



# **Legal opinion on the WTO conformity of an EU export ban on chemicals prohibited in the EU**

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# 1. Introduction

## 1.1. FACTUAL AND EU LEGAL BACKGROUND: EXPORTING WHAT IS BANNED IN THE EU

In September 2020, an investigation by Public Eye and Unearthed revealed for the first time the extent to which hazardous pesticides prohibited in the EU are exported to third countries.<sup>1</sup> The investigation found that in 2018, EU countries approved the export of more than 81,000 tons of pesticides containing 41 hazardous chemicals that are banned for agricultural use in the EU in order to protect human health or the environment.<sup>2</sup> Three quarters of the 85 importing countries are low or middle-income countries,<sup>3</sup> where the use of such substances presents the highest risks and results in devastating effects on human health, the environment, biodiversity and ecosystems. Brazil, Ukraine, Morocco, Mexico and South Africa are among the top ten importers of EU pesticides that are banned within the EU.

While highly questionable on various grounds, this practice is nevertheless legal. The chemicals are banned from use in the EU, yet nothing prevents their production on EU territory nor their export from EU territory to third countries, as long as exporting companies comply with the EU Prior Informed Consent (PIC) Regulation.

The PIC Regulation was adopted to implement the Rotterdam Convention<sup>4</sup> within the EU.<sup>5</sup> It governs the trade of hazardous chemicals that are banned or severely restricted in the EU “in order to protect human health or the environment.”<sup>6</sup> While 52 chemicals are listed in the Rotterdam Convention,<sup>7</sup> the PIC Regulation goes further by covering all hazardous chemicals that have been “banned” or “severely restricted” in the EU.<sup>8</sup> There are currently 207 pesticides, 3 “severely hazardous formulations” and 59 industrial chemicals that are subject to the PIC Regulation.<sup>9</sup> The list of chemicals is updated every year with newly banned or severely restricted chemicals. In April 2022, an amendment to the Regulation added 22 chemicals (15 pesticides and 7 industrial chemicals).<sup>10</sup>

With the exception of certain chemicals listed in Annex V of the PIC Regulation that are banned from export (e.g. persistent organic pollutants and some mercury compounds), the PIC Regulation places obligations on companies that intend to export chemicals to non-EU countries or import them into the EU. Exporters based in an EU Member State must thus notify their intention to export certain chemicals to a non-EU country.

This legislative framework leaves ample room for a questionable double standard in trade practices, whereby the use of certain chemicals is prohibited domestically on the grounds of protecting human health and the environment, while their export, although regulated, remains permissible. The EU thus has one of the most protective and comprehensive frameworks for the use of hazardous chemicals within its own territory, yet the very environmental damage and risk to human health that it actively prevents within its territory is exported to third countries.

Considered through the lens of international human rights law, this double standard has been pointed out to be a blatant human rights violation. In fact, as emphasized by UN Special Rapporteur on toxics Baskut Tuncak in a statement endorsed by 35 UN Human Rights Council experts, “States exporting banned chemicals without a strong public interest justification are in violation of their extraterritorial obligations under international human rights law, including their obligations relating to a healthy environment and safe and healthy working conditions,”<sup>11</sup> referring to the 2017 General Comment No. 24 of the Committee on Economic, Social and Cultural Rights.<sup>12</sup> Highlighting the externalization of health and environmental impacts on the most vulnerable and the distinctly “racialised nature” of these standards, the Special Rapporteur forcefully concluded that failing to address these regulatory and trade practices “is discrimination, pure and simple.”<sup>13</sup>

## 1.2. THE CHEMICALS STRATEGY FOR SUSTAINABILITY AND THE EU COMMITMENT TO ADDRESS THE EXPORT OF BANNED CHEMICALS

Following the European Green Deal and the Farm to Fork Strategy, the EU Chemicals Strategy for Sustainability adopted in October 2020<sup>14</sup> has raised much hope. The EU indeed committed to “lead[ing] by example, and, in line with international commitments, ensur[ing] that hazardous chemicals banned in the European Union are not produced for export, including by amending relevant legislation if and as needed.”<sup>15</sup> The European Council welcomed the initiative to address

“the production for export of harmful chemicals not allowed in the European Union.”<sup>16</sup> Furthermore, the “actions” announced by the European Commission emphasize its commitment to “playing a leading role globally by championing and promoting high standards and not exporting chemicals banned in the EU.”<sup>17</sup>

The EU’s commitment to concrete action against the export of banned chemicals raises the question of the adequate legal action. In and of itself, the commitment to “not exporting chemicals banned in the EU” contains the hypothesis of legally prohibiting their export.

# 2. The case for an EU export ban on prohibited chemicals

## 2.1. WHAT IS AN EXPORT BAN, AND WHAT FOR?

“Export bans” are not embargoes, i.e. trade sanctions taken either individually or collectively and targeting a specific country.<sup>18</sup> States can in fact prohibit (or restrict) exports of specific products for a large number of reasons.<sup>19</sup> The last three years alone have seen a dramatic increase in trade measures enacting export restrictions or prohibitions in reaction to the Covid-19 pandemic, and more recently to the war in Ukraine, which have confronted the WTO with unprecedented challenges.<sup>20</sup> Often, export-restrictive measures in the agricultural and food sectors are adopted to address food security by stabilizing domestic supplies. They can also be used to prevent the depletion of natural resources.

Considering the multiple domestic and global concerns involved, calling for an export ban on hazardous chemicals already banned in the EU does not seem unreasonable. The notion of “export ban,” however, lacks precision. Most intuitively it is understood *stricto sensu* as legal action prohibiting the export of certain products through legislation making their export unlawful. However, the *effects* of an export ban can also be achieved indirectly, by prohibiting the *production* of the targeted products in a given territory. Both strategies interact, and they both have loopholes in terms of the achievement of their objectives. The main fact remains, however, that there are not multiple ways in which the EU can legally enact its commitment to “not exporting chemicals banned in the EU.”<sup>21</sup> The hypothesis considered here is not the prohibition of



*producing* hazardous chemicals on EU territory, as was also indicated by the EU Commission, but the sole prohibition of their *export*, in relation to the rules of the World Trade Organization (WTO) governing international trade.

## 2.2. SUPPORT FOR AN EXPORT BAN AND LEGAL AVENUES

Such legal action had already been endorsed, subsequent to the abovementioned 2020 investigation, by 76 NGOs in an open letter to the EU Commission, calling on it to “prohibit not only the export of hazardous pesticides that are banned in the EU, but also the import of food and agricultural goods produced with such pesticides outside the EU.”<sup>22</sup> More recently, in December 2022, a joint statement was endorsed by as many as 326 NGOs and trade unions, calling on the European Commission to “uphold its commitment and table, without further delay, a legislative proposal to prohibit the export of all pesticides and other hazardous chemicals banned at EU level, to put an end to double standards, and to ensure a level-playing field for the industry and harmonization between national legislations.”<sup>23</sup> Finally, it is noteworthy that a number of Members of the European Parliament also called for an export ban in an open letter to the Commission. Forcefully stating the obvious – “What is too dangerous for use in the EU is also too dangerous for use in other countries”<sup>24</sup> – they called on the Commission to “prohibit the export of pesticides banned from use in the EU.”<sup>25</sup>

It is significant that such action is already being actively pursued by individual EU Members. In a 2020 memo to the EU Commission, France emphasized that the Chemicals Strategy for Sustainability should be “used as an opportunity to ban the production and export of chemicals, in particular pesticides, which are banned in the EU in view of their harmfulness to the environment and human health. The French authorities consider it unacceptable that dangerous substances banned for use within the European Union can be produced on European soil for export outside the EU.”<sup>26</sup> In line with this position, although limited to pesticides, the French EGAlim law prohibits the export to third countries of plant protection products banned in the EU. Germany recently followed suit and a similar legislation is expected to enter into force in 2023.<sup>27</sup> Belgium equally endorsed a similar initiative at

the domestic level: in December 2022, the Minister for Environment introduced a royal decree to prohibit the export of prohibited chemicals from Belgium to non-EU third countries.<sup>28</sup> Beyond individual EU Members’ legislative initiatives and calls for action at the EU level, in September 2022 the German Minister for Agriculture expressed Germany’s determination, together with France, to champion an EU-wide production and export ban on hazardous chemicals. In fact, he forcefully stated that “it is inadmissible that we continue to produce and export pesticides that we have already banned at home on the grounds of protecting human health.”<sup>29</sup>

The EU Commission is expected to draft a legislative proposal in 2023. Among the range of options being considered and/or supported by political, social and economic partners and civil society, the Commission is assessing an amendment of the PIC Regulation.<sup>30</sup> In a 2020 letter to PAN Europe, the Commission indeed reiterated that the Chemicals Strategy for Sustainability aims at going further by “preventing the export of hazardous chemicals, including pesticides, banned in the EU,” and acknowledged that the Commission “is currently considering the various options for implementing this objective, including a revision of the legislation.”<sup>31</sup> In February 2023, the Commission confirmed this strong commitment and its determination to implement the actions of the Chemicals Strategy for Sustainability, as well as the ongoing assessment of available legal options including “a potential ban of the export of certain hazardous chemicals.”<sup>32</sup>

While obvious, it must be acknowledged that none of the legal options under consideration are inherently “easy.” Several studies, for instance, have already addressed the paths and difficulties for mirror measures,<sup>33</sup> which the 2022 French presidency of the Council of the EU had made one of its priorities. The report from the Commission issued on 3 June 2022 confirmed that the WTO offers the policy space for addressing health and environmental concerns through mirror measures, but that this should be done on the basis of a case-by-case assessment.<sup>34</sup> At the same time, pushback from diverging interests is expected for all options under consideration. While the EU needs to address these in the adequate political fora, the purpose of this opinion is exclusively to sketch out the legal WTO framework and to evaluate the legal feasibility of an export ban in light of the relevant WTO rules.

## 3. WTO legal framework: Assessing the path for compatibility of an export ban

Designing an export ban on chemicals already prohibited in the EU can only be done within certain constraints. An export ban differs from the notion of mirror measures, also being considered by the Commission, which have a different rationale as they bear on market access, i.e. on imports, and thus potentially fall within the scope of a number of WTO agreements (SPS and TBT Agreements, and the GATT). A measure prohibiting the export to third countries of chemicals banned in the EU, by definition, bears on exports only from within EU territory and would fall straight within the scope of the GATT (General Agreement on Tariffs and Trade). The GATT covers all fundamental disciplines for international trade in goods, understood as trade commodities, to which chemicals belong. The fundamental rationale of the GATT and all subsequent WTO agreements is to facilitate trade, which entails reducing barriers to trade and regulating existing or future barriers in such a manner that they are not abused. As an export ban is obviously a trade barrier to the highest degree, a better understanding of the WTO legal framework, avenues and constraints is crucial.

### 3.1. INITIAL GATT INCONSISTENCY OF AN EXPORT BAN

Regardless of other WTO obligations that might be breached by an export ban on hazardous chemicals, the most immediate and powerful obstacle is Article XI of the GATT.<sup>35</sup> Article XI addresses quantitative restrictions on imports and exports. As a matter of principle, and with the exception of duties and taxes, such restrictions are prohibited.<sup>36</sup>

The WTO has been asked to adjudicate disputes relating to export restrictions on several occasions. Its case law sheds light on the meaning and scope of application of GATT Article XI disciplines. In *China – Raw Materials*, focusing on the adjective “quantitative,” the Appellate Body held that “Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.”<sup>37</sup> As regards the terms “prohibition” and “restriction,” it held that “[t]he term ‘prohibition’ is defined as a ‘legal ban on the trade or importation of a specified commodity,’” while a restriction is “defined as ‘[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation’, and thus refers generally to something that has a limiting effect.”<sup>38</sup> An EU export

ban on hazardous chemicals would fall squarely within the scope of the proviso<sup>39</sup> and be inconsistent with the general prohibition laid out in Article XI:1.

However, the prohibition of GATT Article XI is not an absolute one. First, the proviso itself contains exceptions (not relevant here); secondly, and more importantly, the GATT contains other exception clauses which may allow a WTO Member to restrict exports in derogation from the general prohibition.

### 3.2. JUSTIFICATION OF AN EXPORT BAN UNDER THE GENERAL EXCEPTIONS OF ARTICLE XX

Article XX operates as a general exception to otherwise GATT-inconsistent, trade-restrictive measures: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (...)”

The ten paragraphs that follow exhaustively list the legitimate policy objectives pursuant to which Members may take trade-restrictive measures under Article XX.<sup>40</sup> Three of them stand out as being relevant for an EU export ban on prohibited chemicals: (measures that are) “(a) necessary to protect public morals;” “(b) necessary to protect human, animal or plant life or health;” and “(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on

domestic production or consumption.” These will be developed further below.

**Balance between rights and duties:** The nature and purpose of Article XX is to achieve a balance between rights and duties. On the one side, Members have the right to invoke an exception under Article XX; on the other side they have a duty to respect the treaty rights of other WTO Members.<sup>41</sup> Article XX thus creates a thin “line of equilibrium” between competing rights, geared towards the aim that neither cancels out the other.<sup>42</sup> This line of equilibrium guides the entire logic of invoking (and challenging) Article XX. A two-tiered test has consequently been developed by the WTO adjudicating bodies, according to “the fundamental structure and logic”<sup>43</sup> of Article XX. First, a measure must be determined to be covered by one of the proviso’s paragraphs (in which case it will be provisionally justified); secondly, it must meet the requirements of the introductory clause of the proviso (known as the “chapeau”).<sup>44</sup>

The main elements and interpretations of this two-tiered test will now be sketched out, with a view to demonstrating that the argumentative path for legal justification of an export ban under WTO rules, while narrow, does in fact exist for an export ban and can be supported. Beforehand, it should be pointed out that Article XX operates only insofar as a measure has been challenged and found to be WTO-inconsistent, in order to defend it by justifying this inconsistency. Article XX being an “affirmative defence,”<sup>45</sup> the burden of proof rests initially on the party invoking the exception. Should the export ban be challenged before the WTO, the EU would thus need to demonstrate *prima facie* it can be justified under Article XX.<sup>46</sup>

## 4. Focus: Article XX legal requirements for justifying an EU export ban

According to the first step of the two-tiered test, a measure found to be inconsistent with GATT obligations needs to be provisionally justified. This entails determining that it addresses a particular interest covered by the exception clause (4.1), and that a sufficient relationship exists between the measure and the interest protected (4.3).<sup>47</sup> Since the ban would focus on exports (vs imports), a particular point of interest is the notion of protecting legitimate interests located or oriented abroad (4.2). If provisionally justified, the measures must then be proven to meet the requirements of the *chapeau* (4.4).

### 4.1. SCOPE OF EXCEPTION CLAUSES: AN EXPORT BAN PURSUANT TO WHAT LEGITIMATE POLICY OBJECTIVE?

The following legitimate objectives covered by Article XX can be considered for justifying an export ban on hazardous chemicals prohibited in the EU: protection of human, animal or plant life or health (paragraph (b)), conservation of exhaustible natural resources (paragraph (g)), and protection of public morals (paragraph (a)).<sup>48</sup> The reasons why the chemicals are already banned in the EU are in fact multiple: their prohibition addresses concerns as pressing yet diverse as human health, consumer protection, farmer exposure,

groundwater contamination, environmental protection and biodiversity protection. These various concerns are comprehensively reflected in the EU PIC Regulation, which lists all chemicals that the EU has banned in order to protect “human health and the environment from potential harm.”<sup>49</sup> These concerns can all be accommodated under Article XX but distinctions are in order: while the logic of the PIC Regulation allows for blending multiple chemicals and pesticides together in its annexed lists, invoking the policy objectives covered by Article XX to prohibit their export calls for distinguishing them based on the object and purpose of the protection.<sup>50</sup> The three categories of policy objectives considered here therefore call for more detail.

**Protection of human, animal or plant life or health:** Paragraph (b) of Article XX allows for measures “necessary to protect human, animal or plant life and health.” An EU export ban aiming to protect human health, as well as to prevent certain types of environmental harm (“plant life or health”), should thus, *prima facie*, fall squarely within the exception clause.<sup>51</sup> This might be facilitated, in particular, if the EU enacted its commitment by an amendment of the PIC Regulation rather than by an autonomous regulation, as the PIC Regulation is explicitly geared towards the protection of human health and the environment and covers all



chemicals banned in order to achieve that protection.<sup>52</sup> Additionally, and since paragraph (b) of Article XX expressly refers to “protection,” there must be a risk to the health or life of humans, animals or plants, which the protective measure (export ban) aims to avoid.<sup>53</sup> While this requirement is not framed as strictly as under the SPS Agreement, which requires a measure to be grounded on a risk assessment according to a set of strictly interpreted requirements, the existence of a risk must nevertheless be supported by evidence (scientific data, expert opinions, etc.), which the WTO adjudicating body will evaluate. However, there is “no requirement (...) to ‘quantify’, as such, the risk to human life or health.”<sup>54</sup>

**Conservation of exhaustible natural resources:** Paragraph (g) allows for trade-restrictive measures “relating to the conservation of exhaustible natural resources,” but with the additional requirement that the measures “are made effective in conjunction with restrictions on domestic production or consumption.” This emphasizes the need for a comprehensive and consistently applied strategy (or what the Appellate Body called the requirement of “even-handedness”<sup>55</sup>), without tolerance for double standards and domestic derogations. As the Appellate Body has stated, the measure must have “a close and genuine relationship of ends and means’ to the conservation of exhaustible natural resources, when such trade measures are brought into operation, adopted, or applied and ‘work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.’”<sup>56</sup> In short, imposing a restrictive measure on trade partners while remaining lenient domestically falls short of the requirements of paragraph (g).<sup>57</sup> The prohibition already in force within EU territory is very strong evidence of such domestic restriction; existing derogations, however, would significantly weaken the argument. Regarding the latter, it should be noted that the European Court of Justice (ECJ) has recently handed down a groundbreaking judgment putting an end to derogations for the use of banned pesticides in the EU. The ECJ particularly emphasized that “the objective of protecting human and animal health and the environment should ‘take priority’ over the objective of improving plant production.”<sup>58</sup> This 2023 judgment is a powerful landmark in committing to consistency, as it concludes that EU Member States are not allowed to authorize the use of pesticides (or the use of seeds treated with those

pesticides) where such use has expressly been prohibited by EU law.<sup>59</sup>

In terms of its scope, paragraph (g) has been broadly interpreted, thus accommodating a large variety of environmental and biodiversity concerns. The Appellate Body indeed took the stance very early on that the notion of “exhaustible natural resources” should not be interpreted in a static way, limited to the understanding they may have been given in the mid-20<sup>th</sup> century when the GATT was drafted. On the contrary, they are to be interpreted “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”<sup>60</sup> Furthermore, in the same landmark decision *US – Shrimp*, the Appellate Body stressed the relevance of the preamble of the WTO Agreement for the interpretation of paragraph (g), where the “objective of sustainable development” is explicitly emphasized. This not only allows but even requires an “evolutionary”<sup>61</sup> interpretation, and the exception clause has thus been understood to cover non-living as well as living resources<sup>62</sup> that are “susceptible of depletion, exhaustion and extinction.”<sup>63</sup> Sea turtles, dolphins and clean air, for instance, were considered to be exhaustible natural resources.<sup>64</sup> This exception clause could be invoked, for instance and not exclusively, to justify banning the export of chemicals that pose threats to bee populations and risks of groundwater contamination.

**Public morals:** Paragraph (a) is the broadest exception clause, as it touches upon public concerns and community interests via the notion of “public morals.” As such, it offers an interesting avenue for justifying the prohibition of the export of all chemicals already banned within the EU, as a whole and without any distinctions based on the types of harm caused by these chemicals. In short, the argument would be that the ban comprehensively protects EU public morals.

The public morals exception inherently carries as much potential for protective policies as risks of abuse, and it has given rise to an abundant literature supporting a wide interpretation of the exception,<sup>65</sup> or, inversely, criticizing its virtual unboundedness.<sup>66</sup> While it certainly calls for caution, the WTO public morals exception provides evidence – quite rare in contemporary international law – of the inescapable enmeshment of legal rules and morality, and an even rarer acknowledgment that the latter can legitimately – and under certain conditions – supersede the former and justify otherwise illegal action.<sup>67</sup> To a certain extent,

the divide between legal and moral concerns and the express consecration of a public morals exception in the WTO is a paradox of sorts: many if not most laws in all countries worldwide express collective moral values, shared by the community of people living in the country. Even the most seemingly technical and formal laws and regulations inherently express moral values and choices. As far as the WTO is concerned, the *EC – Seal Products* case has famously shown that public morals can cover societal concerns regarding animal welfare. A similar argument can be made regarding the prohibition on exporting chemicals that are already banned within the EU: the moral concern at its basis would be putting an end to current double standards in trade practices, whereby harm protected against domestically can nonetheless be externalized through the export of hazardous chemicals to third countries.

“Public morals” is a relative concept that escapes a static and pre-set definition. WTO case law has in fact established that it is dependent on “social, cultural, ethical and religious values” and can therefore vary from country to country.<sup>68</sup> It follows that it can also evolve over time.<sup>69</sup> To encapsulate most comprehensibly what the concept entails, one can refer to the Appellate Body’s approach in *US – Gambling*: “public morals” denotes “standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>70</sup> It follows that countries enjoy a wide (although not unlimited) discretion in defining for themselves the concept of public morals and public moral objectives according to their own value systems.<sup>71</sup> “Public morals” have thus been recognized by the WTO to cover the prevention of underage gambling and the protection of pathological gamblers;<sup>72</sup> the restriction of prohibited content in cultural goods, such as violence or pornographic content and the protection of Chinese culture and traditional values;<sup>73</sup> the protection of animal welfare;<sup>74</sup> combatting money laundering;<sup>75</sup> or bridging the digital divide within society and promoting social inclusion.<sup>76</sup> More recently, the outer bounds of public morals have even been extended to include concerns that have obvious economic dimensions.<sup>77</sup> In light of these precedents, putting a stop to the EU’s double standard by prohibiting the export to third countries of chemicals already banned from use on EU territory to protect health and the environment could, *a priori*, fall squarely within the notion of public morals.

The Appellate Body has held that in order for a measure to be recognized as addressing public morals,

it must first be determined that “the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of ‘public morals’ as ‘defined and applied’ by a regulating Member ‘in its territory, according to its own systems and scales of values.’”<sup>78</sup> In other words, while paragraph (a) does not require the demonstration of a risk to public morals against which the measure seeks to protect,<sup>79</sup> the public concern nevertheless needs to be supported by evidence.<sup>80</sup>

Such evidence can be diverse in nature and can include contemporary public opinion polls, public consultations – such as the one the European Commission is currently conducting on this very issue<sup>81</sup> – historical practice, the legislative history of the measure, the WTO Member’s previous international commitments, results of political referenda, and statements made in international fora. Strong evidence of contemporary EU public morals in support of an export ban would be, for instance, the already existing prohibition of use on EU territory, the comprehensive strategy adopted by the EU in recent years, and the commitments by national and EU authorities to address the export of hazardous chemicals to third countries. Additional powerful evidence would stem from legislative initiatives in individual EU Member States: for instance, the already mentioned French EGAlim law;<sup>82</sup> the similar legislation currently being discussed in Germany;<sup>83</sup> and the same recent initiative by the Belgian government. Additional evidence could also be drawn from civil society initiatives expressing public concern,<sup>84</sup> as well as from domestic judicial practice. For instance, in September 2022 the highest French administrative court (Conseil d’État) recognized that the right of each person to live in a healthy environment, as proclaimed by the French Charter for the Environment, is a “fundamental freedom” and can therefore be invoked in emergency proceedings.<sup>85</sup> While the “fundamental freedom” character is not in itself a novelty, its (long-awaited) explicit recognition by the Conseil d’État did not go unnoticed. All elements from Member States’ domestic legal systems and at EU level can be used to complement and support the EU’s public concern within the understanding of the WTO notion of “public morals.”

**The design of the measure to achieve the objective:** Most importantly, regarding all three exception clauses of Article XX considered here, a critical element is that the measure must be geared towards

achieving the identified policy objective. This has been interpreted to mean that the measure is “designe[d] to achieve” the objective.<sup>86</sup> The crucial point is that a remote connection to a legitimate policy objective listed in Article XX is not enough for the operation of the justification. On the contrary, the policy objective pursued or to be achieved must be made clear and apparent in the design and structure of the measure.<sup>87</sup> Furthermore, when part of a wider strategy, the measure must be a “significant component” thereof.<sup>88</sup> This does not mean, however, that the EU needs to choose amongst the various avenues for legal action currently under consideration to enact its commitments regarding hazardous chemicals. In fact, the Appellate Body already acknowledged in *Brazil – Retreaded Tyres* that “certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures.”<sup>89</sup> By the same token, and in the context of the necessity test which will be addressed below, it held that one specific measure could contribute to one of the objectives “as part of a policy framework comprising different measures, resulting in possible synergies between those measures.”<sup>90</sup>

#### 4.2. EXTRATERRITORIAL REACH OF EU POLICY OBJECTIVES: PROTECTING WHOM OR WHAT, WHERE, AND IN WHOSE INTEREST?

The most sensitive issue connected to invoking one or several exception clauses of Article XX in the present scenario lies in the extraterritorial reach of the policy objectives the ban would aim to achieve. On the one hand, one could argue that an export ban on chemicals already prohibited within the EU would obviously – although indirectly – contribute to protecting human, animal and plant life and health (paragraph (b)) *within* the EU, by reducing the risks of importing products into the EU containing residues, as well as by reducing damage to the environment and to biodiversity (paragraphs (b) and (g)) that has global effects. This argument alone, however, does not seem strong enough, especially since other less trade-restrictive measures can more aptly achieve these objectives (control of maximum residue levels, mirror measures, etc.). Inevitably, this would negatively bear on the necessity test. Furthermore, it would leave paragraph (a) unaddressed.

In fact, and on the other hand, the most immediate “aim” of the protection unquestionably lies abroad: prohibiting the export of chemicals banned in the EU appears, first and foremost, to be protective of life, health, the environment and biodiversity in third countries. This raises the question of the permissibility, under Article XX, of an export ban’s extraterritorial reach. In other words: can a State or WTO Member take legal action to protect human or animal health or life, or the environment, not only domestically but abroad? And can public morals be invoked when the value-based moral concern is for health, life and the environment abroad?

This issue is well known. It has been intensively discussed, and unevenly addressed and settled, in various fora. In the WTO, it has been a sensitive issue since the non-adopted *Tuna* reports under the initial GATT, where the panels decided the exception of Article XX was territorially limited.<sup>91</sup> While the reports were not adopted and although the WTO has cautiously steered in a different direction, its unease with the issue is evidence that the stance taken under the GATT still “haunts” the WTO, to quote Joost Pauwelyn.<sup>92</sup> Yet answers are urgently needed. In fact, and well beyond the scope of the WTO, extraterritoriality is a global and all-encompassing phenomenon, to such an extent that Paul Stephan observed that it “has become a fact of life.”<sup>93</sup> However, two important distinctions are in order, to clarify how an export ban on chemicals prohibited in the EU fits within the broader debate on extraterritoriality.

**Extraterritorial jurisdiction to prescribe distinguished:** First, the most controversial facet of extraterritoriality evidently pertains to regulatory action, whereby a State exercises its legislative jurisdiction (or jurisdiction to prescribe) over behaviors and situations located within the jurisdiction of third States. This touches upon the traditional State-centred world order in which power was exclusively allocated between States, and State jurisdiction is thus first and foremost territorial.<sup>94</sup> Although much of this traditional world order has undergone significant shifts, this paper will not venture there. In fact, the export ban considered here does not raise the same set of issues as does properly extraterritorial legislation. An export ban is a strictly territorial regulation, which does not regulate persons, behaviors or situations outside the jurisdiction of the regulating country (nor does it try to do so indirectly): it regulates strictly *within* its territorial

jurisdiction.<sup>95</sup> In fact, it would prohibit EU Members, and thus EU-based companies, from exporting hazardous chemicals to third countries from EU territory. As such, it does not qualify as “extraterritorial regulation.”<sup>96</sup>

**Indirect extraterritoriality distinguished (territorial legislation with extraterritorial effects on third countries' regulatory autonomy):** A second distinction that needs to be emphasized is what is commonly called “indirect extraterritoriality,” i.e. legislation that has extraterritorial *effects* although, *stricto sensu*, it is not extraterritorial. This is a well-known issue, particularly as regards measures relating to product requirements, and to process and production methods (PPMs). Countries are increasingly adopting trade-restrictive measures that aim at preventing harm to humans, animals or the environment outside their territory, and they do so by imposing requirements that products need to satisfy in order to be allowed into the domestic market. The tension arises from the fact that through its more restrictive requirements, the regulating country *de facto* – but not *de jure* – obligates third countries to comply with its human rights, health or environmental standards, at least if they wish to continue exporting to the regulating country.<sup>97</sup> Although these measures are not extraterritorial *stricto sensu*, they have a powerful effect on third countries. By making market access conditional upon certain standards and requirements, they operate as strong incentives for the exporting country to adapt its own regulation to the regulating country's standards. However, these measures do not – nor can they – *prescribe* third countries to comply with these standards. The line between incentivizing and coercing can nevertheless become blurry and may be reduced to a matter of legal technicality and terminology. The fact is that some trade-restrictive measures, in particular those based on PPMs, can act as incentives for third countries to such an extent that they come close to a form of economic coercion.<sup>98</sup> It is also obvious that while such measures do not, *per se*, regulate behavior outside the jurisdiction of the regulating State, they are nonetheless concerned with conduct abroad, and exert a strong compliance pull on that conduct through unilateral action. The WTO had to adjudicate on this situation on several occasions, where the issue of the jurisdictional scope of Article XX became apparent.<sup>99</sup> The mirror measures currently being considered to enact the EU's commitment will also need to address this fine line of

argumentation. An EU export ban, however, cannot be assimilated with this situation and needs to be clearly differentiated.

In fact, the issue of extraterritoriality under Article XX is dramatically different when the trade-restrictive measure applies to imports into the regulating country, rather than to exports.<sup>100</sup> This is all the more so the case when the restriction takes the form of a complete ban. Contrary to previous cases brought before the WTO (notably *US – Shrimp* and *US – Tuna*), an export ban on chemicals already prohibited in the EU does not aim, in and of itself, at compelling third countries to comply with EU standards of protection, nor at compelling them not to cause harm to human health or the environment. Certain policy moves and argumentative strategies have been coined by commentators as “moral imperialism”<sup>101</sup> or “moral legislation,”<sup>102</sup> and one can certainly engage in a discussion on the virtue of actively pushing for higher moral standards. The fact remains that the WTO has expressed concern regarding Article XX only when the measure is a unilateral imposition of the regulating country's own standards. However, it has shown less caution towards standards based on international standards or multilateral instruments that evidence a form of international consensus. While the EU's comprehensive strategy and commitments to action are undoubtedly trailblazing, and while the export ban would go well beyond the internationally agreed upon chemicals listed in the Rotterdam Convention, thus amounting to a form of unilateral standard setting, the situation is nevertheless dramatically different from the cases the WTO has examined so far.<sup>103</sup> An export ban, in fact, does not compel third countries to adhere to the EU's standards: it merely puts an end to the EU's *own* longstanding double standards.

Indeed, an export ban does not make the import into the regulating country conditional upon the exporting country's compliance with certain standards, nor does it incentivize, let alone coerce, the exporting country into adopting regulations that enact and comply with specific higher standards. An export ban is not concerned with imports and their regulation; it is not concerned with incentivizing or compelling third countries to adopt higher standards for human rights, human and animal health, or environment protection. Both technically and legally, it does not even distinguish between countries that have high or low standards of protection, since it does not prohibit the export

to specific countries. It simply prohibits EU Members from exporting banned chemicals to *any* country, regardless of their domestic standards. What an export ban is primarily concerned with – and this is also what expressly transpires in the EU’s commitments to action – is to not contribute, by its own trade practices of exporting hazardous chemicals, to causing damage abroad deemed so serious that the EU has already taken measures to prevent it in its own territory. It expresses in legal terms the political choice not to cause the very same harm abroad that the EU is fighting against domestically. It is neither more nor less than an assertion of consistency, an incontrovertible manifestation of the EU’s will to act in a coherent manner.

Against this backdrop, it is obvious that an export ban on hazardous chemicals would nonetheless cause the issue of the extraterritorial scope of Article XX to arise. In fact, to uphold such a ban would amount to suggesting that paragraph (b) can be invoked to protect humans, animals and the environment abroad, that paragraph (g) can be invoked to protect natural resources abroad, and that public morals can be concerned with conduct occurring abroad. This, in turn, would imply that the policy objectives covered by these exceptions can have an extraterritorial aim and reach. Whether the Article XX policy objectives cover only values and concerns in one’s own country or also values that are located abroad has been described by Steve Charnovitz as “inwardly-oriented” or “outwardly-oriented” protection.<sup>104</sup> While the distinction is not perfectly airtight and many measures have elements of both inward and outward orientation, entirely “outwardly-oriented” protection and policy objectives are evidently the most challenging. Yet their legality remains to this day a question unanswered by the WTO.

**Open-endedness of Article XX and inconclusive case law:** Indeed, contrary to other WTO provisions, Article XX gives no clear indication of its jurisdictional scope, nor can the latter be inferred from its wording. The SPS Agreement, for instance, defines SPS measures in such a manner that it is implied that they can only protect against risks *within* the territory of the regulating WTO Member.<sup>105</sup> The wording of Article XX is very different and neither expresses nor implies such limitation. Commentators have even suggested that the silence of Article XX is, in fact, not silent at all, since some exceptions clauses, by their very nature, imply an extraterritorial reach. The most

widely acknowledged such case is paragraph (e) addressing “products of prison labour.” Such wording implies that Members can take trade-restrictive measures regarding these products regardless of the territory from which they are exported or imported, as long as they qualify as originating from “prison labour.”

The WTO has encountered the issue of what it has famously coined the “jurisdictional limitation”<sup>106</sup> of Article XX on several occasions. On every such occasion, it circumvented addressing and settling the issue, most notably in the *US – Shrimp* case where, in relation to paragraph (g), it stated: “We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).”<sup>107</sup> In *EC – Seal Products*, since the parties had not addressed the issue, the Appellate Body “decided in this case not to examine this question further.”<sup>108</sup> Yet it “recogniz[ed] the systemic importance of the question of whether there is an implied jurisdictional limitation” (in this case in paragraph (a)).<sup>109</sup> The entire statement, as it was not needed since the parties did not raise the matter, reads like an *obiter dictum*. Regarding an export ban on chemicals prohibited in the EU, several lines of argument are thus available. The manner in which the issue of extraterritoriality arises, however, would depend on the exception clause of Article XX that is invoked to justify the ban: paragraphs (b) and (g) on the one hand, and paragraph (a) on the other, do not raise the same issues in relation to an EU export ban.

**Paragraph (a) and public morals with an element of externality:** Invoking the public morals exception to justify the export ban does not cause any serious issue of extraterritoriality to arise. In fact, the policy objective would not be extraterritorial at all: under paragraph (a), the object of the protection is not health and the environment as such in third countries, but *domestic* public morals, i.e., within the EU. The protected value and the policy objective to be pursued would thus be entirely “territorial.” The link to harmful effects of certain conduct occurring abroad is only ancillary, insofar as the moral concern at the basis of the ban would be that the EU ends its practice of double standards and does not continue to export substances to third countries that have already been banned within



the EU to protect human health and the environment. The core concern at the basis of the ban, under paragraph (a), would therefore not be the protection of health and the environment abroad, but protecting the EU from breaching its own value system.

This is an obvious example of the inevitable enmeshment of inward-oriented and outward-oriented policy objectives. While the measure would be inwardly-oriented, since it protects EU public morals, the moral concern of not practicing harmful double standards also has an “outward” element – as has any double standard since it relates to the differences in conduct and activities in different locations. The only issue in such a scenario is the question of whether paragraph (a) allows for public morals to be concerned with harm occurring abroad. This question has already been addressed in the *EC – Seal Products* case, which gives strong support to the argument that public morals can extend to moral concerns about harm caused abroad. Indeed, if the public morals argument can be successfully made regarding the protection of animal welfare in third countries, then surely public morals can also accommodate *human* welfare abroad,<sup>110</sup> as well as extend to serious environmental concerns – particularly in light of the fact that the substances whose export would be prohibited are already banned within the EU for the very same reasons.

Furthermore, it should once again be emphasized that an export ban on hazardous chemicals does not aim at inducing other countries to comply with the EU’s own standards and legislation. Contrary to the *EC – Seal Products* case, where EU legislation aimed at regulating market *access* by banning the import of products on the grounds of public concern for animal welfare abroad, an export ban would regulate market *exit* alone: it merely puts an end to the EU’s double standard of domestically prohibiting the use of certain harmful chemicals while continuing to export these same chemicals for use in third countries.

**Paragraphs (b) and (g) and the issue of extraterritorial policy objectives:** Instead, under Article XX(b) and (g), health, life, environment and biodiversity protection directly raise the issue of the extraterritorial reach of the policy objectives of an export ban, as these interests and values are mainly oriented at conduct in third countries.<sup>111</sup> Such policy objectives, however, can be justified, based both on the approach developed in WTO case law and the open-ended character of Article XX. In the *Shrimp* case, the Appellate Body

explicitly acknowledged the issue of Article XX’s jurisdictional scope, and, also explicitly, it shied away from answering it insofar as it was not necessary to do so: the migratory and endangered species had a “sufficient nexus” with US territorial waters, which led back to the safe grounds of territoriality. This stance has become known as the “sufficient nexus” criterion: as long as a sufficient nexus can be established between the object of the protection and the regulating WTO Member, the exception may apply.<sup>112</sup> At its core, the sufficient nexus argument is thus an argument relying on the regulating State’s self-interest: by regulating certain conduct, even when such conduct relates to harm occurring abroad, the State’s protection is, directly or indirectly, domestically-oriented. This begs the question of the type of harm that the measure is trying to prevent, and the effects such harm has on the regulating country. In relation to human health, environment and biodiversity, if the harm occurring through the use of the prohibited chemicals affects only the importing countries and is thereby strictly confined to their territories without affecting the regulating country, it might be difficult to suggest that a sufficient nexus with the EU exists.

However, the sufficient nexus argument can also be foregrounded when the harm the measure aims at preventing has global effects and may affect goods of either common interest or interest to the EU. The fact that the harm originates outside the jurisdiction of the regulating Member does not, in such case, make the concern any less legitimate. This is different from the controversial doctrine of effects jurisdiction under international law,<sup>113</sup> and rather touches upon the increasing shift of contemporary international law towards community interests, common goods and global concerns.<sup>114</sup> Regarding human rights, the environment and biodiversity in particular, there is a strong argument to be made that their protection is of common concern, as they are in the interest of all humankind. Even when the harm is geographically located and confined to a different jurisdiction, regulating States can thus have a legitimate interest in preventing this harm, and the existence of a “sufficient nexus” may be supported. Many commentators have, for instance, strongly pleaded for a more balanced approach of the WTO towards human rights. In doing so, Gabrielle Marceau has argued for a more coherent interpretation of WTO provisions in light of human rights, and suggested that Article XX might extend to policies

addressing human rights issues.<sup>115</sup> Similar arguments are increasingly being made regarding environmental protection, when the harmful effects are located outside the regulating country's jurisdiction or have only indirect effects in its own territory.<sup>116</sup> Whether the WTO would welcome such arguments is unclear, although non-trade concerns have increasingly made their way into trade measures and subsequent disputes. Additionally, it should be noted that the Appellate Body emphasized the value of the preamble of the WTO Agreement, holding that the "language [used in the Preamble] demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development."<sup>117</sup> It went on to state that the preamble "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement."<sup>118</sup> All these elements, as well as the rules guiding treaty interpretation, suggest that an argument of "sufficient nexus" can be supported.

However, it should be emphasized that the sufficient nexus approach developed in case law cannot be understood as the criterion or condition for the legality under Article XX of any measures with an extraterritorial reach. Rather, as the *Shrimp* case revealed, it merely expresses the argument by which – and only "in the specific circumstances of the case"<sup>119</sup> – the direct issue of extraterritoriality could be circumvented, by using the "sufficient nexus" with the regulating country's territory to frame the issue in terms of territorial, rather than extraterritorial, jurisdiction. This leaves the issue of extraterritoriality unanswered since the *Shrimp* case. Therefore, regardless of whether a sufficient nexus may be established, a few additional insights are in order regarding the current state of the debate.

In light of ever-increasing global concerns, and given that Article XX gives no indication and that WTO adjudicating bodies have not yet addressed the question, the issue has been primarily an object of doctrinal interest. International legal scholarship has extensively engaged with the question of extraterritoriality as regards Article XX, be it in relation to human rights, laborers' rights, environmental protection or, more recently, the extent of public morals. Whether Article XX can accommodate policy objectives with an extraterritorial reach is ultimately a matter of treaty interpretation, pursuant to the customary rules as codified by the Vienna Convention on the Law of Treaties

(VCLT). Legal analyses have reasoned by analogy from other Article XX clauses,<sup>120</sup> or advanced the notion of "proximity of interest" to support an interpretation whereby Art. XX(b) should be used for concerns limited to the regulating country while transnational and global problems should be assigned to Art. XX(g);<sup>121</sup> others have foregrounded the *travaux préparatoires* in support of extraterritoriality,<sup>122</sup> or, most notably, the principle of systemic integration (Article 31(3)(c) VCLT).<sup>123</sup> Lorand Bartels for instance convincingly suggests that when interpreting Article XX in light of Article 31(3)(c) VCLT, "where the regulating WTO Member has jurisdiction to enact the measure according to the rules governing legislative jurisdiction under public international law, the measure should potentially be 'saved' under Article XX, provided, of course, that it also answers to the description of one or more of the legitimate purposes listed in that provision and satisfies the requirements of the Chapeau."<sup>124</sup> A State's legislative jurisdiction should be determined, Bartels argues, by the concept of "legitimate state interest," which would allow for "balancing the sovereign interests of States in regulating matters of concern to them, regardless of where this concern is located."<sup>125</sup> Following this approach, a strong argument can be made that States indeed do have a legitimate interest in the protection of human health and life, the environment and biodiversity, domestically and abroad.

What the many interpretative analyses and proposals in support of the extraterritorial scope of Article XX<sup>126</sup> reveal is that the real issue is not so much whether the proviso can accommodate measures or policy objectives with an extraterritorial reach – as it surely can – but rather when it might not be appropriate, or, phrased differently, when it might seem abusive to rely on Article XX in order to adopt such measures. But this is not, *per se*, an issue of extraterritoriality. In other words, while the interpretation of the exceptions certainly warrants caution, the risk that the proviso becomes "uncontainable" lies not so much in its jurisdictional scope, but rather in the understanding and interpretation of the legitimate policy objectives covered by Article XX,<sup>127</sup> of which one at least (public morals) is difficult to frame.<sup>128</sup>

In the end, and given the open-ended character of the proviso, one could persuasively argue for the Article XX defence for policy objectives with an extraterritorial scope.<sup>129</sup> Gabrielle Marceau perfectly sums up the current state of the debate (and of possibilities) by

highlighting the openness of the Appellate Body's stance in *US – Shrimp*. Such openness is not neutral, and Marceau reads it as suggesting that “the interest in the regulated product may not be a strictly territorial one.”<sup>130</sup>

As a matter of comparison, it is of interest that a similar argument was recently openly endorsed by the Court of The Hague regarding the duty of care contained in the Dutch legislation, which is open-ended similarly to Article XX GATT: it does not specify whether the “care” is owed only domestically or can be geared towards third countries (in this instance, low and middle-income countries). While unrelated to the WTO, the dispute dealt with by the Court touches upon the same growing sense of responsibility of States not to inflict health and environmental harm to third countries. The Court of The Hague's stance is both pragmatic and audacious in this respect and merits quotation: “Although the term export is not explicitly included in the provision, export from the Netherlands is not explicitly excluded from the duty of care either. (...) The statement that the duty of care cannot relate to the protection of people and the environment outside the Netherlands cannot be accepted as correct either.”<sup>131</sup> The Court indeed argued that “The fact that no concrete requirements were previously set for exports outside the EU fuel, does not mean that this is (now, still) not possible. Insights into the hazards associated with substances and the measures to be taken are constantly evolving, which means that the interpretation of the broadly formulated duty of care may also be subject to change.”<sup>132</sup>

This recent decision fits squarely with the general trend of contemporary policy reasoning, which is increasingly concerned with and focused on shared global interests. Judicial pronouncements through authoritative interpretations are now needed to support this legitimate policy trend.

The fact that the WTO has never conclusively dealt with Article XX's jurisdictional limitations is thus simply not a decisive argument. Ultimately, indeed, however convincingly one can argue in legal terms, the issue is not only one of law and of legal methodology. Nor is it only one of “correctly” using interpretive guidelines which supposedly would lead to the one “correct legal view.”<sup>133</sup> In light of the plain fact that nothing in Article XX is “inherently hostile to extra-territorial measures,”<sup>134</sup> the issue is not only one of legal rules but one of political choice. It is a matter of

possibility – and of decision-making when faced with that possibility – as the Appellate Body was well aware of when it repeatedly avoided addressing the issue. However, and to slightly abuse the Appellate Body's own words, it is already “too late”<sup>135</sup> to continue to not address it. This can only be done with the sense of leadership that the EU Commission committed to.

### 4.3. RELATIONSHIP BETWEEN MEASURE AND POLICY OBJECTIVE

In addition to pursuing a legitimate policy objective under Article XX, any trade-restrictive measure for which Article XX is invoked must also bear a specific relation to the policy objective alleged to be pursued. The nature of this relationship is specified by the words used in each exception clause, which create different thresholds and legal requirements. As concerns the three exception clauses relevant to justifying an EU export ban on prohibited chemicals, two of them (paragraphs (a) and (b)) require the measure to be “necessary” to protect the policy objective covered by the clause, while paragraph (g) requires the measure to be “relating to” the objective of conserving exhaustible natural resources. The degree of connection between the measure and the policy objective aimed to be realized is therefore not of the “same kind”.<sup>136</sup>

**“Relating to” (paragraph (g)):** The expression “relating to” has been interpreted as requiring the existence of a “close and genuine relationship of ends and means” between the measure and the policy objective.<sup>137</sup> This is most persuasively evidenced when the measure is “primarily aimed at” the conservation of natural resources.<sup>138</sup> The objectives aimed at by the EU have been most clearly laid out in its commitments and comprehensive strategy, so that an export ban that would specifically address chemicals banned pursuant to environmental and biodiversity objectives does not seem difficult to qualify as being adopted “in relation to” the EU's policy objective covered by paragraph (g). This objective is also already stated in the current PIC Regulation.

**Necessity test (paragraphs (a) and (b)):** Invoking paragraphs (a) and (b) requires that the measure is “necessary” for achieving the policy objective. The meaning of “necessity” has been extensively discussed in the WTO (and legal scholarship), and its assessment in concrete cases has developed into a multifaceted process of “weighing and balancing” different elements.<sup>139</sup>

In *Brazil – Retreaded Tyres*, the Appellate Body considered this process to be a “holistic operation.”<sup>140</sup> The more recent *US – Tariff Measures* case provides a particularly clear formulation of the process: the “weighing and balancing approach requires an assessment of a series of factors, including (i) the relative importance of the pursued policy objective; (ii) the restrictive impact of the challenged measures on trade; and (iii) the contribution of these measures to the realization of the objective pursued (manifested in the existence of a ‘genuine relationship of ends and means between the objective pursued and the measure at issue’), followed by an assessment of whether potential WTO-consistent or less trade-restrictive alternatives, suggested by the complainant, are reasonably available to the responding Member.”<sup>141</sup>

These different elements have been extensively expounded in case law and developed into high thresholds, to the extent that one commentator even wondered whether the necessity test “killed” the Article XX exceptions.<sup>142</sup> In short, on the one side the more important the societal value pursued by the measure at issue, the greater its contribution to the objective; and on the other side, the less trade-restrictive its effects, the more likely a measure is to be characterized as “necessary.”<sup>143</sup> Once preliminary necessity is thereby established, it must finally be confirmed by a comparison with possible alternatives that are reasonably available to the regulating Member.<sup>144</sup>

Regarding the importance of the interest or value at stake, it has been emphasized that “[t]he more vital or important [the] common interests or values” are, the more likely it is that a measure will pass the necessity test.<sup>145</sup> Protecting human life and health has already been declared by the Appellate Body to be a vital interest, and even to be “both vital and important in the highest degree.”<sup>146</sup> Regarding environmental protection a strong argument can also be made, as evidenced by the Rotterdam Convention and the EU PIC Regulation. This would also make a strong case for the moral concerns under the public morals exception.

In examining the contribution of the measure to the achievement of its objective, the extent to which the export ban would contribute to the EU’s policy objective comes into play. Being merely a side effect is not enough; being indispensable on the other hand is not required.<sup>147</sup> While it is impossible to “quantify” in the abstract the contribution required, one can refer to the Appellate Body in *Brazil – Retreaded Tyres* which

held that “a genuine relationship of ends and means between the objective pursued and the measure at issue” must exist.<sup>148</sup> This relationship depends on the nature of the risk, the objective, and the level of protection to be achieved, as well as on the “nature, quantity, and quality of evidence existing at the time the analysis is made.”<sup>149</sup> In the end, as the Appellate Body stated, “[t]he greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as ‘necessary.’”<sup>150</sup> An export ban is undeniably a strong measure, aiming to realize the policy objective to the highest degree possible; the extent to which it would contribute to the identified policy objectives can therefore hardly be questioned.

Its maximum trade-restrictiveness, consequently, is also hard to deny. As a matter of principle, the logic (and balance) of WTO exceptions is that a measure has the best chance of being considered necessary if it can be proven that it realizes a strong contribution to the objective to be achieved, and at the same time constitutes the least possible restriction on trade. As noted by the Panel in *Indonesia – Chicken*, an export ban is a trade restriction to the highest degree.<sup>151</sup> However, this alone would not condemn an EU export ban on hazardous chemicals to inevitably fail the necessity test. In fact, while a high degree of trade-restrictiveness generally tends to weigh against the necessity of the measure, “a material contribution made by the measure may still outweigh that trade-restrictiveness.”<sup>152</sup>

This is also put in perspective by the element of comparison, which addresses the question of whether there are available alternative measures that the regulating Member could take or could have taken instead. Confirming necessity by such comparison is critical, as it “reflects the shared understanding of Members that substantive (...) obligations should not be deviated from lightly.”<sup>153</sup> Importantly, however, it is not for the regulating Member to prove that there were *no* alternatives.<sup>154</sup> The burden of proof rests initially with the complaining Member. While technically the EU therefore need not consider this issue for the time being, it is obvious that alternative measures are a significant factor to be taken into consideration before adopting any kind of measure, including for reasons of political and economic viability. From a practical standpoint, assessing alternatives is precisely what the EU has been doing since adopting its Chemicals Strategy for Sustainability. It is therefore not too early to suggest,

regarding an export ban, that alternatives do exist, that they are technically available, and that some of them might be less trade-restrictive – but that none of them are *equally effective* in achieving the pursued policy objective(s). This, in fact, encapsulates the functioning of the reasonably available alternatives test. It does not suffice for alternatives to exist – they usually do. They must also be reasonably available; be consistent with WTO obligations, or less inconsistent with them; and, crucially, they must be reasonable to expect from the regulating country in order to achieve the same level of protection, and thus the same contribution to its policy objective.<sup>155</sup>

In light of the policy objectives and interests at stake, there is a strong argument to be made that there are no alternatives that are reasonably available and equally capable of achieving the objective an export ban would achieve. An interesting parallel can be made here with the *Asbestos* case, where the complaining party claimed that France could have enacted “controlled use” as an alternative to the decree enacting the complete ban. No such argument could be made to challenge an export ban on hazardous chemicals: “controlled use” is precisely what the Rotterdam Convention and the PIC Regulation already provide for. Since this has proven to be insufficient, the policy objectives set by the EU in its comprehensive strategies aim higher.

It should nonetheless be added that if an export ban were enacted as an isolated measure without being explicitly integrated into the comprehensive EU strategy, the argument of less restrictive alternatives (notably mirror measures) may prove more difficult to rebut, except for the public morals exception. On the contrary, as part of a set of comprehensive measures enacting the EU’s commitments both in the Farm to Fork Strategy and the Chemicals Strategy for Sustainability, the counterargument that alternatives exist would be significantly weakened. The importance of such complementariness between measures was clearly established in *Brazil – Retreaded Tyres*, where the Appellate Body held that different components of a comprehensive policy cannot be considered to be alternatives for one another: “Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the Import Ban components of

Brazil’s policy regarding waste tyres that are complementary to the Import Ban.”<sup>156</sup>

In light of this stance, it can only be recommended that an export ban not be taken in isolation but identified as an integral part of the comprehensive implementation of the EU’s Chemicals Strategy for Sustainability. Consistency of EU action<sup>157</sup> would in fact be a key factor in support of the WTO-conformity of an export ban. It has already been pointed out that carve-outs or exceptions would critically weaken the legal justification of the export ban. But the issue of consistency also touches upon the design of the entire policy to be pursued, and the set of measures to be consequently enacted. Studies supporting mirror measures have similarly stressed the importance of simultaneously prohibiting derogations in the EU (as was recently done by the ECJ, as pointed out above) and banning the export of these chemicals to third countries.<sup>158</sup> By the same token, the finding of WTO-conformity of an export ban would be greatly facilitated if the ban were a component of a broad and comprehensive set of policy measures, which would attest to the coherence of EU action.

#### **4.4. CHAPEAU REQUIREMENTS: NO ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION, NO DISGUISED RESTRICTION ON TRADE**

Finally, to be justified under Article XX a measure must satisfy the requirements laid out in the introductory clause of Article XX (*chapeau*): it cannot be “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.” These requirements best encapsulate the balance between one Member’s right to invoke an exception and the treaty rights of other Members.<sup>159</sup> They set out to prevent “abuse or misuse”<sup>160</sup> of Article XX exceptions, insofar as the *chapeau* is inherently an expression of the principle of good faith.<sup>161</sup> The *chapeau*’s requirements have proven to be particularly difficult to meet and case law has set very high standards through its interpretations, to the extent that one commentator observed that the *chapeau* itself has become “a disguised restriction on environmental measures.”<sup>162</sup> Furthermore, case law has proven to be somewhat confusing, and sometimes even contradictory or illogical.<sup>163</sup>



The *chapeau's* requirements do not address the measure in itself and its contents, but rather the manner in which it is applied.<sup>164</sup> How the “manner” in which a measure is “applied” is to be determined has led to quite varied appreciations.<sup>165</sup> The Appellate Body, however, has emphasized that “[t]he location of the line of equilibrium, as expressed in the *chapeau*, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.”<sup>166</sup>

**Arbitrary or unjustifiable discrimination:** Case law has often not clearly distinguished between arbitrary and unjustifiable discrimination, but benchmarks have nonetheless emerged. Falling short of this requirement entails i) that the application of the measure results in a discrimination; ii) that this discrimination occurs between Members where the same conditions prevail; and iii) that such discrimination is characterized as “arbitrary” or “unjustifiable.”<sup>167</sup> Instances of arbitrary discrimination have been found in measures providing for no “transparent, predictable (...) process,”<sup>168</sup> or creating “rigid and unbending” requirements for third countries; conversely, a discriminating measure that was not motivated by “capricious” or “random” reasons was found not to be arbitrary.<sup>169</sup>

Regarding the “unjustifiable” character of the discrimination, this raises the question of whether the discrimination is rationally related to or can be reconciled with the policy objective with respect to which the measure has been provisionally justified. The Appellate Body notably observed that it had “difficulty understanding how discrimination might be viewed as complying with the *chapeau* of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.”<sup>170</sup> More incisively even, it considered that “discrimination can result from a rational decision or behaviour, and still be ‘arbitrary or unjustifiable,’ because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified.”<sup>171</sup>

Once again, it should be stressed that consistency would thus be key when enacting an EU export ban on hazardous chemicals. The requirement of the Article XX *chapeau* can in fact only be met if EU action does not leave derogations and exceptions unaddressed, or, alternatively, if these different regulatory treatments can be soundly justified. The imperative of consistency

became particularly apparent in *Brazil – Retreaded Tyres*, where an otherwise comprehensive and sound environmental and human health policy implemented, among others, through an import ban, failed the test of the *chapeau* because of multiple derogations.<sup>172</sup> The same concern for consistency appeared in the *EC – Seal Products* case, in which the EC argued that its import ban on seal products was justified by public morals concerning animal welfare. The EC, however, granted different regulatory treatment according to whether the seal products derived from hunts undertaken by Inuit or other indigenous communities (IC hunts) or from commercial hunts, and failed to explain certain “significant ambiguities” in the criteria set to qualify for the IC exception.<sup>173</sup> Additionally, while the design of the IC exception did not absolutely prevent Inuit hunters from Canada from qualifying, it was *de facto* revealed to be available only to Greenlandic Inuit, while the EU had not made “comparable efforts” to make it available to Canadian Inuit.<sup>174</sup> In light of the invocation by the EU of public morals regarding animal welfare, such lack of consistency revealed in the different regulatory treatment was found to be an arbitrary or unjustifiable discrimination.

These precedents draw attention to the fact that carve-outs, derogations and exceptions would be particularly difficult to justify, regarding any of the exceptions considered. In short, banning the export of prohibited chemicals to certain countries while continuing to allow their export to others might prove impossible to uphold in legal terms, as would derogations granted within the EU. Consequently, both would run the risk of compromising the WTO compatibility of the ban. The non-discrimination obligation is in fact to be understood comprehensively: the regulating Member can neither treat third country producers and products differently from one another, nor can it treat third country producers and products differently from its own producers and products.<sup>175</sup>

**Disguised restriction on trade:** Finally, a measure provisionally justified under Article XX cannot be applied in such a manner that it constitutes a disguised restriction on trade. The operative word in the legal requirement is “disguised”, since all measures provisionally justified under Article XX are already, by definition, a “restriction.” Disguised or concealed discriminations would obviously qualify as “disguised restrictions on trade,” yet they do not exhaust the meaning of “disguised restriction.” As the Appellate Body

held in *US – Gasoline*, “[w]e consider that ‘disguised restriction’, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.”<sup>176</sup> The gist of the requirement is, in fact, that the right of Members to invoke an Article XX exception should not be misused for what is really a form of protectionism.<sup>177</sup> It is difficult to see how an EU export ban on hazardous chemicals could be seen as trade protectionism favouring domestic producers, as EU producers would be the most dramatically affected by the ban. It seems equally far-fetched to suggest that banning the export of chemicals already prohibited in the EU could be a disguised measure to favour the producers of other types of allowed substances.

In short, while the *chapeau* requirements have oftentimes turned out to be particularly challenging for measures provisionally justified under Article XX, there is a strong argument to be made that an EU export ban on chemicals already banned in the EU can satisfy these requirements. Two final observations should be made.

The first is that the non-discrimination requirement entails that particular attention be paid to the conditions prevailing in third countries. This led the Appellate Body to state that “discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”<sup>178</sup> As already pointed out above, this would be an element to address in the adequate political fora with the EU’s trade partners, as the EU has already undertaken to do. However, the instances where the Appellate Body was circumspect about unilateral regulatory action regardless of different conditions prevailing in different countries were dramatically different from the present situation. In particular, the main issue was the fact that the regulating Member used its measure to “require other Members to adopt essentially the

same comprehensive regulatory program, to achieve a certain policy goal.”<sup>179</sup> As such, the measure was in fact more concerned with “effectively influencing” other WTO Members to fall in line with the regulating Member’s regulatory regime.<sup>180</sup> It needs recalling that no such criticism could be raised against an EU export ban on hazardous chemicals, which neither directly nor indirectly requires third countries to adopt the same standards as the EU’s. There is, in fact, no causal relation at all between the prohibition of exporting hazardous chemicals to third countries and their compliance (or not) with the EU’s health and environmental standards.

Secondly, past cases have shown that the WTO pays significant attention to efforts aimed at international cooperation and coordination between Members when assessing whether a trade-restrictive measure can be justified under Article XX. In the *Shrimp* case, for instance, the Appellate Body found that the US had engaged in serious cooperative efforts with some countries but not with others,<sup>181</sup> while in the *Gasoline* case they had failed to try to enter into cooperative arrangements with the countries affected by their measure in order to address administrative difficulties.<sup>182</sup> International cooperation is clearly preferred over unilateral action, in particular concerning objectives that can be perceived as being of common interest. The protection of migratory species, for instance, was perceived to “deman[d] concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations.”<sup>183</sup> By the same token, the Appellate Body has also paid attention to the Rio Declaration on Environment and Development, Article 12 of which states that “[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.” This, however, was acknowledged to merely express a strong preference for a multilateral approach, and it was not understood by the WTO as a requirement for a measure to be justified under Article XX.<sup>184</sup>

## 5. Conclusion

In summary, WTO law leaves sufficient margin for the EU to effectively adopt an export ban on chemicals already prohibited in the EU. While such a ban would be in violation of GATT obligations, most obviously Article XI:1, it can be justified under Article XX, under the condition that it pursues one of the policy objectives laid out by the exceptions proviso and is manifestly designed to achieve the objective. Human health, environmental concerns and biodiversity protection could be addressed under paragraphs (b) and (g) of Article XX with the relevant distinctions; alternatively, the public morals exception of paragraph (a) could address the chemicals encompassed in the ban comprehensively, grounded in the coherence of EU action regarding both its domestic practices and its export practices. As has been succinctly sketched out, all the legal requirements of Article XX as interpreted by WTO

adjudicating bodies can be met by a carefully designed export ban paying due heed to the constraints of Article XX and their interpretations.

Tailoring such an export ban, in fact, ultimately calls for a reflection on the balance to be struck between the competing rights that Article XX has aimed at preserving since it was drafted almost a century ago. What rights, for what balance? In 2023, one cannot but wonder under what legal standard interpreted in good faith it could be upheld that the right of importing countries to import chemicals causing severe harm to humans and the environment must supersede the right of a WTO Member to regulate its exports in order to stop *itself* – and only itself – from contributing to causing the very same harm in third countries that it is actively preventing from occurring on its own territory.

# Endnotes

- 1 'Banned in Europe: How the EU exports pesticides too dangerous for use in Europe', 10 September 2020, at <https://www.publiceye.ch/en/topics/pesticides/banned-in-europe>.
- 2 For an extensive report on the export of chemicals listed under the PIC Regulation, see European Chemicals Agency (ECHA), 'Report on exports and imports in 2020 of chemicals listed in Annex I to the Prior Informed Consent (PIC) Regulation' (December 2021), at [https://echa.europa.eu/documents/10162/1244645/pic\\_article\\_10-2020\\_en.pdf/7a756e7e-af68-250d-6cad-41769a1fc37?t=1639388055700](https://echa.europa.eu/documents/10162/1244645/pic_article_10-2020_en.pdf/7a756e7e-af68-250d-6cad-41769a1fc37?t=1639388055700).
- 3 This practice, not limited to the EU, has been condemned by UN experts: see the statement of 9 July 2020, 'States must stop exporting unwanted toxic chemicals to poorer countries', at <https://www.ohchr.org/en/press-releases/2020/07/states-must-stop-exporting-unwanted-toxic-chemicals-poorer-countries-says-un>.
- 4 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted 10 September 1998, entered into force 24 February 2004). See: <http://www.pic.int/TheConvention/Overview/tabid/1044/language/en-US/Default.aspx>.
- 5 Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals.
- 6 Article 1(1)(b) PIC Regulation.
- 7 See the list contained in Annex III: <http://www.pic.int/TheConvention/Chemicals/AnnexIIIChemicals/tabid/1132/language/en-US/Default.aspx>
- 8 The PIC Regulation establishes different categories of chemicals: Chemicals subject to export notification procedure (listed in Annex I Part I); chemicals qualifying for PIC notification (listed in Annex I Part 2); chemicals subject to the PIC procedure (listed in Annex I Part 3); and chemicals and articles already subject to an export ban (listed in Annex V). Regarding the latter, these include persistent organic pollutants as listed in Annexes A and B to the Stockholm Convention on Persistent Organic Pollutants (Annex V Part 1), and chemicals other than persistent organic pollutants as listed in Annexes A and B to the Stockholm Convention on Persistent Organic Pollutants (Annex V Part 2).
- 9 See ECHA, <https://echa.europa.eu/information-on-chemicals/pic/chemicals>.
- 10 See ECHA, <https://echa.europa.eu/-/22-harmful-chemicals-added-to-pic-exporters-must-notify-from-july>.
- 11 Baskut Tuncak, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (toxics), at: <https://www.ohchr.org/en/press-releases/2020/07/states-must-stop-exporting-unwanted-toxic-chemicals-poorer-countries-says-un>
- 12 CESCR, General comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017).
- 13 Ibid. For the full report presented to the UN General Assembly, see 'Implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes,' Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, A/74/480 (7 October 2019). The Report emphasizes: "Every State has an obligation to prevent exposure to hazardous substances and wastes (toxics) under international human rights law. This obligation derives implicitly, but clearly, from any number of rights and duties enshrined within the global human rights framework, under which States are obligated to respect and fulfil recognized human rights, and to protect those rights, including from the implications of exposure to toxics. Those rights include the human rights to life, health, safe food and water, adequate housing, and safe and healthy working conditions. The duty to prevent exposure is further reinforced by the national and regional recognition of the right to a safe, clean, healthy and sustainable environment, including clean air" (footnotes omitted).
- 14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Chemicals Strategy for Sustainability – Towards a Toxic-Free Environment', 14 October 2020, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A667%3AFIN>
- 15 'Chemicals Strategy for Sustainability – Towards a Toxic-Free Environment', op. cit., 24.
- 16 Council of the European Union, 'Sustainable Chemicals Strategy of the Union: Time to Deliver – Council Conclusions', 6941/21, 15 March 2021, para. 45, at: <https://www.consilium.europa.eu/media/48827/st06941-en21.pdf>
- 17 See [https://environment.ec.europa.eu/strategy/chemicals-strategy\\_en](https://environment.ec.europa.eu/strategy/chemicals-strategy_en).
- 18 See for instance J. P. Chamberlain, 'Embargo as Sanction of International Law', 27 Proceedings of the American Society of International Law 66 (1933).
- 19 For a more detailed account see B. Karapinar, 'Export Restrictions and the WTO Law: How to Reform the Regulatory Deficiency', 45 Journal of World Trade 1139 (2011); G. Marceau, 'WTO and Export Restrictions', 50 Journal of World Trade 563 (2016).
- 20 See the list of Covid-related export restrictions on the WTO website: [https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_goods\\_measures\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measures_e.htm). See also C. Huang, 'Exempting and Justifying Covid-19 Related Export Restrictions Under WTO Law', 48 Legal Issues of Economic Integration 201 (2021).

- 21 See [https://environment.ec.europa.eu/strategy/chemicals-strategy\\_en](https://environment.ec.europa.eu/strategy/chemicals-strategy_en).
- 22 Open letter, [https://www.pan-europe.info/sites/pan-europe.info/files/public/resources/other/Open%20Letter\\_Double%20standards%20Final\\_05112020.pdf](https://www.pan-europe.info/sites/pan-europe.info/files/public/resources/other/Open%20Letter_Double%20standards%20Final_05112020.pdf).
- 23 Joint Statement, 'NGOs and Trade Unions Demand the End of EU's Export of Banned Pesticides and Other Hazardous Chemicals', 1 December 2022, at: <https://corporateeurope.org/sites/default/files/2022-11/joint-statement-1-december-2022.pdf>.
- 24 Open letter, 11 November 2020, at: [https://www.michele-rivasi.eu/wp-content/uploads/2020/11/STATEMENT\\_pesticides20200111.pdf](https://www.michele-rivasi.eu/wp-content/uploads/2020/11/STATEMENT_pesticides20200111.pdf)
- 25 Ibid.
- 26 Contribution from the French authorities on the consultation of the roadmap published by the European Commission on the "Sustainable Chemicals Strategy (for a European Union environment free of toxic substances)", 24 June 2020, 14, available at: [https://www.ecologie.gouv.fr/sites/default/files/0334%20NAF%20Réponse%20consultation%20stratégie%20produits%20chimiques\\_EN.pdf](https://www.ecologie.gouv.fr/sites/default/files/0334%20NAF%20Réponse%20consultation%20stratégie%20produits%20chimiques_EN.pdf).
- 27 In this context, see the legal opinion on a German export ban on pesticides by M. Fries and I. Westphal, 'Umsetzung eines Ausfuhrverbots für bestimmte, gefährliche Pestizide aus Deutschland', September 2022 (legal opinion for the European Center for Constitutional and Human Rights, the Heinrich-Böll-Stiftung, the INKOTA network, Pan-Germany and the Rosa-Luxemburg-Stiftung), at: [https://www.boell.de/sites/default/files/2022-09/zusammenfassung\\_rechtsgutachten\\_pestizidexportverbot\\_20220908\\_0.pdf](https://www.boell.de/sites/default/files/2022-09/zusammenfassung_rechtsgutachten_pestizidexportverbot_20220908_0.pdf). The opinion succinctly addresses the issue of WTO compatibility (p. 21-23) and concludes that the German export ban can be justified under WTO general exceptions, as the present opinion will also demonstrate regarding a ban enacted by the EU.
- 28 See for instance <https://www.lesoir.be/481023/article/2022-12-04/la-belgique-interdira-l'exportation-des-pesticides-les-plus-dangereux>.
- 29 Original quote: "Es geht nicht an, dass wir nach wie vor Pestizide produzieren und exportieren, die wir bei uns mit Blick auf die Gesundheit der Menschen zu Recht verboten haben." See for instance A. Meier, 'EU will weniger Pestizide: Bauern laufen Sturm gegen Brüsseler Entwurf – auch Özdemir sieht noch Änderungsbedarf', *Tagesspiegel*, 12 September 2022, at: <https://www.tagesspiegel.de/politik/eu-will-weniger-pestizide-bauern-laufen-sturm-gegen-brusseler-entwurf-auch-ozdemir-sieht-noch-anderungsbedarf-8634847.html>; 'Cem Özdemir plant Ausfuhrverbot für gesundheitsschädliche Pestizide', *Die Zeit*, 11 September 2022, at: [https://www.zeit.de/politik/deutschland/2022-09/exportverbot-pestizide-ozdemir?utm\\_referrer=https%3A%2F%2Fwww.google.com%2F](https://www.zeit.de/politik/deutschland/2022-09/exportverbot-pestizide-ozdemir?utm_referrer=https%3A%2F%2Fwww.google.com%2F)
- 30 Answer given by Mr Sinkevicius on behalf of the European Commission, 20 September 2021 (in answer to 'Ending the export of banned pesticides: concrete actions', Question for written answer E-002974/2021 to the Commission, 3 June 2021, at: [https://www.europarl.europa.eu/doceo/document/E-9-2021-002974-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2021-002974-ASW_EN.html)).
- 31 Letter from the Commission to PAN-Europe, 9 December 2020, available at: [https://www.pan-europe.info/sites/pan-europe.info/files/letter%20reply%20SG%20E\\_2\\_revLV.pdf](https://www.pan-europe.info/sites/pan-europe.info/files/letter%20reply%20SG%20E_2_revLV.pdf).
- 32 Letter from the Commission to PAN-Europe, Public Eye et al., 7 February 2023, at: [https://www.publiceye.ch/fileadmin/doc/Pesticide/Pesticides\\_LG\\_2023\\_Reply\\_from\\_Commissioner\\_Sinkevicius\\_9704725.pdf](https://www.publiceye.ch/fileadmin/doc/Pesticide/Pesticides_LG_2023_Reply_from_Commissioner_Sinkevicius_9704725.pdf).
- 33 See the policy paper by Europe Jacques Delors, 'A Narrow Path for EU Agri-Food Mirror Measures?', April 2022, at: <https://www.europejacquesdelors.eu/publications/grape-2-a-narrow-path-for-eu-agri-food-mirror-measures>; Fondation Nicolas Hulot et al., 'Globalisation: How Can We Stop the Import of Food Produced Using Banned Practices in Europe? A European regulation to protect the environment and our farmers', April 2021, at: <https://www.veblen-institute.org/Globalisation-How-can-we-stop-the-import-of-food-produced-using-banned.html>.
- 34 'Application of EU health and environmental standards to imported agricultural and agri-food products', Report from the Commission to the European Parliament and the Council, COM(2022) 226 final (3 June 2022), 6-9 and 22-23 (report available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0226&from=EN>).
- 35 Article 12 of the Agreement on Agriculture also addresses export restrictions, under one of the exceptions of Article XI.
- 36 GATT Article XI:1 reads as follows: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."
- 37 Appellate Body Report, *China – Raw Materials*, para. 320.
- 38 Appellate Body Report, *China – Raw Materials*, para. 319.
- 39 The Panel in *India – Quantitative Restrictions* declares the broad scope of Article XI:1 with the following observation: Article XI:1 "provid[es] for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. In referring to the GATT Panel decision in *Japan – Trade in Semi-conductors*, the Panel recognises the comprehensive coverage of Article XI:1: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges'" (*India – Quantitative Restrictions*, para. 5.128).
- 40 The full text of GATT Article XX reads as follows: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:  
(a) necessary to protect public morals;  
(b) necessary to protect human, animal or plant life or health;  
(c) relating to the importations or exportations of gold or silver;  
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;  
(e) relating to the products of prison labour;



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

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

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

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

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.”

41 Appellate Body Report, US – Shrimp, para. 156.

42 Appellate Body Report, US – Shrimp, para. 159; see also Appellate Body Report, EC – Seal Products, para. 5.297.

43 Appellate Body Report, US – Shrimp, para. 119.

44 Appellate Body Report, US – Gasoline, p. 22.

45 Appellate Body Report, Indonesia – Import Licensing Regimes, para. 5.51.

46 Appellate Body Report, US – Gasoline, p. 22; Panel Report, EC – Asbestos, paras 8.177-8.178.

47 For instance, Appellate Body Report, India – Solar Cells, para. 5.57 (note omitted); Appellate Body Report, Argentina – Financial Services, para. 6.202. The same methodology has been applied to general exceptions under the GATS, e.g., Appellate Body Report, US – Gambling, para. 292.

48 Invoking paragraph (d) (policy objective of securing compliance with domestic laws or regulations) seems to be excluded: while the EU Chemicals Strategy for Sustainability commits to future action, it does not in itself constitute such action, less so in the form of legal rules. The India – Solar Cells case provides relevant precedent in this regard. The Panel considered that “the relevant texts of these instruments [which related, among others, to ecological sustainability], whether seen in isolation or read together, do not set out, with a sufficient degree of normativity and specificity.” (Panel Report, India – Solar Cells, para. 5.133).

49 Article 1 PIC Regulation.

50 See for instance P. Conconi and T. Voon, ‘EC–Seal Products: The Tension between Public Morals and International Trade Agreements’, 15 *World Trade Review* 211 (2016), addressing the difficulty of the Appellate Body’s reasoning in Brazil – Retreaded Tyres for multi-purpose measures.

51 As the Panel stated in the Asbestos case, “[i]n principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists” (Panel Report, EC – Asbestos, para. 7.186).

52 Notably, Article 1 furthermore highlights “environmentally sound use of hazardous chemicals” as an additional objective of the Regulation.

53 Panel Report, US – Gasoline, para. 6.20; Panel Report, EC – Asbestos, para. 8.170.

54 Appellate Body Report, EC – Asbestos, para. 167.

55 Appellate Body Report, US – Gasoline, p. 20.

56 Appellate Body Reports, China – Rare Earths, para. 5.94.

57 Appellate Body Reports, China – Rare Earths, para. 5.136: “Just as GATT-inconsistent measures impose limitations on international trade, domestic restrictions must impose limitations on domestic production or consumption.”

58 ECJ (First Chamber), *Pesticide Action Network e. a., C-162/21* (preliminary ruling), 19 January 2023, para. 58 ff.

59 *Ibid.*, para. 54: “Article 53(1) of Regulation No 1107/2009 must be interpreted as not permitting a Member State to authorise the placing on the market of plant protection products for seed treatment, or the placing on the market and use of seeds treated with those products, where the placing on the market and use of seeds treated with those products have been expressly prohibited by an implementing regulation.”

60 Appellate Body Report, US – Shrimp, para. 129.

61 Appellate Body Report, US – Shrimp, paras 129-130.

62 Appellate Body Report, US – Shrimp, para. 131.

63 Appellate Body Report, US – Shrimp, para. 128. Interestingly, the Appellate Body added “frequently because of human activities.”

64 Respectively in the US – Shrimp, US – Tuna II (Mexico) (Article 21.5 – Mexico) (Panel Report, para. 7.521), and US – Gasoline cases.

65 R. Howse and J. Langille, ‘Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values’, 37 *Yale Journal of International Law* 368 (2012), 427.

66 E. Whitsitt, ‘A Comment on the Public Morals Exception in International Trade and the EC–Seal Products Case: Moral Imperialism and Other Concerns’, 3 *Cambridge International Law Journal* 1376 (2014), 1381-1384; C.T. Feddersen, ‘Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and Conventional Rules of Interpretation’, 7 *Minnesota Journal of International Law* 75 (1998), 115.

67 R. Howse and J. Langille, ‘Permitting Pluralism’, *op. cit.*, 427; R. Howse, J. Langille and K. Sykes, ‘Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products’, 48 *The George Washington International Law Review* 81 (2015), 105.

68 Panel Report, China – Publications and Audiovisual Products, para. 7.763.

69 See US – Gambling; Panel Report, China – Publications and Audiovisual Products, para. 7.759.

70 See US – Gambling. See also Panel Report, US – Tariff Measures, para. 7.115; Panel Report, China – Publications and Audiovisual Products, para. 7.759; Panel Report, EC – Seal Products, para. 7.380; Panel Report, Colombia – Textiles, para. 7.299; and Panel Report, Brazil – Taxation, para. 7.520.

71 See for instance Appellate Body Reports, EC – Seal Products, para. 5.199.

72 Panel Report, US – Gambling, para. 6.469.

73 Panel Report, China – Publications and Audiovisual Products, para. 7.763.

74 Panel Report, EC – Seal Products, para. 7.410.

75 Panel Report, Colombia – Textiles, paras 7.338-7.339.

76 Panel Report, Brazil – Taxation, paras 7.521 and 7.568.

- 77 Panel Report, US – Tariff Measures (China), para. 7.140.
- 78 Panel Report, EC – Seal Products, para. 7.383.
- 79 See for instance Appellate Body Reports, EC – Seal Products, paras. 5.197-5.198.
- 80 Appellate Body Report, EC – Seal Products, paras 5.289-5.290.
- 81 [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13750-Hazardous-chemicals-prohibiting-production-for-export-of-chemicals-banned-in-the-European-Union\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13750-Hazardous-chemicals-prohibiting-production-for-export-of-chemicals-banned-in-the-European-Union_en).
- 82 Loi n° 2018-938 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous (Law for a balance in trade relations in the agriculture and food sector, and healthy, sustainable and accessible food for all, 30 October 2018), available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000037547946/>. Article 44 of the legislation modifies Article L. 236-1 A of the Rural and Maritime Fisheries Code which reads as follows: "Il est interdit de proposer à la vente ou de distribuer à titre gratuit en vue de la consommation humaine ou animale des denrées alimentaires ou produits agricoles pour lesquels il a été fait usage de produits phytopharmaceutiques ou vétérinaires ou d'aliments pour animaux non autorisés par la réglementation européenne ou ne respectant pas les exigences d'identification et de traçabilité imposées par cette même réglementation." (It is prohibited to offer for sale or to distribute free of charge, for human or animal consumption, foodstuffs or agricultural products produced using plant protection products, veterinary products or animal feedstuffs that are not authorised by European regulations or that do not comply with the identification and traceability requirements imposed by these regulations).
- 83 Interestingly, the German Plant Protection Act in fact already contains this possibility in explicit terms: the Ministry for Food and Agriculture is enabled, insofar as required to implement EU legislation or to prevent risks to human or animal health or other risks, to prohibit or restrict the export of pesticides to non-EU countries (Gesetz zum Schutz der Kulturpflanzen (Pflanzenschutzgesetz – PflSchG), 6 February 2012, Article 25(3)(2), at: [https://www.gesetze-im-internet.de/pflschg\\_2012/BJNR014810012.html](https://www.gesetze-im-internet.de/pflschg_2012/BJNR014810012.html)). The export ban under consideration in Germany would therefore not be entirely de novo, but would merely "activate" a prohibition already provided for.
- 84 For instance, one can mention the petition calling for an export ban on chemicals already banned in the EU (<https://actions.eko.org/a/outlaw-exports-of-banned-chemicals?eko=true>), and the petition calling for the prohibition of the export of bee-killing pesticides, which has reached over 2.5 million signatures: <https://actions.sumofus.org/a/stop-the-export-of-banned-bee-killing-pesticides>.
- 85 Conseil d'État, 20 September 2022, no. 451129, para. 5 (available at: [https://www.legifrance.gouv.fr/ceta/id/CETATEXT000046316542?init=true&page=1&query=&searchField=ALL&tab\\_selection=cetat](https://www.legifrance.gouv.fr/ceta/id/CETATEXT000046316542?init=true&page=1&query=&searchField=ALL&tab_selection=cetat)).
- 86 Panel Report, EC – Tariff Preferences, paras 7.198-7.199. In relation to Art. XX(a), it has been clarified that this does not mean that the text of the instrument expressly needs to refer to "public morals" (Appellate Body Reports, Colombia – Textiles, para. 5.69, and EC – Seal Products, para. 5.144).
- 87 As a matter of comparison, the preamble of the EU import ban on seal products (Regulation (EC) No. 1007/2009) explicitly emphasized governments' concern as well as public concern regarding animal welfare (see for instance para. 4: "The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering"). Regulation (EU) No. 2015/1775 amending Regulation (EC) No. 1007/2009 furthermore emphasized in its preamble that the latter had been adopted "in response to public moral concerns about the animal welfare aspects of the killing of seals and the possible presence on the Union market of products obtained from seals killed in a way that causes excessive pain, distress, fear and other forms of suffering" (Preamble, para. 1, emphasis added). While declarations of intention and purpose in a preamble do not suffice alone, they are nonetheless important indicators to consider, combined with the structure of the measure.
- 88 Panel Report, EC – Tariff Preferences, paras 7.206-7.207.
- 89 Appellate Body Report, Brazil – Retreaded Tyres, para. 151.
- 90 Panel Report, China – Rare Earths, para. 7.146.
- 91 GATT Panel, US – Restrictions on Imports of Tuna (Mexico), DS21/R, 1991, para. 5.14.
- 92 J. Pauwelyn, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO', 15 *European Journal of International Law* (2004), 585.
- 93 P.B. Stephan, 'The Political Economy of Extraterritoriality', 1 *Politics and Governance* 92 (2013), 93.
- 94 The Permanent Court of International Justice famously wrote in the Lotus case that "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State" (PCIJ, Lotus, judgment of 7 September 1927, Series A no. 10, 18).
- 95 Interestingly, the same argument was recently made by the Court of The Hague in a case addressing the export of "dirty" fuels to third countries, which considered that the challenged Dutch policy rule raised no issue of extraterritoriality whatsoever, contrary to the complainant's argument: "Since enforcement is limited to the Netherlands, enforcement does not conflict with the principle of territoriality, i.e., the principle that regulation should be limited to regulation within national borders." The fuel specifications are "territorial" only, insofar as they apply exclusively on Dutch territory, and the State's choice to not export harmful fuels to third countries to prevent their use in these countries does not force the Dutch standard upon them. See Court of The Hague, Zenith Energy Amsterdam Terminal B.V. and Exolum Amsterdam B.V. v. The Netherlands, judgment in summary proceedings of 27 January 2023, especially para. 4.14.
- 96 The same argument has been forcefully made by Howse and Regan regarding process-based restrictions: see R. Howse and D. Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy', 11 *European Journal of International Law* 249 (2000), 274.
- 97 L. Ankersmit, J. Lawrence and G. Davies, 'Diverging EU and WTO perspectives on extraterritorial process regulation', 21 *Minnesota Journal of International Law Online* (2012), 24.
- 98 *Ibid.*, 24-25.
- 99 See the Shrimp, Tuna and Seal Products cases.
- 100 For a detailed and insightful analysis of the issue of extraterritorial measures in the light of WTO law and, specifically,

- Article XX of the GATT, see D. Luff, *Le droit de l'Organisation mondiale du commerce* (Bruylant/LGDJ, 2004), 148-164.
- 101 M. Du, 'Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization', 50 *Journal of World Trade* 675 (2016); E. Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC – Seal Products Case: Moral Imperialism and Other Concerns', 4 *Cambridge Journal of International and Comparative Law* 1376 (2014).
- 102 R. Howse, J. Langille and K. Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products', *op. cit.*
- 103 Significantly, the Appellate Body nonetheless recognized that unilateral measures requiring third countries to comply with certain policies are not, a priori, incapable of being justified by Article XX (Appellate Body Report, US – Shrimp, para. 121).
- 104 S. Charnovitz, 'The Moral Exception in Trade Policy', 38 *Virginia Journal of International Law* 689 (1998), 695.
- 105 Annex 1 to the SPS Agreement.
- 106 Appellate Body Report, US – Shrimp, para. 133.
- 107 Appellate Body Report, US – Shrimp, para. 133.
- 108 Appellate Body Report, EC – Seal Products, para. 5.173.
- 109 *Ibid.*
- 110 On a similar issue see R. Howse, 'The World Trade Organization and the Protection of Workers' Rights', 3 *Journal of Small and Emerging Business Law* 131 (1999), 142-143; see also L. Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction', 36 *Journal of World Trade* 353 (2002).
- 111 In EC – Tariff Preferences the Panel took a critical stance, ruling that the "policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities" (Panel Report, EC – Tariff Preferences, para. 7.210).
- 112 See also the Seal Products case, where the sufficient nexus between EU and public moral concerns about animal welfare was not challenged, regardless of the jurisdiction where the seals are hunted.
- 113 See for instance Restatement (Third) of Foreign Relations Law of the United States (1987): a "state has jurisdiction to prescribe law with respect to (...) conduct outside its territory that has or is intended to have substantial effect within its territory" (§ 402(1)(c)).
- 114 See for instance E. Benvenisti and G. Nolte (eds), *Community Interests Across International Law* (OUP, 2018).
- 115 G. Marceau, 'WTO Dispute Settlement and Human Rights', 13 *European Journal of International Law* 753 (2002), 778. See also R. Harris and G. Moon, 'GATT Article XX and Human Rights: What Do We Know from the First 20 Years?', 16 *Melbourne Journal of International Law* 1 (2015).
- 116 B. Cooreman, 'Addressing Environmental Concerns through Trade: A Case for Extraterritoriality?', 65 *International & Comparative Law Quarterly* 229 (2016); B. Cooreman, 'Testing the Limits of Article XX(a) GATT after Seals', 5 *Journal of International Trade and Arbitration Law* 519 (2016); S. Negri (ed.), *Environmental Health in International and EU Law* (Routledge, 2020); J. Vinuales, 'A Human Rights Approach to Environmental Protection? An Assessment', in N. Bhuta (ed.), *The Frontiers of Human Rights* (OUP, 2016), 177.
- 117 Appellate Body Report, US – Shrimp, para. 153.
- 118 Appellate Body Report, US – Shrimp, para. 153, reiterated in para. 155.
- 119 Appellate Body Report, US – Shrimp, para. 133.
- 120 For instance, A. Nollkaemper, 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs from Animals Taken by Leghold Traps', 8 *Journal of Environmental Law* 237 (1996), 248.
- 121 B.J. Condon, 'GATT Article XX and Proximity-of-Interest: Determining the Subject Matter of Paragraphs (b) and (g)', 9 *UCLA Journal of International Law and Foreign Affairs* 137 (2004).
- 122 M.H. Choo, 'An Institutional Perspective on Resolving Trade-Environmental Conflicts', 12 *Journal of Environmental Law and Litigation* 433 (1997), 445; B. Cooreman, 'Addressing Environmental Concerns through Trade: A Case for Extraterritoriality?', 65 *International and Comparative Law Quarterly* 229 (2016); S. Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX', 25 *Journal of World Trade* 37 (1991).
- 123 According to Article 31(3) VCLT, when interpreting a treaty "there shall be taken into account, together with the context (...) c) any relevant rules of international law applicable in the relations between the parties". See in particular L. Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction', 36 *Journal of World Trade* 353 (2002).
- 124 L. Bartels, 'The Problem of Extraterritorial Jurisdiction', *op. cit.*, 365-366.
- 125 *Ibid.*
- 126 See for instance R. Howse and J. Langille, 'Permitting Pluralism', *op. cit.*; C. Delev, 'A Moral Stretch? US-Tariff Measures and the Public Morals Exception in WTO Law', 21 *Journal of World Trade Law* 249 (2022); R. Alford, 'Extraterritorial Regulation of Human Rights and the Environment Under the WTO General Exceptions', *Opinio Juris*, 2 November 2010, at: <http://opiniojuris.org/2010/11/02/extraterritorial-regulation-of-human-rights-and-the-environment-under-the-wto-general-exceptions/>.
- 127 B. Cooreman, 'Addressing Environmental Concerns through Trade: A Case for Extraterritoriality?', 65 *International and Comparative Law Quarterly* 229 (2016), 235.
- 128 See developments above. For a critical assessment, see S Charnovitz, 'The Moral Exception in Trade Policy', *op. cit.*, 689.
- 129 L. Bartels, 'The Problem of Extraterritorial Jurisdiction', *op. cit.*, 359; M. Wu (2008) 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine', 33 *Yale Journal of International Law* 215 (2008), 217-219.
- 130 L. Bartels, 'The Problem of Extraterritorial Jurisdiction', *op. cit.*, 359.
- 131 Court of The Hague, *Zenith Energy Amsterdam Terminal B.V. and Exolum Amsterdam B.V. v. The Netherlands*, judgment in summary proceedings of 27 January 2023, para. 4.10.
- 132 *Ibid.*
- 133 Joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice (ICJ, *South West Africa cases*, Preliminary Objections, Judgment of 21 December 1962), ICJ Reports 1962, 466.
- 134 L. Bartels, 'The Problem of Extraterritorial Jurisdiction', *op. cit.*, 359 (emphasis in original).
- 135 "[R]ecalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources" (Appellate Body Report, US – Shrimp, para. 131).
- 136 Appellate Body Report, US – Gasoline, p. 17.
- 137 Appellate Body Reports, *China – Rare Earths*, para. 5.90. See also Appellate Body Report, US – Shrimp, para. 141.

- 138 Appellate Body Report, US – Gasoline, p. 18.
- 139 For instance, Appellate Body Reports, Korea – Various Measures on Beef, para. 164; US – Gambling, para. 306; China – Publications and Audiovisual Products, para. 242; Colombia – Textiles, paras 5.71-5.73 and 5.77; and India – Solar Cells, para. 5.59.
- 140 Appellate Body Report, Brazil – Retreaded Tyres, para.182.
- 141 Appellate Body Report, US – Tariff Measures (China), para. 7.159.
- 142 F. Fontanelli, 'Necessity Killed the GATT: Art XX GATT and the misleading rhetoric about "weighing and balancing"', 5 *European Journal of Legal Studies* 36 (2012).
- 143 See respectively, on each of the three elements, Appellate Body Reports, EC – Asbestos, para. 172; China – Publications and Audiovisual Products, para. 310; and Korea – Various Measures on Beef, para. 163.
- 144 Appellate Body Report, Brazil – Retreaded Tyres, para. 156.
- 145 Appellate Body Report, Korea – Various Measures on Beef, para. 162. See also Appellate Body Report, EC – Asbestos, para. 172.
- 146 Appellate Body Report, EC – Asbestos, para. 172; Appellate Body Report, Brazil – Retreaded Tyres, para. 179.
- 147 Appellate Body, Korea – Various Measures on Beef.
- 148 Appellate Body Report, Brazil – Retreaded Tyres, para. 145.
- 149 Appellate Body Report, Brazil – Retreaded Tyres, para. 146
- 150 Appellate Body Report, China – Publications and Audiovisual Products, paras 251-253; Appellate Body Report, Colombia – Textiles, para. 5.72. See also, originally, Appellate Body Report, Korea – Various Measures on Beef, para. 163.
- 151 As noted in Panel Report, Indonesia – Chicken, para. 7.227.
- 152 Appellate Body Report, Brazil – Retreaded Tyres.
- 153 Appellate Body Report, US – Gambling, para. 308.
- 154 Appellate Body Report, US – Gambling, para. 309.
- 155 See for instance Appellate Body Report, Brazil – Retreaded Tyres, para. 170. For a clear formulation, see also Appellate Body Report, EC – Asbestos, para. 172.
- 156 Appellate Body Report, Brazil – Retreaded Tyres, para. 172.
- 157 As would be evidenced, for instance, by mirror measures, human rights due diligence obligations on chemical companies, and/or the promotion of a global phase out of pesticides and their substitution with safe alternatives regarding health and environment protection.
- 158 See for instance Fondation Nicolas Hulot et al., 'Globalisation: How Can We Stop the Import of Food Produced Using Banned Practices in Europe?', op. cit., 39 (interview with lawyer Clémentine Baldon, 'An EU regulation on mirror measures could be compatible with WTO law').
- 159 Appellate Body Report, US – Shrimp, para. 156.
- 160 Appellate Body Reports, US – Gasoline, p. 22; US – Shrimp, para. 116. A similar stance has been taken regarding the security exception, even though Article XXI does not contain an equivalent introductory clause: see Panel Report, Russia – Traffic in Transit, para. 7.128.
- 161 For instance, Panel Report, US – Gambling, para. 6.575; Appellate Body Report, US – Shrimp, para. 158. See also D. Carreau, P. Juillard, R. Bismuth and A. Hamann, *Droit international économique* (5th ed., Dalloz 2017), 246-247.
- 162 S. Gaines, 'The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures', 22 *University of Pennsylvania Journal of International Economic Law* 739 (2001).
- 163 For critical assessments see L. Bartels, 'The Chapeau of the General Exceptions in the WTO/GATT and GATS Agreements: a Reconstruction', 109 *American Journal of International Law* 95 (2015); A. Davies, 'Interpreting the Chapeau of GATT Article XX in Light of the "New" Approach in Brazil – Tyres', 43 *Journal of World Trade Law* 507 (2009).
- 164 Appellate Body Report, US – Gasoline, para. 121. See also Panel Report, Colombia – Textiles, para. 7.542; Appellate Body Reports, US – Gasoline, p. 22; US – Shrimp, para. 115; and Brazil – Retreaded Tyres, para. 215.
- 165 On inference from design (contents), architecture and revealing structure of the measure, see for instance Appellate Body Report, Japan – Alcoholic Beverages II, p. 29; reiterated in EC – Seal Products, para. 5.302. Contra, see: Appellate Body Report, Brazil – Retreaded Tyres; Panel Report, Colombia – Textiles, para. 7.542. For a curious middle ground, see Appellate Body Report, China – Rare Earths, paras 5.113, 5.138.
- 166 Appellate Body Report, US – Shrimp, paras 156, 159.
- 167 Appellate Body Report, US – Tuna II (Mexico) (Article 21:5), WT/DS381/AB/RW, 20 November 2015, para. 7.301. See also Appellate Body Report, US – Shrimp, para. 150. However, the Appellate Body in Tuna II rectified the initial order of analysis, since the condition of same conditions prevailing between countries is a "basis" for characterizing the discrimination as arbitrary or unjustifiable.
- 168 Appellate Body Report, US – Shrimp, para. 180.
- 169 Appellate Body Report, Brazil – Retreaded Tyres, para. 232.
- 170 Appellate Body Report, Brazil – Retreaded Tyres, para. 227.
- 171 Appellate Body Report, Brazil – Retreaded Tyres, para. 232.
- 172 For a critical assessment of the approach taken by the Appellate Body, which blurred the lines between the chapeau test and the test of provisional justification, see A. Davies, 'Interpreting the Chapeau of GATT Article XX in Light of the "New" Approach in Brazil – Tyres', 43 *Journal of World Trade Law* 507 (2009).
- 173 Appellate Body Reports, EC – Seal Products, paras 5.326 and 5.328.
- 174 Appellate Body Reports, EC – Seal Products, paras 5.333-5.338. By the same token, the Appellate Body in US – Shrimp found that while the US negotiated "seriously" with some Members, they did not with others although they equally exported shrimp to the US. Consequently, the Appellate Body concluded that "[t]he effect is plainly discriminatory and, in our view, unjustifiable" (para. 172).
- 175 Appellate Body Report, US – Shrimp, para. 150.
- 176 Appellate Body Report, US – Gasoline, p. 25.
- 177 Appellate Body Report, EC – Asbestos, para. 8.236.
- 178 Appellate Body Report, US – Shrimp, paras 164-165.
- 179 Appellate Body Report, US – Shrimp, para. 164.
- 180 Appellate Body Report, US – Shrimp, para. 165.
- 181 Appellate Body Report, US – Shrimp, paras 171-172.
- 182 Appellate Body Report, US – Gasoline, 27.
- 183 Appellate Body Report, US – Shrimp, para. 168.
- 184 Appellate Body Report, US – Shrimp (Article 21:5), para. 124.