

COMMENTS

ARE NON-TRADE VALUES ADEQUATELY PROTECTED UNDER GATT ART. XX?

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The role of WTO in balancing of fair and transparent terms of trade with non-trade values has been widely discussed by politicians, academics, human rights organizations and environmental groups. Indeed, only one of more than twenty lawsuits justifying the application of measures under Art. XX has ended in a victory.

The essay examines to what extent social values can be protected under law of WTO. For these purposes the main characteristics of GATT 1994, such as limitations and conditions for exceptions, a proper balance of provisions of Art. XX and their independence from other exceptions in GATT 1994 are considered as well scope of its application for such non-trade values as public morals; human, animal or plant life or health; exhaustible natural resources and national legislation. The most indicative cases of the WTO dispute settlement system are analysed to extract the practical value of exceptions under Art. XX.

Emphasis on human rights and compliance with the rules of international environmental law is determined by their particular importance for developing states which are not sufficiently influential in the global economy.

The author argues that, despite very limited list of exceptions, provisions of Art. XX GATT 1994 are consistent with the goals of the WTO and allow to provide the effective protection for common human and social values.

Key words: WTO; non-trade values; Art. XX of the GATT 1994; exceptions of Art. XX of the GATT 1994; two-tier test.

1. Introduction

Non-trade values are mentioned in six paragraphs of Art. XX GATT 1994 which relate to public morals; human, animal or plant life or health; compliance with laws

or regulations which are not inconsistent with the provisions of GATT 1994; the products of prison labour; national treasures of artistic, historic or archaeological value and exhaustible natural resources.

Thus, on the one hand Art. XX provides protection for some social values, and on the other hand, the list of values it protects is strictly limited. Moreover, only one (*US – Shrimp* (Art. 21.5 Malaysia)) of twenty attempts by WTO Members have been successful in justifying otherwise GATT-inconsistent measures under Art. XX of the GATT 1994.¹ This is why some international and non-governmental organizations questioned the effectiveness of the protection of social values by this article. Others argue that the WTO 'should expand its jurisdiction to deal with non-trade matters such as the environment in more formal ways.'²

This essay justifies the adequacy of Art. XX of the GATT 1994 to its purposes by examination of, firstly, the key features of this Article and its relation with other provisions of the GATT; secondly, their reflection in practice including decisions of WTO bodies, and, finally provides modes of application of Art. XX of the GATT 1994 for the protection of such main values as environment, human rights and public morality. This essay is focused on the exceptions to the WTO regulations that are usually considered as the most indicative cases of the WTO dispute settlement system.

2. Characteristics of Art. XX of the GATT 1994 and Scope of Its Application

2.1. Characteristics of Art. XX Of The GATT XX

To understand the specificity of Art. XX of GATT 1994 three statements should be taken into consideration.

2.1.1. Exceptions are Limited and Conditional

Article XX of the GATT is applicable only for limited and conditional exceptions from obligations under other GATT provisions.³ As the panel set in ¶ 5.9 of *US – Section 337 Tariff Act* (1989) Art. XX is

entitled 'General Exceptions' and that the central phrase in the introductory clause reads: 'nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures . . .' Article XX(d) thus provides for a limited and conditional exception from obligations under other provisions.

¹ Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* 553 (3rd ed., Cambridge University Press 2013).

² Elizabeth Trujillo, *A Dialogical Approach to Trade and Environment*, 16(3) *J. Int'l Econ. L.* 535, 538 (2013).

³ Bossche & Zdouc, *supra* n. 1, at 546.

The Panel therefore concluded that Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4. If any inconsistencies with Article III:4 were found, the Panel would then examine whether they could be justified under Article XX (d).⁴

That means, that non-trade values are under protection of this Article only when:

- 1) exceptions comply the exhaustive list of Art. XX; and
- 2) measures are not inconsistent with other GATT provisions.

Thus Members of WTO may invoke this Article for justifying policies protecting non-trade values only when both conditions are fulfilled.

2.1.2. Article XX is a Balancing Provision

Despite some experts' doubts⁵ Art. XX strikes a balance between the need to protect such universal human values as public morality, human rights, etc. and GATT goals to reduce trade barriers. For example, a statement in the Appellate Body report in *US – Gasoline (1996)* states that 'the phrase "relating to the conservation of exhaustible natural resources" may not be read so expansively as seriously to subvert the purpose and object of Article III:4.⁶ This does not require a narrow interpretation of Art. XX because

[t]he relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.⁷

2.1.3. Independence of Art. XX from Other Similar Provisions

It would be a mistake to apply findings of inconsistency with other articles of the GATT 1994 for justifying measures by exceptions from Art. XX. For example, in *Thailand – Cigarettes (Philippines) (2011)* the Appellate Body noted:

⁴ Panel Report, *US – Section 337 Tariff Act (1989)*.

⁵ Donald H. Regan, *The Meaning of 'Necessary,' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6(3) *World Trade Rev.* 347 (2007).

⁶ Appellate Body Report, *US – Gasoline 18 (1996)*.

⁷ *Id.* at 18.

We have difficulties understanding why the Panel's disposition of the Philippines' claim under Article III:4 should depend on the Panel's disposition of Thailand's defense under Article XX(d). It is true that, in examining a specific measure, a panel may be called upon to analyze a substantive obligation and an affirmative defense, and to apply both to that measure. It is also true that such an exercise will require a panel to find and apply a 'line of equilibrium' between a substantive obligation and an exception. Yet this does not render that panel's analyses of the obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further and separate' assessment of whether such measure is otherwise justified.⁸

2.2. Scope of Application

2.2.1. Article XX and WTO Agreements Other Than GATT 1994

While there is no doubt that Art. XX justifies any inconsistency with obligations under GATT 1994, it is still not clear whether this Article is available to justify measures inconsistent with other WTO agreements. Initially the panel stated that these measures are not the subject of Art. XX: 'the Panel did not determine whether Article XX(a) is available as a direct defense for breaches of China's trading rights commitments as set out in the Accession Protocol;⁹ but later the Appellate body noted that, as

the reference to China's power to regulate trade 'in a manner consistent with the WTO Agreement' seems to us to encompass both China's power to take regulatory action provided that its measures satisfy prescribed WTO disciplines and meet specified conditions (for example, an SPS measure that conforms to the SPS Agreement) and China's power to take regulatory action that derogates from WTO obligations that would otherwise constrain China's exercise of such power . . .¹⁰

< . . . >

we consider that the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products. In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and

⁸ Appellate Body Report, *Thailand – Cigarettes (Philippines)* ¶ 174 (2011).

⁹ Panel Report, *China – Publications and Audiovisual Products* ¶ 8.2(a)(ii) (2010).

¹⁰ Appellate Body Report, *China – Publications and Audiovisual Products* ¶ 228 (2010).

China's regulation of trade in the relevant products, we find that China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994. Successful justification of these provisions however, requires China to demonstrate that it complies with the requirements of Article XX of the GATT 1994 and, therefore, constitutes the exercise of its right to regulate trade in a manner consistent with the WTO Agreement.¹¹

However later in *China – Raw Materials* (2012) the Appellate Body agreed with the panel that in this particular case Art. XX is not applied to justify inconsistency with other agreements.¹²

2.2.2. Measures for Justification under Art. XX

Two requirements of the measures in question are set by GATT and the case law: firstly, it should not 'undermine the WTO multilateral trading system.'¹³ Article XX may be employed to justify measures prescribed by the importing country which exporting countries have to comply with or adopt.¹⁴ Secondly, a measure in question must pass two-tier test which the following:

- 1) the requirements of one of the exceptions from Art. XX of the GATT; and
- 2) requirements of the chapeau (introductory clause) of Art. XX.¹⁵

The importance of this test is described in *Brazil – Retreated Tyres* (2007) when the panel set that the manner by which the measure is implemented in practice is not examined but it should be 'relevant to later parts of the Panel's assessment, especially under the chapeau of Article XX, where the focus will be, by contrast, primarily on the manner in which the measure is applied.'¹⁶ The main purpose of the chapeau of Art. XX is 'to avoid that provisionally justified measures are applied in such a way as would constitute a misuse or an abuse of the exceptions of Article XX.'¹⁷

2.2.3. Territorial Jurisdiction

Although the position of the Appellate Body has not been declared yet, the panel in *EC – Tariff Preferences* (2004) said:

¹¹ *China – Publications and Audiovisual Products*, *supra* n. 10, at ¶ 233.

¹² *Id.* at ¶ 307.

¹³ Appellate Body Report, *US – Shrimp* ¶ 121 (1998).

¹⁴ *Bossche & Zdouc*, *supra* n. 1, at 551.

¹⁵ *Id.* at 552.

¹⁶ Panel Report, *Brazil – Retreated Tyres* ¶ 7.107 (2007).

¹⁷ *Bossche & Zdouc*, *supra* n. 1, at 573.

the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX (b) of GATT 1994.¹⁸

Nevertheless there is no jurisdictional limitation for measures under Art. XX.

Thus, despite the specific nature of Art. XX, due to which this Article should be interpreted carefully in every case, Art. XX provides extensive protection for non-trade values regarding not only GATT but also other WTO agreements, by various internal state measures aimed for national and global use.

3. Specific Exceptions of Art. XX and Their Practical Value

3.1. Protection of Public Morals

This exception was referred to in *US – Tuna (Mexico)* (1991) and *US – Malt Beverages* (1992) but until *China – Publications and Audiovisual Products* (2010) the panel did not ‘examine the relevance of this provision.’¹⁹ In *China – Publications and Audiovisual Products* (2010) China invoked Art. XX(a) to justify a content-review mechanism and a system for the selection of companies which were authorised to import publication and audiovisual products. The panel adopted the term ‘public morals’ from *US – Gambling* (2005) as (1) ‘standards of right and wrong conduct maintained by or on behalf of a community or nation;’²⁰ (2) ‘the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values’²¹ and (3) Members ‘should be given some scope to define and apply for themselves the concepts of “public morals” . . . in their respective territories, according to their own systems and scales of values.’²² However measures in issue did not pass two-tier tests as necessary, particularly, the panel concluded that ‘China has not demonstrated the “necessity” of the approval criteria at issue’²³ because at least one less trade-restrictive measure was available.²⁴

¹⁸ Panel Report, *EC – Tariff Preferences* ¶ 7.210 (2004).

¹⁹ Bossche & Zdouc, *supra* n. 1, at 569.

²⁰ Panel Report, *US – Gambling* ¶ 6.465 (2005); Appellate Body Report, *US – Gambling* ¶ 299 (2005).

²¹ Panel Report, *US – Gambling* ¶ 6.461 (2005).

²² *Id.* at ¶ 6.461.

²³ Panel Report, *China – Publications and Audiovisual Products* ¶ 7.909 (2010).

²⁴ *Id.* at ¶ 7.909.

It should be noted that members of WTO use Art. XX(a) to justify import bans or other restrictions such as import of horror comics and some types of maps in Bangladesh²⁵ or alcoholic beverages in Saudi Arabia.²⁶

Thus, Art. XX of the GATT protects moral values in the frames described in this paragraph only.

3.2. Protection of Human, Animal or Plant Life or Health

Article XX(b) covers measures 'necessary to protect human, animal or plant life or health.' The first step of the two-tier test does not usually cause difficulties for interpretation: panels and the Appellate Body accepted various measures as appropriate to protect values described in Art. XX(b): measures to reduce the smoking of cigarettes,²⁷ air pollution,²⁸ health risks.²⁹ However these measure must be imposed as a part of comprehensive policy and may not be used as an excuse for discrimination post factum as noted the panel in *China – Raw Materials* (2012): 'invocation of environmental and health concerns is merely a post hoc rationalization developed solely for purposes of this dispute.'³⁰

Not all environmental measures can be justified by Art. XX(b): they should be established to protect specific risks, not environment as a whole as the panel highlighted in *Brazil – Retreaded Tyres* (2007).³¹

Also the 'necessity' requirement is more complex in this case. To comply to Art. XX(b) the following must be considered:

1) 'the weighing and balancing'³² have always to be taken into consideration. The Appellate Body interprets the necessity as in *Brazil – Retreaded Tyres* (2007) with referencing to *US – Gambling* (2005):³³

in order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors,

²⁵ Report by Secretariat, *Trade Policy Review: Bangladesh*, WT/TPR/S/270, 10 September 2012, Appendix, Table AIII.1, at <http://www.wto.org/english/tratop_e/tp_r_e/tp370_e.htm> (accessed June 17, 2014).

²⁶ Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, 1 November 2005, Annex F, List of Banned Imports, at <[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20@Symbol=%20wt/acc/sau/*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20wt/acc/sau/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#)> (accessed June 17, 2014).

²⁷ *Thailand – Cigarettes (Philippines)*, *supra* n. 8.

²⁸ *US – Gasoline*, *supra* n. 6.

²⁹ Panel Report, *Brasil – Retreaded Tyres* (2007).

³⁰ Panel Reports, *China – Raw Materials* ¶ 7.499 (2012).

³¹ *Brazil – Retreaded Tyres*, *supra* n. 29.

³² *Id.* at ¶ 182.

³³ Appellate Body Report, *US – Gambling* ¶ 307 (2005).

particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary;³⁴

2) the more important the protection value and the more the contribution to its protection, the more easily the measure is considered as necessary.³⁵ The Appellate Body highlighted in *EC – Asbestos* (2001): 'In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibers. The value pursued is both vital and important in the highest degree³⁶ but intensification of restrictions of measures inevitably entails complication of justification of necessity;³⁷

3) not only reasonably available measures but also difficulties of their implementation are to be considered. In *EC – Asbestos* the Appellate Body set that

France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt.' Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection.³⁸

This position is also confirmed in *Brasil – Retreaded Tyres* (2007):

[a]n alternative measure may be found not to be 'reasonably available' . . . where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties,³⁹

³⁴ *Brasil – Retreaded Tyres*, *supra* n. 29, at ¶ 178.

³⁵ *Bossche & Zdouc*, *supra* n. 1, at 557.

³⁶ Appellate Body Report, *EC – Asbestos* ¶ 172 (2001).

³⁷ *Bossche & Zdouc*, *supra* n. 1, at 557.

³⁸ *EC – Asbestos*, *supra* n. 36, at ¶ 174.

³⁹ *Id.* at ¶ 156.

4) WTO members independently define the level of protection for values under Art. XX(b) as noted in the panel report in *US – Gasoline* (1996):

it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefitting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product;⁴⁰

5) policies should not merely follow a majority of scientific opinion.⁴¹ There should be a link between the objective of protecting policy and measures in question.

For example, the panel in *China – Raw Materials* (2012) found that the necessity of export restriction is not demonstrated; examined objectives of the export restrictions and whether these restrictions made a material contribution to the achievement of the policy and the impact of restrictions on trade and the possibility of using less-restrictive measures.⁴²

3.3. Protection of Exhaustible Natural Resources

Article XX(g) relates to exhaustible natural resources and suggests a three-tier test. First, the measure must relate to the ‘conservation of exhaustible natural resources.’ ‘exhaustible’ natural resources and ‘renewable’ natural resources are [not] mutually exclusive.

One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, ‘renewable,’ are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as ‘finite’ as petroleum, iron ore and other non-living resources.⁴³

So the definition of exhaustible resources is sufficient. Second, the measure must be reasonably related to conservation of an exhaustible natural resource and not disproportionately [wide] broad:

The term ‘relat[e] to’ is defined as ‘hav[ing] some connection with, be[ing] connected to.’ The Appellate Body has found that, for a measure to relate to conservation in the sense of Article XX(g), there must be ‘a close and genuine

⁴⁰ Panel Report, *US – Gasoline* ¶ 6.22 (1996).

⁴¹ *EC – Asbestos*, *supra* n. 36, at ¶ 178.

⁴² *Bossche & Zdouc*, *supra* n. 1, at 560.

⁴³ *US – Shrimp*, *supra* n. 13, at ¶ 128.

relationship of ends and means.' The word 'conservation,' in turn, means 'the preservation of the environment, especially of natural resources.'⁴⁴

The third criterion is even-handedness (but not identity) in the impositions of restrictions on imported and domestic products: the Appellate Body found that 'there is, of course, no textual basis for requiring identical treatment of domestic and imported products.'⁴⁵

All these steps are illustrated in the panel report in *China – Raw Material* (2012) declared that Chinese measures did not meet any of the elements of three-tier test.⁴⁶

To sum up, Art. XX(b) and (d) protect human, animal or plant life and health as well as exhaustible natural resources if measures comply all requirements.

3.4. Protection of National Legislation

Article XX(d) justifies measures necessary to secure compliance with laws or regulations which are not inconsistent with the GATT, including provisions of customary law, competition law and intellectual property law. The test of a measure is more specific for Art. XX(d). Firstly, a measure must be designed to secure compliance with national law.⁴⁷ In *US – Gasoline* the panel noted that measures in question 'were not an enforcement mechanism. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX(d) was concerned.'⁴⁸ However 'the measure cannot be guaranteed to achieve its result with absolute certainty.'⁴⁹ Secondly, the legislation must be domestic:

the terms 'laws or regulations' refer to rules that form part of the domestic legal system of a WTO Member. Thus, the 'laws or regulations' with which the Member invoking Article XX(d) may seek to secure compliance do not include obligations of another WTO Member under an international agreement.⁵⁰

Thirdly, the legislation 'referred to Article XX(d) have to be GATT-consistent.'⁵¹ Thus, actually the test becomes three-tier like in *Canada – Wheat Exports and Grain*

⁴⁴ Appellate Body Report, *China – Raw Materials* ¶ 355 (2012).

⁴⁵ *US – Gasoline*, *supra* n. 6, at 21.

⁴⁶ *China – Raw Material*, *supra* n. 30, at ¶ 7.467.

⁴⁷ *Bossche & Zdouc*, *supra* n. 1, at 561.

⁴⁸ *US – Gasoline*, *supra* n. 40, at ¶ 6.33.

⁴⁹ Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* ¶ 74 (2006).

⁵⁰ *Id.* at ¶ 69.

⁵¹ *Bossche & Zdouc*, *supra* n. 1, at 563.

Imports (2004).⁵² Evaluation necessarily follows the general rules of weighing and balancing.⁵³

3.5. Other Exceptions

It is not clear at present how efficient exceptions are under Art. XX(e) regarding products of prison labour and (f) regarding 'protection of national treasures of artistic, historic or archaeological value' because there is no case law referring to these paragraphs. Authors suggest two ways to implement Art. XX(e): as a cause for banning the importation of goods produced by prisoners⁵⁴ or as a start for developing this concept as a model preventing the use of products as a result of 'slave labour or conditions contrary to the most fundamental labour standards.'⁵⁵

Article XX(f) concerns measures for the protection of national treasures of artistic, historic or archeological value and does not require necessity for the measures.

4. Current Issues regarding Protection of Non-Trade Values

4.1. Human Rights

Recently there were few discussions regarding the role of WTO and particularly GATT in protection of human rights. For example, the United Nations (UN), non-governmental organisations and many scholars argue for the linkage of human rights to international trade within the context of the WTO as an 'inevitable expansion of the WTO trade mandate.'⁵⁶ Furthermore, WTO is called 'to shift to a human rights-based approach to international trade'⁵⁷ because the human rights are the main priority of Governments and fundamental principle.⁵⁸

However this approach is not acceptable for the following reasons. First, the purpose of WTO's establishment was not promotion of human rights but 'peaceful and predictable interstate economic relations free of political maneuvering.'⁵⁹ Thus focus on measures to protect human rights would distract from the main priority of WTO – reduction of barriers in trade between states because '[t]he WTO is not

⁵² Panel Report, *Canada – Wheat Exports and Grain Imports* ¶ 6.218 (2004).

⁵³ *Id.* at ¶ 6.226; Appellate Body Report, *Korea – Various Measures on Beef* ¶ 164 (2001).

⁵⁴ Bossche & Zdouc, *supra* n. 1, at 571.

⁵⁵ *Id.*

⁵⁶ Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 *Geo. Wash. Int'l L. Rev.* 537 (2001) (cited in Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35(3) *Geo. J. Int'l L.* 597 (2004)).

⁵⁷ Eres, *supra* n. 56, at 597.

⁵⁸ *Id.*

⁵⁹ *Id.*

an appropriate forum for debating, implementing, or interpreting human rights law. It is an efficient and effective international organization mandated to regulate international trade.⁶⁰ Indeed, neither the historical reason GATT nor current case law give legal ground for changes of the list of exceptions under Art. XX of the GATT.

The second objection against strengthening the exiting regulation of exceptions is a flexibility of Art. XX of the GATT: there are enough opportunities for indirect protection of human rights through provisions of Art. XX(a), (b) and (d).

Thus, Art. XX of the GATT is sufficient to protect human rights using Members' measures necessary to protect moral values, compliance with domestic law or human life and health.

4.2. Carbon Border Measures

Another debate concerns carbon border measures because climate change resulting from greenhouse gas emissions and other global ecological issues which cannot be solved locally.⁶¹ Despite some doubts Art. XX of the GATT provides the framework for justification of measures in question as necessary for the protection of human, animal or plant life or health (Art. XX(b)) because in the *Brazil – Retreaded Tyres* the Appellate Body recognized that a trade-restrictive measure, the contribution of which is not immediately observable, could nevertheless be justified under Art. XX(b).⁶² As to other situations, the measure must comply with the regular two-tier test. Thus Art. XX of the GATT protects main ecological values without resorting to 'green extremism.'

5. Conclusion

To conclude, Art. XX of the GATT contains exceptions intended for protection of non-trade values such as human life and health, public morals, environment, and respect for the local law. Critics point to the lack of protection of these values by the WTO, primarily because of the very limited list of exceptions.

However, firstly, the design of Art. XX justifies a broad range of exception social values protection:

1) very general definitions of values (for example, a list of measures necessary to protect human, animal or plant life and health is actually unlimited) which can cover all current needs of the world community including human rights or extra measures against climate change;

2) members of WTO have the right to establish their domestic legislation to solve local social issues and this right is under protection of Art. XX GATT 1994.

⁶⁰ Eres, *supra* n. 57, at 602.

⁶¹ Ludvine Tamiotti, *The Legal Interface between Carbon Border Measures and Trade Rule*, 11(5) Climate Policy 1202–11 (2011), available at <<http://dx.doi.org/10.1080/14693062.2011.592672>> (accessed June 17, 2014).

⁶² *Id.*

Secondly, the basic idea of the establishing of the WTO is the development of free trade and the removal of barriers and unjustifiable discrimination in this particular area. The full protection of non-trade values, such as human rights or environment, constitutes the primary duty of state governments and the mandate of various international and non-governmental organisations.

And, finally, protecting measures can be justified as exceptional if they meet the clear requirements of two-tier (sometimes three-tier) test and there are no less restrictive alternatives.

Consequently, Art. XX of the GATT 1994 provides adequate and sufficient protection for the main non-trade values in the framework of the tasks the World Trade Organization and the purpose of signing the GATT.

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