body, United States noted some concerns with the Panel's two-step analysis.[138] The United States claimed that the Panel's treatment would lead to confusion (mainly because the Panel actually found that the measures were "necessary" *absent reasonable alternative measures*).[139] As *both* parts of the test are supposed to contribute to the overall necessity analysis, it is to some extent confusing that the Panel would equate a successful prima facie case with "necessity," only later to call the measures "not necessary" because of the existence of reasonably available, less-restrictive alternatives. This point was not specifically raised as error – the U.S. merely "welcome[d] clarification from the Appellate Body that an Article XX analysis should be approached in an integrated fashion."[140]

The Appellate Body acknowledged that the Panel's verbiage was likely to create some confusion.[141] As the AB noted, "the Panel's use of the word 'conclude' in setting out its intermediate findings risks misleading a reader, as does its characterization of certain requirements as 'necessary' *before* it had considered the availability of a less restrictive alternative measure."[142] Ultimately, however, the Appellate Body confirmed that the "necessity" analysis does involve "distinct steps," and that the Panel's analysis did not "amount to error."[143] Although the point is mainly semantic, it demonstrates the necessity test's susceptibility to inconsistent application.

B. *"Weighing and Balancing"*

As previously noted, the Panel found that China successfully made a prima facie case that the measures were "necessary to protect public morals." There were several issues that led the Panel to this conclusion.

"Relative Importance" – In terms of the importance of the values at stake, China asserted that protecting public morality is "of vital importance."[144] The U.S. did not directly contest China's stance on this factor.[145] The Panel found that China's interests were sufficiently important,

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[138] DSC for China-Audiovisual AB, *supra* note 43, at 10 (noting that the US expressed concern over the Panel's decision to segregate the prima facie case from the "reasonably available alternatives" inquiry).

[139] Appellate Body Report, *China–Measures Affecting Trading Rights and Distributional Services for Certain Publications and Audiovisual Products*, ¶ 237, WT/DS363/AB/R (Jan. 19, 2010) [hereinafter China-Audiovisual AB Report].

[140] *Id.* ¶ 238.

[141] *Id.* ¶ 248.

[142] *Id.* (emphasis in original).

[143] *Id.* ¶ 249.

[144] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.794.

[145] *Id.* ¶ 7.816.

and that "it is up to each Member to determine what level of protection is appropriate in a given situation."[146]

"Material Contribution" – The Appellate Body's means-end analysis was divided into three constituent issues.

With regard to the state-ownership requirement, the Appellate Body concluded that the Panel did not err in finding that China's state-ownership requirement did not make a contribution to the protection of public morals.[147] With regard to the exclusion of foreign-invested enterprises, the Appellate Body affirmed the Panel's holding that excluding foreign enterprises did not make a material contribution to protecting public morals.[148]

The Panel determined that the "state plan" requirement was *capable of making* "a material contribution to the protection of public morals."[149] On this point, the Appellate Body concluded that the Panel had erred in its analysis.[150] Here, the Appellate Body had the opportunity to address the discrepancy that arose in *Brazil-Tyres*.[151] The AB in *China-Audiovisual* came to the following conclusion:

> The Panel stated at the outset of its analysis that it would "consider whether [the state plan requirement] *makes a contribution* to the realization of . . . the protection of public morals in China." This language suggests that the Panel intended to assess the *actual* contribution of the State plan requirement to the protection of public morals in China. The Panel then stated that it could "see that limiting the number of import entities *can make a material contribution*." Finally, in its conclusion, the Panel stated that "the requirement of conformity with the State plan is *apt to make a material contribution* to the protection of public morals." This statement does not appear to relate to the *actual* contribution of the State plan requirement to the protection of public morals in China.[152]

Ultimately, the Appellate Body found that the Panel's analysis was deficient in this regard, and consequently held that China had not met its burden of proof for this element of the "necessity" test.[153]

"Restrictive Impact" – It is worth noting that the Panel provided one additional factor to the "restrictive impact on international trade" analysis. In determining the restrictive impact of the measures, the Panel

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[146] *Id.* ¶ 7.819.

[147] China-Audiovisual AB Report, *supra* note 139, ¶ 269.

[148] *Id.* ¶ 278.

[149] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.836.

[150] China-Audiovisual AB Report, *supra* note 139, ¶ 294.

[151] *See supra* notes 126-27 and accompanying text (discussing the difference between asking whether measures are "capable of making a contribution" to the objective and analyzing the "extent" of measures' contribution to their objective).

[152] China-Audiovisual AB Report, *supra* note 139, ¶ 290.

[153] *Id.* ¶¶ 294, 297.

should weigh not only the restrictive impact on imports of the relevant products, but also the restrictive effect of the measures on those who wish to engage in importing the products.[154] This factor is favorable to a complainant because it will tend to increase a given measure's "restrictive impact."

On appeal, China claimed that the Panel had erred in considering the effect of the measures on prospective importers. In response, the Appellate Body noted that prior cases had characterized this element as an assessment of the "restrictive effect of a measure on international commerce."[155] In the Appellate Body's opinion, this phrase (when considered in conjunction with China's Accessions commitments) was broad enough to support the Panel's inquiry into the restrictive effect on those wishing to engage in international trade.[156]

C. *"Reasonably Available Alternative Measures"*

The United States presented alternative measures that it argued would be less restrictive on international trading rights.[157] Most importantly, the procedure suggested by the United States did not involve a restriction on which entities could import audiovisual products.[158] In order to protect public morals, the Government would conduct a final content review before the products could pass customs.[159] The U.S. argued that this procedure would achieve the necessary level of protection without restricting the rights of importers.[160]

The Panel analyzed the United States' proposed alternative and determined that the suggested plan *would* allow China to achieve the desired level of protection of public morals.[161] Additionally, the Panel found that the US plan would be "significantly less restrictive" than the current measures.[162] Completing the analysis, the Panel concluded that China was not able to demonstrate that the United States' alternative was not reasonably available to it.[163]

The Panel found that because the United States had presented "at least one" reasonably available alternative measure that was less trade-restrictive, China had failed to justify its measures pursuant to GATT Article XX(a).[164]

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[154] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.788.
[155] China-Audiovisual AB Report, *supra* note 139, ¶ 306.
[156] *Id.* ¶ 311.
[157] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.886.
[158] *Id.* ¶ 7.887.
[159] *Id.*
[160] *Id.*
[161] *Id.* ¶ 7.897.
[162] *Id.*
[163] *Id.* ¶ 7.907.
[164] *Id.* ¶ 7.911.

On appeal, China argued that the suggested alternative was not reasonably available to it. Specifically, China characterized the alternative as "merely theoretical in nature" because designating the Chinese government as the sole content review mechanism "would impose an undue financial and administrative burden on China."[165]The Appellate Body held that the Panel took the proper approach to the alternative measures analysis, and ultimately upheld the Panel's conclusion that the United States had provided at least one reasonably available alternative.[166]

As the Panel and Appellate Body concluded that China's policy was not "necessary" to protect public morals, the measures at issue were not justified under GATT Article XX(a).[167]

IV. Comparison to Application in Prior Case Law

The goal of this section is to compare the application of the "necessary" element in the six focal cases discussed earlier in this article.

Case	Provision	"Necessary" Outcome
U.S.-Gasoline	XX(b),(d)	Negative.
Korea-Beef	XX(d)	Negative.
EC-Asbestos	XX(b)	Positive, measures justified.
U.S.-Gambling	GATS XIV(a)	Positive, but measures eventually failed Chapeau analysis.
Brazil-Tyres	XX(b)	Positive, but measures eventually failed Chapeau analysis.
China-Audiovisual Products	XX(a)	Negative, failed to rebut alternative measures.

China-Audiovisual Products is another example of a proponent's failure to navigate the rigorous necessity test. Of the six cases discussed in this article, only one (*EC-Asbestos*) resulted in an ultimate finding of justification under Article XX. However, in three of the six cases, the proponent was able to overcome the necessity test. In the only other evaluation of the public morals exception, *U.S.-Gambling*, the United States' measures were considered "necessary," but eventually failed under the GATS Article XIV chapeau.[168]

Most importantly, over thirteen years and several cases since *US-Gasoline*, the necessity test has not emerged from a troubling state of flux. Each of the six discussed cases required additional elements and either clarification or restatement of the test, or both.

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[165] China-Audiovisual AB Report, *supra* note 139, ¶¶ 312, 322.

[166] *Id.* ¶ 332.

[167] *Id.* ¶ 415.

[168] China-Audiovisual Panel Report, *supra* note 29, ¶ 7.783; U.S.-Gambling Panel Report, *supra* note 93, ¶¶ 6.447-.448 (finding the text of GATT Article XX and GATS Article XVI to be sufficiently similar, such that "jurisprudence in relation to the former may be relevant and useful in the interpretation of the latter").

V. Conclusion

The "necessity" element has become a significant hurdle for parties attempting to justify measures under the GATT Article XX or GATS Article XIV exceptions. This may be a response to the relatively lax first element of the analysis – demonstrating that the measure in question is *designed* for the "protection of public morals." It is likely that the WTO is partial to the goal of minimizing trade barriers,[169] and that this would suggest an underlying advantage to the complaining party. However, announcements by the WTO are frequently hedged in order to (at least apparently in order to) leave room for cultural diversity. Take for example the proclamation that, "The WTO's founding and guiding principles remain the pursuit of open borders . . . . The opening of national markets to international trade, *with justifiable exceptions or with adequate flexibilities*, will encourage and contribute to sustainable development, raise people's welfare, reduce poverty, and foster peace and stability."[170] This obscure stance leaves difficult questions for the Panel and Appellate Body. What exactly constitutes a "justifiable exception," and what level of flexibility should be considered "adequate?"

The scope of the "general exceptions" contained in the GATT and GATS is a serious issue with direct consequences for the autonomy of WTO members. As one author noted:

> The WTO adjudicating bodies confronted with such a defence face the difficult task of weighing and balancing the policy objectives and public interests invoked by the responding Member against the interests of trade and economic development of the complaining Member. While a broad application of the general exceptions carries the risk of undermining the fundamental principles of the WTO agreements, a very stringent approach may infringe the legitimate interests and sovereign rights of a Member with regard to the protection of important values of its society.[171]

A. *Criticisms of the Current Jurisprudence*

1. Narrow Interpretation

Some groups have criticized the WTO's judicial bodies for interpreting the Article XX exceptions "too narrowly."[172] Although arriving at the optimal level of domestic sovereignty is an important goal, it is more important to provide a clear and predictable standard for use in future cases.

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[169] *See The WTO in Brief*, *supra* note 1.

[170] *About the WTO – A Statement by the Director General*, World Trade Organization, *available at* http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (emphasis added).

[171] Diebold, *supra* note 48, at 44.

[172] DSC for China-Audiovisual Panel, *supra* note 43, at 10.

In determining the proper scope of these exceptions, the judicial bodies should bear in mind article 31 of the Vienna Convention. Article 31 offers general rules of interpretation, and subsection (1) provides that, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*."[173] The issue here is that directing the adjudicating bodies to consider the object and purpose of the Article XX exceptions would likely make the test more, and not less, vague.

2. Subjective Analysis

Through the course of these cases, the Panel and Appellate Body have injected uncertainty by allowing subjective elements to influence the necessity test. The most troubling inquiry is the "relative importance" standard announced in *Korea-Beef*. By endorsing a discussion of the "importance of the interests or values at stake," the judicial bodies have dealt a blow to predictability in international trade.

Moreover, the subjective elements of the necessity test are preliminary to analysis under the Chapeau, which has its own brand of obscure reasoning.[174]

3. Clarity and Predictability

As the Appellate Body in *Korea-Beef* announced, "necessary" could refer to "a range of degrees of necessity," and that a "'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"[175] Because "necessary" is susceptible to several interpretations, it is not surprising that this brand of semantics has become a hallmark of the necessity test.

"Necessity" has been a difficult concept to clarify, but it would be beneficial for the WTO's judicial bodies to arrive at a uniform standard that can be consistently applied. As the WTO's Dispute Settlement Understanding notes, "[t]he dispute settlement system of the WTO is a central element in providing security and *predictability* to the multilateral trading system."[176]

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[173] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 311 (emphasis added).

[174] GATT 1947, *supra* note 3 (Article XX requires that measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.").

[175] Korea-Beef AB report, *supra* note 84, ¶ 161.

[176] WTO Agreement, Annex 2, "Understanding on Rules and Procedures Governing the Settlement of Disputes" art. 3.2, Apr. 15, 1994, 1869 U.N.T.S. 402 (emphasis added).

The trend of "necessity" jurisprudence has been to add uncertainty to an already complex burden of justification under Article XX. Without an effort to streamline the necessity analysis, the test will continue to confound the parties to these disputes. By reformulating the current test, the judicial bodies can add clarity and legitimacy to what has become a subjective and unwieldy standard.