The Hungarian Fat Tax under the General Agreement on Tariffs and Trade Article XX(b)

The World Health Organization has compiled startling statistics on the global prevalence of obesity. Among them: Worldwide obesity has nearly doubled in the past 30 years; In 2008, more than 1.4 billion adults 20 and older were overweight, and 500 million adults were clinically obese; Being overweight or obese is one of the leading risks for global death; Once a high-income country problem, the rate of overweight and obese children is now 30% higher in developing countries with emerging economies.[1] There is well-documented scientific evidence indicating that obesity is strongly related to a vast number of diseases including hypertension, hypercholesterolemia, type 2 diabetes mellitus, respiratory conditions, arthritis, and certain types of cancer. Moreover, obesity lessens the quality of life of individuals.[2] And yet, obesity is entirely preventable.[3]

The growing rate of obesity and the resulting medical costs are leading states to explore fiscal and regulatory interventions to provide consumers with economic incentives to modify their food consumption, thus controlling their body weight.[4] These interventions seek to curb the overconsumption of sugar-sweetened beverages and high in fat, salt, and sugar foods that are associated with excess caloric intake and eventual increases in body weight.[5] An increasing number of countries across the industrialized world are considering levying taxes on unhealthy

[1] Obesity and overweight: fact sheet no 311 Geneva: World Health Organization; 2012 [Updated August 2014). Available from: http://www.who.int/mediacentre/factsheets/fs311/en/index.html.
[2] Sassi F. *Obesity and the Economics of Prevention: Fit Not Fat*. Paris: OECD Publishing; 2010. Available from: http://www.oecd.org/els/ health-systems/46044572.pdf. Accessed November 18, 2014.
[3] Obesity and overweight: fact sheet no 311 Geneva: World Health Organization; 2012 [Updated August 2014). Available from: http://www.who.int/mediacentre/factsheets/fs311/en/index.html.
[4] Alemanno, Alberto and Carreno, Ignacio, '*Fat Taxes' in Europe and Beyond – A Legal and Policy Analysis Under EU and WTO Law*, European Food and Feed Law Review, 2/2013, (July 19, 2013). Available at SSRN: http://ssrn.com/abstract=2295923
[5] Maniadakis N, Kapaki V, Damianidi L, Kourlaba G. A systematic review of the effectiveness of taxes on nonalcoholic beverages and high-in-fat foods as a means to prevent obesity trends. *ClinicoEconomics and Outcomes Research:* 2013: 5: 519–543 (2013). Available at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3810203/

food, often called "fat or sugar taxes," as a means to regulate the consumption of these products. The logic is that, eventually, this will help curb obesity, trim health care costs, raise revenue, and ultimately improve public health.[6] The definition of a "fat tax" is a tax or surcharge placed upon fattening foods or beverages on individuals with the aim to decrease consumption of foods that are linked to obesity and other health-related risks.[7] The use of food taxing policies has been lauded as a plausible intervention, specifically, because the price of a calorie has been shown to be substantially cheaper when obtained from unhealthful, energy-dense foods, as opposed to more healthful, less-dense foods. As an example, the price of a 300-calorie Snickers is $1.29 at Philadelphia-area convenience store, Wawa. The price of a 300-calorie kale and quinoa salad is $4.49.[8] However, taxation structures that worked for other substances, such as tobacco (an excise tax on a single substance that is proven to be harmful) may not be automatically transferable to food because it is essential to sustain life and as such tends to involve more complex choices.[9] Opponents of "fat taxes" argue that they represent a violation of consumer sovereignty, and that consumer behavior is complex and multi-factorial such that substitution effects make it impossible to guarantee a reduction in total energy intake by specific taxes alone.[10]

In deciding whether to implement food regulation measures for obesity prevention, governments also need to take into account, among other factors, the possibility that one of their trading partners might object and allege that they are violating international obligations. Under the World Trade Organization's General Agreement on Tariffs and Trade (GATT), all measures

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[6] Alemanno, Alberto and Carreno, Ignacio, '*Fat Taxes' in Europe and Beyond – A Legal and Policy Analysis Under EU and WTO Law*, European Food and Feed Law Review, 2/2013, pp. 97-112 (July 19, 2013). Available at SSRN: http://ssrn.com/abstract=2295923
[7] Id.
[8] As of December 29, 2014.
[9] Alemanno, Alberto and Carreno, Ignacio, '*Fat Taxes' in Europe and Beyond – A Legal and Policy Analysis Under EU and WTO Law*, European Food and Feed Law Review, 2/2013, pp. 97-112 (July 19, 2013).
[10] Oliver T. Mytton et al., *Taxing Unhealthy Food and Drinks to Improve Health.* 344 British Medical Journal. e2931, pp 1-7 (May 15, 2012).

that could affect products in international trade—including imported food, must comply with certain basic principles. The most important of these are the two obligations of nondiscrimination: the "most-favored nation" obligation in Article I and "national treatment" obligation in Article III. Article I provides that states must give equally favorable treatment to "like" (similar or competing) products of all other members. Article III requires states to give foreign products treatment at least as favorable as like domestic (local) products in their regulations and internal taxes. It does not seem likely that measures for obesity prevention would explicitly distinguish between products based on their country of origin. However, it is possible that regulatory requirements or differential rates of tax could have a disproportionate impact on imports as compared to domestic products, or on the products of a particular country or countries.[11] If in this scenario a measure is found to discriminate between like foreign and domestic products, it might be defended under Article XX, which allows measures to be taken for certain purposes, despite GATT obligations. These include measures "necessary to protect human life or health" in Article XX(b).[12]

On September 1, 2011, Hungary introduced a tax on products considered excessively salty, sweet or with high caffeine levels--Act CIII of 2011 on the Public Health Product Tax, also known as the 'chips tax', which is levied on the producer or first distributor.[13] This paper will seek to evaluate Hungary's tax under the GATT framework, specifically, how it might fare against challenges by invoking the exception in Article XX(b) as an affirmative defense. To do this, it will examine three seminal World Trade Organization (WTO) cases regarding Article

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[11] Barbara von Tigerstrom, *How Do International Trade Obligations Affect Policy Obligations for Obesity Prevention? Lessons from Recent Developments in Trade and Tobacco Control,* Canadian Journal of Diabetes *37, 182-188* (March 27, 2013).
[12] Id.
[13] Alemanno, Alberto and Carreno, Ignacio, '*Fat Taxes' in Europe and Beyond – A Legal and Policy Analysis Under EU and WTO Law*, European Food and Feed Law Review, 2/2013, pp. 97-112 (July 19, 2013). Available at SSRN: http://ssrn.com/abstract=2295923

XX(b) of the GATT, as well as global policy concerns that should also affect whether the tax is legitimized. First it will provide an overview of the Hungarian tax. Then it will provide an examination of Article XX(b) jurisprudence using three seminal cases. Lastly, it will provide an analysis of the validity of Hungarian tax as a public health exception, using the case law discussed as well as global policy concerns.

I. The Hungarian fat tax: an overview

The Hungarian life expectancy is one of the lowest in the European Union.[14] In 2012, it was just 75 years, as opposed to an average of 80 years for the entire bloc.[15] Nearly two-thirds of Hungarians are overweight or obese, and the country also has the highest per capita salt consumption in the European Union.[16] The recent set of taxes approved by the Hungarian Parliament that took effect in September 2011 seeks to combat these statistics by levying an additional charge on a range of unhealthy pre-packaged foods containing high salt and sugar contents.[17] Among them: potato chips, salted nuts, chocolate, candy, cookies, ice cream, and energy drinks.

The tax was first nicknamed the "hamburger tax" and included the idea of a tax on fast food, but the effort was later renamed a "chips tax."[18] This effectively skirted the issue of fat altogether, a change that many people attribute to lobbying by multinational corporations.[19] In the end, the taxes were applied only to packaged foods. The rates vary depending on the food

[14] Suzanne Daley, *Hungary Tries a Dash of Taxes to Promote Healthier Eating Habits,* New York Times (March 2, 2013).
[15] Eurostat, *Statistics Explained* (September 25, 2014). Available online at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Mortality_and_life_expectancy_statistics
[16] Id.
[17] Ed Holt, *Hungary to Introduce Broad Range of Fat Taxes,* The Lancet, Volume 378, Issue 9793, 755 (August 27, 2011); Derek Thompson, *Hungary introduces Fat Tax; (Don't Laugh),* The Atlantic (September 1, 2011)
[18] Suzanne Daley, *Hungary Tries a Dash of Taxes to Promote Healthier Eating Habits,* New York Times (March 2, 2013).
[19] Id.

group: adding approximately 13 cents to the cost of a 100-gram, or nearly 4-ounce, chocolate bar, or about 20 cents to a small bag of potato chips.[20] The tax is levied on the manufacturer of the products-- or if the product is imported, the first Hungarian distributor. [21]

The supporters of the taxes say that the charges will push people into eating more healthily. According to the Hungarian Prime Minister, the logic behind the tax is that those who live unhealthily should have to contribute more.[22] The added revenue will be used to help finance the countries' heavily indebted health-care system. The idea is that Hungarians whose diet choices land them in the hospital, should at least have to offset some of the costs of their care. [23] Critics say the taxes are discriminatory in that they target only certain products, will hurt local businesses, and people in some areas will start travelling to neighboring countries to purchase cheaper products, robbing the state of the extra tax revenues it wants. They also argue that taxes on some foods affect poorer people disproportionately because foods judged healthier are often more expensive and out of reach of those on lower wages.[24]

It is not unfounded criticism. In 2011 Denmark introduced a comparable 'fat tax,' raising the price of meat, dairy, edible oils and fats, margarine and other blended spreads, among other items. [25] The Danish government scrapped it less than a year later citing cumbersome administrative costs and undeterred Danes crossing the border into neighboring countries to purchase their unhealthy snacks.[26] Experts say the effort was also undermined by pressure from

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[20] Id.
[21] Margit Feher, *Hungary to Tax Foods It Thinks Unhealthy,* Wall Street Journal (June 22, 2011). available online at: http://blogs.wsj.com/emergingeurope/2011/06/22/hungary-to-tax-foods-it-thinks-unhealthy/
[22] Catherine Cheney, *Battling the Couch Potatoes: Hungary Introduces 'Fat Tax',* Spiegel Online International (September 1, 2011).
[23] Id.
[24] Id.
[25] Suzanne Daley, *Hungary Tries a Dash of Taxes to Promote Healthier Eating Habits,* New York Times (March 2, 2013).
[26] Ed Holt, *Hungary to Introduce Broad Range of Fat Taxes,* The Lancet, Volume 378, Issue 9793, 755 (August 27, 2011).

the food industry.[27] Europe, in general, however is leading the way on progressive 'fat tax' strategies with a handful of countries slapping taxes on items like sugary sodas, fatty cheeses and salty chips, and others considering it. In addition to Hungary and Denmark, France, Finland, Britain, Ireland and Romania have all either instituted food taxes or considered it.[28]

Meanwhile in Hungary, The government hoped to collect 20 billion forints (about $88 million) from the food taxes in it's first year of operation and fell 3 billion forints, or about $13 million, short. One reason was that energy drink makers quickly changed their products to avoid the tax. As a response, the government has reformulated its tax scheme to apply to these energy drinks and hopes to collect more money in the coming years.[29]

Under the WTO framework, if there is evidence that the tax applies more frequently to imported products than domestic products, or that Hungarian distributors are refusing to carry foreign products to avoid paying the tax, there could be a claim brought under Article III of the GATT, which seeks to protect foreign products from trade discrimination. For instance, if Hungarian potato chip manufacturers changed their products to avoid the tax and foreign potato chip manufacturers did not, a bag of foreign potato chips would cost disproportionately more than a bag of Hungarian potato chips, which would be in violation of the National Treatment principle under GATT Art. III(2).[30]

The only way to bypass this clear (and hypothetical) violation would be to assert an Article XX exception. The tax has two identified objectives potentially applicable to Article XX.

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[27] Suzanne Daley, *Hungary Tries a Dash of Taxes to Promote Healthier Eating Habits,* New York Times (March 2, 2013).
[28] Jason Gale, *Choosing Between Free Trade and Public Health,* Bloomberg BusinessWeek Magazine (November 22, 2011).
[29] Id.
[30] "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." General Agreement on Tariffs and Trade , Article III paragraph 2 (1994).

The first objective of the tax is to protect the Hungarian public from the health issues associated with bad nutrition and obesity.[31] The second objective is to raise money to get the Hungarian health system out of debt.[32] Thus, the provision in Article XX that excepts from the GATT measures adopted out of necessity to protect public health could conceivably be invoked as an affirmative defense to any claims of violations. Because the notion of 'fat taxes' have been gaining ground in recent years, this paper will evaluate how a fat tax might fare under Article XX(b) of the GATT using the Hungarian 'fat tax' as a case study by first explaining and evaluating relevant WTO case law, then by discussing how this particular fat tax might fare if that case law were applied.

II. Article XX(b) Relevant Case Law

Article XX of the GATT provides a list of "General Exceptions" that, under certain circumstances, permit states to behave in ways that would otherwise be violations of their WTO obligations.[33] The relevant portion of the treaty reads as follows:

"Article XX: General Exceptions

> 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:
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> . . . .
>
> (*b*) necessary to protect human, animal or plant life or health"[34]

To qualify for an exception is it necessary to satisfy both the specific exception and the

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[31] Catherine Cheney, *Battling the Couch Potatoes: Hungary Introduces 'Fat Tax',* Spiegel Online International (September 1, 2011).
[32] Id.
[33] Andrew T Guzman & Joost H.B. Pauwelyn, *International Trade Law,* (2nd ed. 2009).
[34] General Agreement on Tariffs and Trade, Article XX(b) (1994).

chapeau (the introductory paragraph).[35] The *United States – Gasoline* panel report provides a clear statement of this two-part requirement. In the *United States – Gasoline* case, Venezuela and Brazil claimed that a United States regulation that applied stricter rules on the chemical characteristics of imported gasoline than it did for domestically refined gasoline was a discrimination against gasoline imports in violation of Article III of the GATT. The United States argued that the regulation was consistent with Article III and whether it was or not, it was still justified under the exceptions in Article XX paragraphs (b), (d), and (g). Discussing the exception in Article XX(b) specifically, the panel noted that as the party invoking an exception, the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The United States, therefore, had to establish the following elements:

> (1) That the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health
>
> (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfill the policy objective; and
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> (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.[36]

Thus, we will investigate the interpretations of Article XX(b) regarding what *policies* designed to protect human health are applicable, what constitutes a *necessary* measure, and what it means to be in conformity with the requirements of the *introductory clause* (the Chapeau).

A. Policies

The following key WTO cases help to highlight the range of public health policy

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[35] Andrew T Guzman & Joost H.B. Pauwelyn, *International Trade Law,* (2nd ed. 2009).

[36] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/R (adopted Jan. 29, 1996) ¶ 6.20. (emphasis added)

concerns that are considered legitimate assertions of the XX(b) exception.

1. *Thai – Cigarette*

In *Thai – Cigarette*, the United States challenged a ban on the importation of cigarettes into Thailand as a violation of the General Elimination of Quantitative Restrictions under Article XI.[37] Thailand contended that the prohibition on imports of cigarettes was justified by the objective of public health policy which it was pursuing, namely to reduce the consumption of tobacco which was harmful to public health.[38] The specific policy reasons cited in the Panel Report are that cigarette consumption lowered the standard of living, increased sickness and led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use of human and natural resources. [39]

While no comparable ban existed on domestic Thai cigarettes,[40] the Thai government claimed that American imports were more likely to induce women and young persons to take up smoking, because of sophisticated advertising directed at these groups.[41] The Thai government asserted that they could only be successful in their policy by prohibiting cigarette imports.

In this case, the Panel accepted that smoking constituted a serious risk to human health and that consequently, measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b).[42] Thus, the objective of the tax fit squarely within the realm of

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[37] "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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." General Agreement on Tariffs and Trade , Article XI paragraph 1 (1947); Panel Report, *Thailand – Restricions on Importation of and Internal Taxes on Cigarettes,* DS10/R – 37S/200 (adopted November 7, 1990*).*

[38] Panel Report, *Thailand – Restricions on Importation of and Internal Taxes on Cigarettes,* DS10/R – 37S/200 (adopted Nov. 7, 1990*)* ¶ 21.

[39] Id.

[40] "The production of tobacco had not altogether been prohibited in Thailand because this might have led to production and consumption of narcotic drugs having effects even more harmful than tobacco, such as opium, marijuana and kratom (a plant with fragrant yellow flowers and intoxicating leaves)." Id.

[41] Id. at ¶ 27.

[42] Id. at ¶ 73.

legitimate XX(b) policy reasons.

2. *EC – Asbestos*

In *EC – Asbestos*, a French prohibition on the sale or importation of asbestos or products (such as cement) containing asbestos was challenged by Canada as unduly discriminatory under the National Treatment Principle in Article III.[43] The Appellate Body affirmed the findings in the Panel report that concluded that the European Communities (acting on France's behalf) made a prima facie case for the existence of a health risk in connection with the use of asbestos, by showing strong evidence that it caused lung cancer and mesothelioma in the occupational sectors downstream of production and processing. It was also deemed a health hazard to the public in general, in relation to the products containing the asbestos cement materials.[44] Thus, the asbestos prohibition implemented by France fell within the range of policies designed to protect human life or health as covered by Article XX(b).

3. *Brazil – Tyre*

In *Brazil – Tyre,* the European Union challenged a Brazilian import ban on used and retreaded tires.[45] Brazil conceded that it was a violation of the GATT but sought to justify it under Article XX(b).[46] The justification offered by Brazil for this ban was that, along with other policies, it was designed to reduce the volume of waste tires, which were a breeding ground for mosquitoes that carried malaria and dengue fever. Moreover, large quantities of waste tires

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[43] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products WT/DS135/R* (adopted March 12, 2001).
[44] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R* (adopted March 12, 2001) ¶ 157.
[45] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R (adopted December 3, 2007).
[46] Id.

raised health risks from tire fires that generated toxic fumes and residue.[47] Brazil contended that because waste tire disposal presents health risks that cannot be eliminated, only non-generation of waste tires allowed Brazil to achieve its chosen level of protection.[48] As distinguished from the policy in *EC – Asbestos,* the European Union charged that asbestos fibers are immediately and directly harmful to human health, unlike retreaded tires, which do not constitute any particular health risk with the same immediacy.[49] To address the question, the Panel in *Brazil – Tyres* considered it necessary first to determine the existence of *a health risk*, i.e. whether the product at issue posed a risk to, in that case, human life or health. They noted that once such a risk is found to exist, the objective of the measure should be assessed to determine whether the policy underlying the measure is to reduce such a risk. If so, it falls within the range of policies covered by Article XX(b).[50] The Panel determined that Brazil sufficiently demonstrated that accumulated waste tires provide a fertile breeding ground for mosquitoes and consequentially contribute to the transmission of dengue and yellow-fever. Moreover, they found that the accumulation of waste tires pose an increased risk of tire fires as well as the associated health risks arising from such fires. Thus, Brazil was able to demonstrate the existence of risks to human life and health within the meaning of Article XX(b) in connection with the accumulation of waste tires.[51] While the Union did appeal the Panel's findings, they did not appeal the panel's findings in regards to the policy of the tire import ban as it relates to human life and health under Article XX(b).

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[47] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* 3 December (2007) WT/DS332/R (adopted June 12, 2007) ¶ 4.12.
[48] Id. at ¶ 4.13.
[49] Id. at ¶ 4.18
[50] Id. at ¶ 7.52
[51] Id. at ¶ 7.83

B. The Necessity Test

Though the policy concerns underlying the import restrictions in the aforementioned three cases were all found to be valid to protect human life and/or health, and as such a legitimate policy concerns under Article XX(b), the policy reasons must also be *necessary* to protect human life and/or health. Thus, the scope of valid import restrictions becomes much narrower when this second prong of the analysis is factored.

1. *Thai – Cigarette*

While the policy underlying Thailand's restriction on foreign cigarettes was sound, the Panel concluded that it was not a valid exception under Article XX(b) because it was not necessary.[52] The Panel ruled that an import ban would only be "necessary" for public health reasons, within the meaning of Article XX(b), if alternative non-trade restricting measures were not available to achieve the public health objectives in question.[53] It noted that other countries had introduced strict, non-discriminatory labeling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. And that a non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative measure consistent with the GATT's terms.[54] The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it sought to pursue through an import ban on all cigarettes.[55] Because these measures would be a satisfactory alternative to an import ban, the ban could not be justified under Article XX(b).

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[52] Panel Report, *Thailand – Restricions on Importation of and Internal Taxes on Cigarettes,* DS10/R – 37S/200 (adopted Nov. 7, 1990*).*
[53] Id. at ¶ 75
[54] Id. at ¶ 77
[55] Id.

2. *EC – Asbestos*

France's import prohibition on asbestos was found to be a valid exercise of the Article XX(b) exception. The Appellate Body of the WTO found that France's invocation of article XX(b) was justified. There was no alternative measure, such as "controlled use" requirements available which France could reasonably be expected to employ to achieve its health and safety policy objectives, which in this case was zero health risk from exposure to asbestos.[56] The Appellate Body in interpreting and applying Article XX(b) suggested that there may be different levels of scrutiny applicable to the analysis of whether a measure is "necessary" depending on the importance of the objectives or interests it serves.[57] Canada asserted that "controlled use" would represent a "reasonably available" measure that would serve the same end, such that a complete prohibition would violate Article XX(b).[58] However, the Appellate Body noted 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 measure sought to eradicate completely.[59]

Thus, where the objective pursued by the measure is the preservation of human life and health, and the country's objective is to reduce the health risks in question to zero, the measure is entitled to a "margin of appreciation," and the availability of alternative, less trade-restrictive measures that may not achieve this objective as fully would not disqualify the measure from exemption under Article XX(b).[60]

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[56] "It is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a "halt" to the spread of asbestos-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection." Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R* (adopted March 12, 2001), ¶ 168

[57] Michael J. Trebilcock, *Understanding Trade Law,* 148-152, (2011)

[58] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R* (adopted March 12, 2001), ¶ 173.

[59] Id. at ¶ 174.

[60] Michael J. Trebilcock, *Understanding Trade Law,* 148-152, (2011)

3. *Brazil – Tyre*

Brazil – Tyre reaffirms *Asbestos.* The Appellate Body upholding the decision of the Panel interpreted the "necessity" test under Article XX(b) as requiring that the measure in question make a "material contribution" to the achievement of the health and safety objectives in question.[61] The Panel noted that the necessity of a measure should be determined through a process of weighing and balancing a series of factors, including the relative importance of the interests or values furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.[62]

Furthermore, WTO member states have the right to determine the level of protection of health that they consider appropriate in a given situation and that Brazil's chosen level of protection*,* was the reduction of the risks of waste tire accumulation to the maximum extent possible.[63] However, a contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade-restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of this interest or the values underlying the objective pursued by it.[64] This is, in effect, a proportionality test or qualitative cost-benefit test.[65] The Appellate Body contended that fewer waste tires would be generated with the import ban in place and that the ban was part of an overall comprehensive strategy to lessen the harmful effects of waste tires. As a *key element* of this strategy, the import ban would be likely to bring a

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[61] Id.
[62] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* 3 December (2007) WT/DS332/R (adopted June 12, 2007) ¶ 7.104.
[63] Id. at ¶ 7.109.
[64] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R (adopted December 3, 2007) ¶ 151.
[65] Alan O Sykes, *The Least Restrictive Means*, 70:1 U. of Chicago L. Rev. 403 (2003)

material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tires.[66]

In further interpreting the clause, the Appellate Body looked to *US – Gambling* which interpreted similar "necessary" language under Article XIV(a) of the General Agreement on Trade in Services, noting that the word "necessary" was not equivalent to "indispensable."[67]

> "It is well-established that a responding party invoking an affirmative defense bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defense...
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> . . . .
>
> This means that the responding party must show that its measure is "necessary" to achieve objectives. It is not the responding party's burden to show that there are *no* reasonably available alternatives to achieve its objectives. In particular a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden. Rather it is for a responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is "necessary."[68]

With respect to the issue of whether less trade-restrictive alternatives might have been available to achieve these objectives, the Appellate Body, again affirming the Panel, held that the E.U. bore the burden of identifying such alternatives, and that the alternatives the E.U. had identified, such as stockpiling and incineration, on the evidence before the Panel, were not as likely to achieve Brazil's health, safety and environmental objectives as the measures it had

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[66] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R (adopted December 3, 2007) ¶ 155.

[67] Id. at ¶ 141.

[68] Appellate Body Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services,* WT/ DS285/AB/R (adopted April 20, 2005) ¶¶ 309-311 (emphasis in original).

adopted.[69] As such, the ban on tire imports was a "necessary" measure to protect human life and/or health under Article XX(b).

Notably, the South American Trade Treaty MERCOSUR's tribunal held that the tire ban violated its obligations under MERCOSUR so Brazil had to start permitting imports of retreaded tires from other MERCOSUR countries. The Appellate Body held this was unjustifiably discriminatory toward imports of retreaded tires from the E.U., and though the measure was valid under prong one and two of the XX(b) analysis, as it was inconsistent with the Chapeau, and the invocation of the Article XX(b) exception was not justified.[70]

C. The Chapeau

The Chapeau, or introductory clause, prohibits such application of a measure at issue, otherwise falling within the scope of Article XX, as would constitute:

(a) "arbitrary discrimination" between countries where the same conditions prevail

(b) "unjustifiable discrimination" with the same qualifier; or

(c) "disguised restriction" on international trade.[71]

"Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of "disguised restriction." We 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. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade."[72]

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[69] Michael J. Trebilcock, *Understanding Trade Law,* 148-152, (2011)
[70] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R (adopted December 3, 2007) ¶ 252.
[71] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/ AB/R (adopted May 20, 1996) (Unlike current AB reports this early report does not feature numbered paragraphs)
[72] Id. (emphasis in original)

The Chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is accordingly, important to underscore that the purpose and object of the introductory clause of Article XX is the prevention of [abuse of the Article XX exceptions].[73] The Chapeau is animated by the principle that while the exceptions or Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the rights under the substantive rules of the treaty.[74] The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[75]

The burden of demonstrating that a measure is provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception.[76]

The seminal case involving the interpretation of the Chapeau is *US – Shrimp.* In 1987, the US issued regulations under the Endangered Species Act requiring US shrimp trawlers to use "turtle excluder devices" (TED).[77] A TED is a grate that is intended to allow shrimp to pass through to the back of the net while preventing turtles or other large items or animals from doing so.[78] The act also mandated that all shipments of shrimp and shrimp products into the United States had to be accompanied by a declaration attesting that the product was harvested " under conditions that do not adversely affect sea turtles."[79] The Appellate Body, reaffirming the Panel, found that the United States gave differing treatment to differing countries desiring to adhere to

[73] Id.
[74] Id.
[75] Id.
[76] Id.
[77] Andrew T Guzman & Joost H.B. Pauwelyn, *International Trade Law,* (2nd ed. 2009).
[78] Id.
[79] Id.

the turtle-protecting guidelines, negotiating seriously with some, but not with others, and also allowed certain countries longer "phase-in" periods to implement the rules.[80] This was deemed to be unjustifiable discrimination against the Chapeau.[81]

In regards to arbitrary discrimination, the Court found that the U.S. process of certifying countries of turtle-safe procedures gave no formal opportunity to an applicant country to be heard. Countries did not have the opportunity to respond at all to any arguments that may have been made against them in the course of the certification process before a decision to grant or deny certification was made.[82] The Court also held that members applying for certification whose applications were rejected were denied basic fairness and due process.[83] This is essentially because the countries' whose applications were denied did not receive formal notice of such denial, nor of the reasons for the denial. Moreover, there was no formal legal procedure for review of, or appeal from a denial of an application. In the view of the Appellate Body, this amounted to arbitrary discrimination.[84] The Appellate Body ruled that because the actions of the United States constituted both arbitrary and unjustifiable discrimination there was no need to investigate whether or not the actions also were a "disguised restriction."[85]

III. Analysis

Based on the relevant case law regarding Article XX(b), it is not clear whether the Hungarian Fat Tax would be found to be a reasonable exercise of the exception if challenged under the GATT. Though the policy behind the tax seems legitimately for the protection of

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[80] Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products,* WT/DS58/AB/R (adopted October 12, 1998) ¶¶ 172 -173.
[81] Id. at ¶ 176.
[82] Id. at ¶ 181.
[83] Id.
[84] Id. at ¶ 184
[85] Id.

public health, it might fail under the necessity test as other less trade-restrictive means can achieve similar ends. Additionally, if the process of avoiding the tax was too rigid for importing countries, or easier for some countries' versus others, procedurally, this could be also found to be unjustifiable or arbitrary discrimination under the Chapeau. However, evidence shows that there is a widespread international policy interest in preventing obesity. The logical inference from this is that measures to help wipeout obesity, including taxes on fattening foods, would be given more leeway than maybe the case law suggests.

A. Policy

In order to be a valid public health exception, the underlying policy of the tax must seek to protect human life and/or health.[86] The case law suggests this is fairly broad. In *EC – Asbestos* and *Brazil – Tyre* it was a specific product as issue, so the countries' invoking the exception just had to provide evidence that 1.) the product constituted a danger to human life and health and 2.) by allowing less or none of the product, that danger would be lessened. There is no shortage of evidence of Hungary's increasing battle with obesity, or that instances of obesity are more likely to result in premature death.[87] However, unlike in *Brazil - Tyre* or *EC – Asbestos,* the resulting harms of obesity cannot be attributed to the consumption or exposure to a single identifiable product. That is why this case is more closely aligned with *Thai – Cigarette* insofar as policy reasons.

Similar to *Thai – Cigarette*, the tax in question concerns a consumer good being taxed for the protection of human health against non–communicable diseases that aren't conclusively attributable to the products being taxed. In *Thai – Cigarette*, the Panel ruled that because there was enough evidence that smoking was harmful, the policy underlying the tax was justifiable as

[86] General Agreement on Tariffs and Trade, Article XX(b) (1994).
[87] Catherine Cheney, *Battling the Couch Potatoes: Hungary Introduces 'Fat Tax',* Spiegel Online International (September 1, 2011).

to the Article XX(b) exception. In this way, the policy underlying the tax should be justified, because of the correlation between heart disease and unhealthy foods.[88] The opposing party might argue that cigarettes are not necessary to sustain life, whereas unhealthy food is still food, which is necessary for survival. However, because there is an (albeit indirect) correlation between the consumption of the food being taxed in Hungary and higher prevalence of obesity and NCDs, the government instituting a tax to make this food harder to obtain would limit the consumption of it. Under this logic, the tax is a likely valid policy under Article XX(b). This argument would be further strengthened if, as in *EC – Asbestos* and *Brazil – Tyre,* Hungary could produce evidence that consumption rates of the unhealthy foods tax specifically contributed to obesity-linked NCD's, or that the percentage of overweight and obese Hungarians had been reduced as a result of the tax. Evidence of both of these would further indicate that the tax was achieving its objective of protecting human health and/or life under Article XX(b).

In addition to lowering the rates of obesity, the other policy reason Hungary cites for implementing the tax is to raise funds for their heavily indebted health system.[89] Under the case law analysis could also be a valid policy reason, albeit one that has not been explored before. Access to reasonable healthcare can certainly be justified as a protection of human life/health, and a tax that helps a healthcare system in jeopardy protect its efficacy would be essentially protecting human life and health as well. That could make this policy reason a valid one. This would be further strengthened with evidence of lessening state-wide healthcare debt due to the proceeds raised from the tax. On the other hand, essentially any tax proceeds that contribute to the indebted healthcare system could be a valid policy under this logic, whether that tax is

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[88] Obesity and overweight: fact sheet no 311 [webpage on the Internet]. Geneva: World Health Organization; 2012 [Updated August 2014). Available from: http://www.who.int/mediacentre/factsheets/fs311/en/index.html. Accessed November 18, 2014.

[89] Suzanne Daley, *Hungary Tries a Dash of Taxes to Promote Healthier Eating Habits,* New York Times (March 2, 2013).

collected from unhealthy food, or tolls on public roads, or "Nike" brand sneakers. As such, this policy reason might be too broad, even for this already-broad exception.

B. Necessity

It if the Hungarian fat tax was not a legitimate exception under Article XX(b) it would likely be because it would not pass the second prong of the test. In order to be a valid health exception the tax must protect public health, but also be *necessary* to protect public health.[90] Under the simple necessary test articulated in *Thai – Cigarette,* the fat tax would not be deemed necessary unless there were not less trade-restrictive means available to achieve the same objective. It is easy to make a case that government subsidies on gym memberships, or a marketing campaign educating the public on healthy food choices would be sufficient less trade-restrictive means of lessening the obesity rate. Additionally, the government could levy taxes in ways that don't restrict trade to help ensure that Hungary's health infrastructure remains sound. Under the analysis in *Thai – Cigarette,* Hungary's tax would likely not be deemed necessary to constitute a valid public health exception.

However, after *EC – Asbestos* and *Brazil – Tyre*, the scope of what constitutes a necessary measure is seemingly more expansive. For instance, if Hungary were to assert that their policy was to eradicate obesity completely, similar to France's policy to eradicate harms stemming from exposure to asbestos in *EC - Asbestos*, the tax would be entitled to a further margin of appreciation such that the availability of alternative, less trade-restrictive measures (like gym subsidies) that may not achieve the objective as fully would not disqualify the measure from exemption. While a gym subsidy could contribute to the eradication of obesity, it would not pack the "one-two punch" that the fat tax does in also lessening the debt of Hungary's health system. For this reason even though the fat tax is more trade restrictive than a gym subsidy, it is

[90] General Agreement on Tariffs and Trade, Article XX(b) (1994).

more narrowly tailored to the policy objectives and for that reason might be given more deference.

Furthermore, the Court in *Brazil – Tyre* noted that the measure need only make a 'material contribution' to the objective to be valid.[91] In this way the fat tax needn't even be the most effective measure to be considered necessary under Article XX(b). The necessity of a measure should be determined through a process of weighing and balancing a series of factors, including the relative importance of the interests or values furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.[92] Under this proportionality test, the Court would need to find that the obesity rate as a matter of relative importance outweighs the trade restrictions imposed by the tax. Notably, Hungary would be under no obligation to identify the universe of less trade-restrictive alternative measures available, nor would they need to demonstrate how the measure at issue would be more effective than the alternatives.[93] This is of great importance in advocating for a fat tax to fight a complex condition like obesity. Because obesity is attributable to many factors other than nutrition, including genetics and a sedentary lifestyle, no one factor could be shown as indispensible.

However, the Hungarian government would need to provide evidence that the tax was making a material contribution to the objectives. In regards to what constitutes strong evidence, it is important to note that Hungary would be under no obligation to quantify the risk to human life or health.[94] For instance, in *EC – Asbestos*, Canada tried to argue that France should have to

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[91] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R (adopted December 3, 2007) ¶ 151.
[92] Id.
[93] Appellate Body Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services,* WT/ DS285/AB/R (adopted April 20, 2005) ¶¶ 309-311.
[94] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R* (adopted March 12, 2001), ¶ 168.

quantify the total risk of exposure to asbestos, in order to show how it would be significantly reduced by the import ban.[95] The Appellate Body noted that a risk may be evaluated either in quantitative or qualitative terms.[96] For Hungary, this means that they would not necessarily need to show that the tax actually *was* effective to the objective sought, only that evidence indicates that it *should* be effective. This is not nearly as severe a burden as it would be to poll the entire country on their weight before and after the implementation of the tax. Rather, they can show that the tax is making a material contribution to the policy objectives by projecting data from smaller sample groups, or asserting expert theories and hypotheses.[97] Also, if the fat tax was implemented in tandem with other initiatives such as gym subsidies or obesity education programs the Court might also be more willing to accept them together as a holistic package that is necessary to curb obesity.

Essentially, Hungary would have a colorable claim for justifying the fat tax as necessary to public health under Article XX(b) as long as there is a modicum of evidence indicating that the tax would make a material contribution to the policy objectives of lessening the obesity rate and offsetting the debt of the healthcare system. However, because of the wide availability of alternatives that are not trade-restrictive, if it were to fail Article XX(b), it would likely be under this prong of the analysis.

C. The Chapeau

Assuming the Hungarian fat tax is found to be a legitimate policy to protect public life and/or health (likely) and necessary to ensure the efficiency of that policy (less likely), the tax would still have to clear the Chapeau of Article XX. In order to do that, the tax cannot be found

[95] Id. at ¶ 167.
[96] Id.
[97] For instance, In *EC-Asbestos*, France relied on expert testimony, statistical data compiled by these experts, scientific models, and a study from Japan to assert that asbestos exposure was dangerous even in low doses. Id. at ¶ 19.

to be unjustifiably discriminatory, arbitrarily discriminatory, or a disguised restriction on international trade.[98]

To determine this, the WTO would likely look at the procedural aspects of the tax, as it was these procedural aspects that were under much criticism in *US – Shrimp* as discriminatory under the Chapeau. For instance, in that case the Appellate Body found that a lack of adequate process can constitute arbitrary discrimination.[99] Also in that case, there was a slew of procedural shortcuts identified by the Court that amounted to arbitrary discrimination. These include: insufficient transparence, an unpredictable certification process, no opportunity for an applicant country to be heard, no reasons given for the denial of an application, and no review or appeal of that decision.[100]

As distinguished from *US – Shrimp*, the Hungarian fat tax does not require conforming to a procedure or process in order to import your products, rather it blanket taxes any product that meets its specifications.[101] However, the findings in *US – Shrimp* do suggest that the specifications for the tax should be concrete, transparent and readily available and understandable to any country in order to not be held arbitrarily discriminatory.

Additionally, in *US – Shrimp*, the United States was found to be unjustifiably discriminating by giving different treatment to different countries, negotiating with some but not others, and allowing longer "phase-in" periods for certain importers.[102] If there is evidence that some countries and manufacturers are being treated differently from other manufacturers, or that some countries' products are being taxed but not other countries' comparable products this

[98] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R (adopted May 20, 1996) (Unlike current AB reports this early report does not feature numbered paragraphs).
[99] Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products,* WT/DS58/AB/R (adopted October 12, 1998) ¶ ¶ 172 -173.
[100] Id.
[101] Margit Feher, *Hungary to Tax Foods It Thinks Unhealthy,* Wall Street Journal (June 22, 2011).
[102] Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products,* WT/DS58/AB/R (adopted October 12, 1998) ¶ 176.

would support a finding of unjustifiable discrimination. As long as Hungary was methodological in upholding the tax, and predictable and constant in their application of which products receive the tax, they should not face any issues under the Chapeau of Article XX. Notably, none of the seminal cases expounding on the application of Article XX(b) made any seminal findings as to the Chapeau, indicating that it is not frequently at issue when asserting an exception for public health.

D. Global Policy

In addition to the WTO case law, there are other "soft factors" that could weigh on a decision by the WTO in regards to what constitutes a valid public health exception under Article XX(b). One of these soft factors is the global policy on obesity control. If the prevalence of obesity is treated with more severity on a global scale, then efforts to prevent it will likely be given more deference.

In recent years, there has been more mobilization by state governments and non-governmental organizations to curb the "obesity pandemic." In addition to Hungary, Denmark and other states implementing taxes on unhealthy foods, The World Health Organization and the United Nations have also taken action to lessen the obesity rate. In 2004, the World Health Organization adopted the Global Strategy on Diet, Physical Activity and Health to combat the growing burden of non-communicable diseases attributed to poor diet and physical inactivity.[103] Additionally, Heads of State and Government committed in the Political Declaration of the High-level Meeting of the United Nations General Assembly on the Prevention and Control of NCDs

[103] World Health Organization, *Global Strategy on Diet Physical Activity and Health* (2004). Available online at: http://www.who.int/dietphysicalactivity/strategy/eb11344/strategy_english_web.pdf

to reduce the exposure of populations to unhealthy diets and physical inactivity.[104] The 2013 World Health Assembly endorsed the WHO's Global NCD Action Plan 2013-2020, which includes a set of actions for Member States, international partners and the WHO Secretariat to promote healthy diets and physical activity, and to attain 9 voluntary global targets for NCDs including ones on diet and physical activity to be achieved by 2025.[105] This is evidence that globally, obesity is viewed as a serious public health crisis.

It is also easy to draw parallels between the world's actions to reduce tobacco usage and reduce obesity. Obesity, like smoking, is completely preventable and is also very strongly correlated with increase risk for NCDs. And while large campaigns in developed countries have lessened the rate of tobacco usage significantly, in under-developed countries tobacco rates have surged.[106]As an counter to this, in 2005 the WHO organized the Framework Convention for Tobacco Control (FCTC). The FCTC requires parties to adopt strong measures in a number of areas such as placing large health warnings on tobacco packaging, and requiring manufacturers to disclose the contents and emissions of tobacco products. It also urges parties to consider tax increases on cigarettes to curb demand.[107] Since its inception, the FCTC has become one of the most widely embraced treaties in the history of the United Nations with 178 Parties covering 89% of the world's population.[108]

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[104] United Nations General Assembly Resolution 66/2 *Political Declaration of the High-level Meeting of the General As*sembly *on the Prevention and Control of Non-communicable Diseases* (adopted September 19, 2011). Available online at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/458/94/PDF/N1145894.pdf?OpenElement
[105] World Health Organization, *Global Action Plan for the Prevention of NCDs 2013 – 2020* (2013). Available online at: http://apps.who.int/iris/bitstream/10665/94384/1/9789241506236_eng.pdf?ua=1
[106] The Global Tobacco Epidemic, American Cancer Society (Last accessed December 29, 2014). Available online at: http://www.cancer.org/aboutus/globalhealth/globaltobaccocontrol/the-global-tobacco-epidemic
[107] Richard A. Daynard, "Lessons from Tobacco Control for the Obesity Control Movement," *Journal of Public Health Policy,* Vol. 24, No. 3/4, 291-295 (2003).
[108] Tobacco Fact Sheet, World Health Organization, (Last accessed December 29, 2014). Available online at: http://www.who.int/mediacentre/factsheets/fs339/en/

In 2011, Australia passed a law pursuant to its obligations under the FCTC that banned all branding elements (logos, trademarks, colors) from cigarette packages.[109] Tobacco manufacturers have since challenged the law as a violation of their rights under the GATT, as well as other trade treaties. Australia is invoking the health exception in Article XX(b) as one of their arguments to justify the packaging decision.[110] The litigation is still pending in the WTO.[111] However, domestically, there was a landmark decision handed down by the Australian High Court. In that case, tobacco manufacturers challenged the tobacco packaging as unconstitutional and an infringement of their intellectual property rights.[112] The Australian High Court ruled that the packaging was not infringing on tobacco manufacturers' intellectual property rights, and pointed out that intellectual property law is designed to serve public policy objectives. The Chief Justice emphasized the public policy dimensions, noting that trademark legislation has "manifested from time to time a varying accommodation of commercial and the consuming public's interests."[113] Even the lone dissenting judge described tobacco manufacturers as purveyors of "lies and death."[114] This strong policy ruling is likely to be persuasive to the WTO in regards to the pending tobacco cases.

Similarly, there has been a push to institute a specific Framework Convention for Obesity Control, or a more expansive Framework Convention on Global Health that would also

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[109] Parliament of Australia, Australia's WTO Plain Packaging Case, an Update (July 8, 2014). Available online at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/July/WTO_plain_cigarette_packaging_case

[110] "Plain packaging is a 'necessary' measure designed to pursue a legitimate objective (the protection of human health and to give effect to the FCTC), is making a 'material contribution' to that objective, and is not more trade-restrictive than necessary to fulfill the objective." Id

[111] Id.

[112] Matthew Rimmer, "Cigarettes will Kill You: The High Court of Australia and Plain Packaging of Tobacco Products," World Intellectual Property Organization Magazine, (February, 2013) Available online at: http://www.wipo.int/wipo_magazine/en/2013/01/article_0005.html

[113] Id.

[114] Id.

encompass controlling obesity.[115] If these initiatives are successful, and followed a similar model to the FCTC, they would advocate for 'fat taxes.' This would likely make any challenge to a 'fat tax' under the GATT much more difficult to argue successfully.

IV. Conclusion

There is a strong case that the Hungarian 'Fat Tax' would be a valid public health exception if challenged under the GATT. This is based on the jurisprudence interpreting Article XX(b), which mandates that the measure be 'necessary' to pursue a legitimate health objective, makes a 'material contribution' to that objective, and is not more trade-restrictive than necessary. The biggest argument against the tax as a valid Article XX(b) exception is that there are many alternative viable measures that are less trade-restrictive. However, it is in the author's view that the recent global surge of efforts to combat obesity as a serious threat to human life and health, would make the Court give any efforts to prevent it more deference, tilting the scales in favor of the 'fat tax' as a legitimate public health exception under Article XX(b).

[115] " Utterly Needed: A Framework Convention on Obesity Control," editorial, The Lancet 378, no. 9793, 741 (2011); Lawrence O. Gostin, "Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework Convention on Global Health" 96 Geo. L.J. 331-392 (2008).