Hanging in the Balance: The Prohibition of Protectionism in Article III and XX of the GATT 1994 in Light of the "*Inherent Balance*" Theory

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Abstract *The Multilateral Trade System has dealt multiple times with measures that violate the International Trade rules and the general notion of free strade, in favour of protectionism. The latter has mainly occurred under the disguise of legitimate regulatory concerns and non-trade values, such as environmental protection or promotion of domestic moral values. In light of these circumstances, the Appellate Body has examined in a wide variety of cases how the different provisions of the GATT 1994 scrutinize such instances, mainly in light of the Article III of the GATT 1994, i.e. the national treatment obligation, and the degree of regulatory freedom to adopt such measures, mainly in light of Article XX of the GATT 1994. Yet, notwithstanding the vast jurisprudential practice, it seems that the WTO Adjudicating Bodies have not clearly drawn the line of "permissible" regulatory protectionism that each provision of Article III provides for, as well as the exact point at which protectionism becomes a corroding element in justifying violations of Article III, in the general exception of Article XX. In this regard, this article tries to find this line by applying the "theory of inherent balance" as established by WTO jurisprudence.*

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I. INTRODUCTION

The national treatment standard is considered one of the core disciplines in international economic law in general and one of the cornerstones of the GATT system in specific, ever since its inception in 1947.[1] As far as trade in goods is concerned, the principle is mainly embodied in Article III of the GATT, which has ironically been characterized by legal indeterminacy.[2] The WTO (as well as GATT) jurisprudence and scholars (to some extent) have interpreted the different terms incorporated in the relevant sub-paragraphs of Art. III (mainly: 1, 3 and 4) dissimilarly throughout the years. This is due to the sensitivity of the measures covered by said Article as they mainly satellite around the two poles, "*devotion to free trade*" and "*the right of WTO members to regulate as a sovereign states their domestically determined policy objectives*".[3] Hence, the terms of Art. III have been applied both in severity and laxity depending on the time of jurisprudential reference.[4]

This indeterminacy cannot be examined lightly, as a mere attempt by the WTO adjudicating bodies to avoid taking the responsibility to handle this *hot potato*; rather, the desirable balance between free trade and the regulatory autonomy of WTO Members to pursue non-trade related objectives, is

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1 Tomer Broude and Philip I. Levy, "Do You Mind if I Don't Smoke? Products, Purpose and Indeterminacy in US – Measures Affecting the Production and Sale of Clove Cigarettes", 13 (2) World Trade Review 357, 368 (2014).

2 Nicolas F. Diebold, "Standards of Non-Discrimination in International Economic Law", 60 International and Comparative Law Quarterly 831, 832-833 (2011); Simon Lester, "Finding the Boundaries of International Economic Law", 17(1) Journal of International Economic Law 3, 9 (2014).

3 Ming Du, " 'Treatment No Less Favorable' and the Future of National Treatment Obligation in GATT Article III:4 after EC-Seal Products", 15(1) World Trade Review 139, 141 (2015).

4 Weihuan Zhou, "US – Clove Cigarettes and US – Tuna II (Mexico): Implications for the Role of Regulatory Purpose under Article III:4 of the GATT", 15(4) Journal of International Economic Law, 1075, 1077-1078 (2012).

constantly shaken when WTO Member States use the different non-trade interests, such as climate change or consumer protection, as a disguise for measures with protectionism intent or effect.[5] On these grounds, the issue whether a WTO member may, and to what extent, differentiate and/or provide different treatment to products on the basis of factors other than origin while pursing regulatory purposes, has become pivotal for the multilateral trade system.

On this matter, Art. XX, acting as the general exception provided for in the GATT, stood out as the main safe haven for measures seeking to protect non-trade related values.[6] There is, however, a plurality of case law with Respondents trying to justify an inconsistency in Art. III of the GATT by referring to Art. XX of the GATT, but with little success.[7] The Appellate Body in different cases has always found deficiencies in the measures that failed to meet the non-discrimination standard of the *chapeau*. This failure of Member States to meet the requirements of Art. XX has also corroborated the trend to provide leniency in the different standards of Art. III, in order to avoid having to resort to the General Exception clause, which has a shift in the burden of proof.[8]

The purpose of the present analysis is not to mimic previous scholars who have insightfully analyzed the topic of non-trade related objectives in Art. III of the GATT.[9] Rather, the paper seeks to identify what is the minimum amount of protectionism intent/effect that a Panel should substantiate in order to find violation of the national treatment standards in Art. III, as well as the relevant maximum amount of protectionism allowed under Art. XX of the GATT.

For this reason, this paper briefly introduces the core jurisprudence along with scholarly interpretation of the different pivotal standards found in Arts. III and XX of the GATT, in order to draw some conclusions which would

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5 The difference between intent and effect shall be analysed afterwards.

6 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* 1092-1093 (4th edn., Cambridge: Cambridge University Press).

7 *Ibid*., at 1173; WTO Economic Research and Statistic Division, "The Interface between the Trade and Climate Change Regimes: Scoping the Issues", Staff Working Paper ERSD-2011-1 (2011).

8 M. Matsushita, T. Schoenbaum, P. Mavroidis, and M. Hahn, *The World Trade Organization: Law, Practice, and Policy* 185-188 (3rd edn., London: Oxford University Press, 2017); S. Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (1st edn., Leiden: Nijhoff, 2010).

9 E. Lydgate, "Consumer preferences and the National Treatment Principle: Emerging Environmental Regulations Prompt a New Look at an Old Problem", 10(2) World Trade Review 165 (2011); M. Du, "The Rise of National Regulatory Autonomy in the GATT/WTO Regime", 14(3) Journal of International Economic Law 639, 655 (2011).

assist in identifying any deficiency or specific indeterminacy that ought to be mended.

Afterwards, the discrepancies of the various interpretations shall be mended through an emerging interpretative tool of "*inherent balance*", which was recently brought up by WTO jurisprudence. This theory of inherent balance of the different WTO Covered Agreements has been used to clarify the normative ambit of a provision or Covered Agreement. Hence, for the purposes of introducing "smoothly" the application of the aforementioned tool, we shall include, additionally, in our analysis of Art. III and XX of the GATT, a few aspects regarding the specific architecture of the said provisions, which shall prove to be useful in the later part of this paper.

II. THE STANDARD OF NATIONAL TREATMENT UNDER ART. III:1, ART. III:2 AND ART. III:4 OF GATT, 1994

Art. III of the GATT reads as follows:

> "*National Treatment on Internal Taxation and Regulation*
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> 1. *The [Members] recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*
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> 2. *The products of the territory of any [Member] imported into the territory of any other [Member] 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. Moreover, no [Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*
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> ...
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> 4. *The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting*

> *their internal sale, offering for sale, purchase, transportation, distribution or use*."

Since it directly derives from the text of the treaty itself, the general scope of Art. III of GATT, 1994 is to prohibit discrimination *against* imported products.[10] Generally speaking, the listed paragraphs of Art. III prohibit Members from treating imported products less favourably than like domestic products, once the imported product has entered the domestic market, that is, once it has been cleared through customs.[11] To quote the Appellate Body from *Japan- Alcoholic Beverages*:

> "*The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic production"'. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.*"[12]

Paragraph 1, in contrast to paragraph 2 and 4, is not an operational provision that poses positive obligations. Rather it sets out the "*general principle*" of Art. III. This principle aims to provide guidance in interpreting and understanding the specific obligations in the rest of Art. III provisions.[13]

The center of interest in the aforementioned provisions are the terms "*so as to afford protection*" in Art. III:1, "*in excess of*" in Art. III:2 and "*treatment no less favourable*" in Art. III:4. In the following section, the main case law for each of those terms shall be presented in order to juxtapose each term with the minimum prohibited protectionism intent/effect.

It should be noted that the present article does not wish to settle whether Art. III:1 applies to the different national treatment obligations under paragraphs 2 and 4. Rather, it seeks to find the exact influence of this standard, without taking into account whether it shall be directly applicable, as

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[10] P. Mavroidis, *Trade in Goods: The GATT and the Other Agreements Regulating Trade in Goods* 217 (2nd edn., Oxford: Oxford University Press, 2013).

[11] Van den Bossche, P. et al. (2018), n. 6, pp. 712-713; Sifonios D. (2018), *Environmental Process and Production Methods (PPMs) in WTO Law*, Springer International Publishing, pp. 85-86.

[12] Appellate Body Report, Japan – Taxes on Alcoholic Beverages, ¶ 5.2.2, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (adopted November 1, 1996); Matsushita et al., *supra* note 8, at 712.

[13] Appellate Body Report, Japan – Alcoholic Beverages, ¶ 18; Appellate Body Report, Korea – Taxes on Alcoholic Beverages, ¶¶ 114-15, WTO Doc. WT/DS75/AB/R, WT/DS84/AB/R (adopted February 17, 1999); Appellate Body Report, Chile – Taxes on Alcoholic Beverages, ¶ 67, WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R (adopted January 12, 2000).

explicitly in the second sentence of Art. III:2 , or be considered an interpretative tool that should be incorporated in other standards- such as the "*less favourable treatment*" of sub-paragraph 4.[14] Yet, the author simply mentions that treaty interpretation, as a holistic exercise, should take into account all the different tools offered by the customary rules of international law on interpretation such as the text itself (the term "*excess*" allows a narrower variety of interpretation than "*less favourable treatment*"), the immediate and the wider context (the structure of each obligation in the different sub-paragraphs provides clues for the exact influence that paragraph 1 of Art. III may provide).[15]

A. Art. III:2 and Art. III:1 "So as to afford protection"

Before examining Art. III:1, we should start from the clearest jurisprudentially applied sub-paragraph. Hence, we begin with the first sentence of Art. III:2. The question posed therein is whether the imported products are taxed in excess of the like domestic products. The "*national treatment obligation*" under the first sentence of Art. III:2 demands, in other words, that internal taxes levied upon imported products are not in excess of internal charges imposed on like domestic products.[16]

In *Japan – Alcoholic Beverages II*, the Appellate Body stressed that "*in excess of*" should be interpreted very strictly.[17] It concluded that even a *de minimis* differentiation in the taxation imposed on the respective like products can lead to a violation under the first sentence of Art. III:2. In other words, even the smallest amount of "excess" is too much.

Hence, the first sentence does not require an examination of a protectionist scope, as even a simple differentiation meets the standard.[18] This was recently reaffirmed by the Panel in *Brazil– Taxation* (upheld by the Appellate

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[14] Du, *supra* note 3; Zhou, *supra* note 4.

[15] I. Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21(3) European Journal of International Law 605, 619-21 (2010).

[16] Appellate Body Report, Canada – Certain Measures Concerning Periodicals, ¶ 468, WTO Doc. WT/DS31/AB/R (adopted July 30, 1997).

[17] Appellate Body Report, Japan – Alcoholic Beverages, ¶ 27.

[18] Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, ¶ 11.245, WTO Doc. WT/DS155/Rand Corr.1 (adopted February 16, 2001); Panel Report, Colombia – Indicative Prices and Restrictions on Ports of Entry, ¶ 7.195, WTO Doc. WT/DS366/R and Corr.1 (adopted May 20, 2009); Panel Reports, China – Measures Affecting Imports of Automobile Parts, WTO Doc. WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2 (adopted January 12, 2009), upheld (WTO Doc. WT/DS339/R) and as modified (WTO Doc. WT/DS340/R, WT/DS342/R) by Appellate Body Reports WTO Doc. WT/DS339/AB/R, WT/DS340/AB/R , WT/DS342/AB/R ¶ 7.221.

Body) by explicitly stating "*finding on the WTO-consistency of the measure is not based on any consideration of the rationale or justification for the measure*".[19] In contrast, the second element of Art. III:2 necessitates a discussion over a protectionist intent/effect.

The Ad Article to paragraph 2 to III:2 of the GATT specifies that "*a tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which* was not similarly taxed (emphasis provided)".

Hence, the core element of the second sentence of Art. III:2 is dissimilar taxation. "*Similarly taxed*" should be interpreted in a way that allows it to have a different meaning from "*taxed in excess of*" (first sentence of Art. III:2).[20] For example, it has been accepted that a *de minimis* differentiation in the amount of tax levied on the domestic and imported products, that does not affect the competitive relationship of the products, does not lead to a violation of the national treatment obligation under the second sentence of Art. III:2.[21] For example, in *Philippines – Distilled Spirits* (2012), the imported distilled spirits were taxed ten to forty times more than the domestic distilled spirits. Not surprisingly, the panel in that case found that the products in issue were "*not taxed similarly*".[22] The Appellate Body in *Canada – Periodicals* found that the *de minimis* standard in the second sentence is satisfied in cases where the tax is sufficient to prevent the sale of the product on which it is imposed.[23]

The main aspect of the second sentence is the direct application of Art. III:1 as a main, yet distinct, component of a finding of a violation of the second sentence of Art. III:2.[24]

In specific, a violation of the second sentence of Art. III:2 occurs when the dissimilar taxation on directly competitive and substitutable products has

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[19] Panel Reports, Brazil – Certain Measures Concerning Taxation and Charges, WTO Doc. WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1 (adopted January 11, 2019), as modified by Appellate Body Reports WTO Doc. WT/DS472/AB/R / WT/DS497/AB/R, ¶ 7.153.

[20] Appellate Body Report, Japan – Alcoholic Beverages, ¶ 119.

[21] Van den Bossche, *supra* note 6, 750-751.

[22] Panel Reports, Philippines – Taxes on Distilled Spirits, WTO Doc. WT/DS396/R, WT/DS403/R, (adopted January 20, 2012), as modified by Appellate Body Reports WTO Doc. WT/DS396/AB/R, WT/DS403/AB/R, ¶ 7.154.

[23] Appellate Body Report, Canada – Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/AB/R ¶ 29 (adopted July 30, 1997).

[24] Appellate Body Report, Japan – Alcoholic Beverages, ¶ 119.

to be implemented so as to afford protection to domestic production [hereinafter "SATAP"]. This means that WTO Members are actually allowed to apply dissimilar taxes on directly competitive or substitutable products as long as these taxes are not applied so as to afford protection to domestic production.[25] It affords States greater regulatory autonomy in the case of "*directly substitutable and competitive*" products, as long as no protection to the domestic production can be substantiated.[26]

It is important to note that the "*protectionist application*" is a distinct element from that of dissimilar taxation. *In Japan – Alcoholic Beverages*, the Appellate Body stated that "*the Panel erred in blurring the distinction between [the issue of whether the products at issue were 'not similarly taxed'] and the entirely separate issue of whether the tax measure in question was applied 'so as to afford protection'. Again, these are separate issues that must be addressed individually.*"[27]

The Appellate Body introduced the tools to find whether a measure is applied so as to afford protection, by requiring a "*comprehensive and objective analysis of the structure and [overall] application of the measure in question on domestic as compared to imported products*".[28] In this regard, it noted that protective application can be ascertained, not only by its aim *per se,* which is usually difficult to discern, but also by examining the design, the architecture and the overall revealing structure of the measure at hand.[29] For example, the magnitude itself of dissimilar taxation may provide evidence of such protectionist application. Hence, it can be concluded that the SATAP standard "*is not an issue of intent*", and an examination of a protectionist application is needed.

As a result, the SATAP standard need not be examined in light of the reasoning of the domestic legislators and regulators that usually envisage many different and differently weighted regulatory "intents".[30] Rather, if a

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[25] Van den Bossche, *supra* note 6, at 752; Sifonios, *supra* note 11, at 144-145.

[26] Matsushita, *supra* note 8, at 206.

[27] Appellate Body Report, Japan – Alcoholic Beverages,¶ 119.

[28] Appellate Body Report, Japan – Alcoholic Beverages, ¶ 120; G. Marceau and J. Trachtman, *GATT, TBT and SPS: A Map of Domestic Regulation of Goods*, in The WTO Dispute Settlement System 1995-2003 274-6 [F. Ortino and E-U Petersmann (eds.), 2004].

[29] Appellate Body Report, Japan – Alcoholic Beverages, ¶ 120; E. Vranes, "Carbon Taxes, PPMs and the GATT", in *Research Handbook on Climate Change and Trade Law* 94 [Cheltenham (ed.), UK: Edward Elgar Publishing, 2016].

[30] H. Horn and P. Mavroidis, "Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination" citation, 15(1) European Journal of International Law 39, 41 (2004).

tax measure is applied in contrast with the SATAP standard as a matter of objective observation, then the protectionist intent is irrelevant.[31]

In a later case (*Chile – Alcoholic Beverages*), Chile argued that the internal taxation on the alcoholic beverages at issue was aimed at, among other things, reducing the consumption of alcoholic beverages with higher alcohol content. The Appellate Body held that the mere statement of such or other objectives pursued by Chile did not constitute an effective rebuttal on the part of Chile in order to defend the alleged protective application of the internal taxation on alcoholic beverages.[32]

In contrast, the fact that was deemed crucial for determining the protectionist nature of a measure was whether a majority of domestic products are in effect taxed at the lower rate and the majority of imported products are burdened with the higher tax rate.[33] Curiously, under Chile's tax system, the majority of the goods falling into a less favourable tax category were of domestic origin. However, the Appellate Body still found a protectionist intent due to the fact that almost all imported products fell into the less favourable category, while 75 per cent of the domestic production benefited from a much more advantageous treatment.[34]

It could still be argued that the fact that the Appellate Body highlighted the objective effect of the measure over its subjective purpose/policy aim, does not exclude an examination of the genuine purpose of the measure via its scrutiny of the measure's design and structure. After all, the Appellate Body has previously clarified that all relevant facts should be taken into account.[35] For example, in *Canada – Periodicals*, the Adjudicating Body gave considerable importance to the different statements made by the Canadian Government about the policy objectives of the tax measure at issue.[36] In addition, the Appellate Body in *Chile– Alcoholic Beverages* found that "*the statutory purposes or objectives – that is, the purpose or objectives of a*

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31 H. Horn and P. Mavroidis, "The Burden of Proof in Trade Disputes and the Environment", 62 (1) Journal of Environmental Economics and Management 14, 15-29 (2009).

32 Appellate Body Report, Chile – Alcoholic Beverage, ¶ 71; Federico Ortino, "WTO Jurisprudence on De Jure and De Facto Discrimination", in The WTO Dispute Settlement System, 1995-2003 182 [Federico Ortino and Ernst-Ulrich Petersmann (eds.), Kluwer Law International].

33 E. Vranes, *Trade and the Environment: Fundamental Issues in International Law*, *WTO Law and Legal Theory* 323-3 (Oxford University Press, 2009).

34 Appellate Body Report, Chile – Alcoholic Beverage, ¶¶ 57,67.

35 Appellate Body Reports, Philippines – Taxes on Distilled Spirits, ¶ 250, WTO Doc. WT/DS396/AB/R, WT/DS403/AB/R (adopted January 20, 2012).

36 Appellate Body Report, Canada – Certain Measures Concerning Periodicals, ¶¶ 475-476, WTO Doc. WT/DS31/AB/R (adopted July 30, 1997).

Member's legislature and government as a whole – to the extent that they are given objective expression in the statute itself, are pertinent".[37]

Therefore, at least *prima facie* the SATAP treatment does not require an examination of protectionist intent but rather evidence of protectionist effect. The level of the protectionist effect was not clarified by the Appellate Body, an issue that will arise later in the present analysis. Yet, it should be noted that the Appellate Body has been clear that "*a tax measure affords protection to domestic production does not depend upon showing "some identifiable trade effect"*".[38] Moreover, the GATT Panel in *US – Superfund* had already clarified that the SATAP standard is mostly related to a behaviour of regulatory autonomy than specific market effects.[39]

B. Art. III:4 "less favourable treatment"

Under Art. III: 4 of the GATT, the obligation established refers to non-fiscal measures. As explained by the Appellate Body in *Korea–Beef*, Art. III:4 is violated when, among else, less favourable treatment is accorded to like domestic products via non-fiscal measures, such as internal regulations.[40]

As the Appellate Body in *EC–Asbestos* stated, the notion of "*less favourable treatment*" must be considered in the light of the purpose of avoiding "*protection*" stated in Art. III:1 and that the mere existence of distinctions in treating like products does not necessarily lead to a finding of less favourable treatment. Differential treatment is, thus, permitted and does not violate Art. III as long as it is not based on the country of origin "*less favourable treatment*" of the group of like imported products compared with the group of like domestic products.[41]

Yet, it should be noted that the Appellate Body has clarified that a formal difference in treatment between imported products and like domestic products, even if based exclusively on the origin of the products, is neither necessary, nor sufficient, to show a violation of Art. III:4.[42] Rather, as explained

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37 Appellate Body Report, Chile – Alcoholic Beverage, ¶ 62.

38 Appellate Body Report, Korea – Alcoholic Beverages, ¶ 153.

39 Panel Report, United States – Taxes on Petroleum and Certain Imported Substances, WTO Doc. L/6175, (adopted June 17, 1987).

40 Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, ¶ 113, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted January 10, 2001).

41 Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 100, WTO Doc. WT/DS135/AB/R (adopted April 5, 2001).

42 Appellate Body Report, European Communities – Asbestos, ¶ 100; G. Marceau and J. Reinaud, "The Interface between the Trade and Climate Change Regimes: Scoping the Issues", 46 Journal of World Trade 502-503 (2012).

in *Korea – Beef*, what is relevant is whether such regulatory differences modified the conditions of competition to the detriment of imported products. After all, the notion of "*less favourable treatment*", as the Appellate Body has clarified, implies that it "*modifies the conditions of competition in the relevant market to the detriment of imported products*".[43]

Hence, a regulatory distinction should be examined whether it imposes disadvantageous conditions on imports, by considering the structure and design of the regulatory scheme; hence, a mere regulatory distinction is not prohibited as such.[44]

It should be noted that the jurisprudence has sent mixed signals concerning the relation of the "*less favourable treatment*" standard with the SATAP of Art. III:1. In specific, the Appellate Body in the aforementioned case of *Korea–Beef* reversed the Panel's finding and found that since Art. III:4 does not specifically refer to Art. III:1, a determination of whether there has been a violation of Art. III:4 does not require a separate consideration of whether a measure "*affords protection to domestic production*".[45] In contrast, the Appellate Body in *EC– Asbestos*, as we have seen, indicated the informative applicability of paragraph 1 by equating the less favourable treatment in Art. III:4 to the SATAP of Art. III:1.[46]

This was again altered by the Appellate Body in *Thailand–Cigarettes* and *EC– Seal Products* by indicating that Art. III:4 does not oblige the Panel to explore the regulatory purpose of a disputed measure, and that a non-protectionist explanation cannot render an otherwise discriminatory measure, consistent with Art. III:4.[47] Rather the investigative focus should be on whether competition conditions between like products were distorted to the detriment of imported products.[48]

However, the inconclusiveness continued in the *Dominican Republic–Cigarettes* case, where the Appellate Body found that the RD$5 million bond requirement did not violate the national treatment obligation, despite the detrimental effect to the foreign producers that were by their nature less able to fulfil the aforementioned obligation.[49] In specific, the Appellate Body noted: "*The existence of a detrimental effect on a given imported product resulting*

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43 Appellate Body Report, Korea – Beef, ¶ 137; J. Pauwelyn, "Carbon Leakage Measures and Border Tax Adjustments under WTO Law", 39-40 (2012).
44 Matsushita, *supra* note 8, at 209.
45 Appellate Body Report, Korea – Beef, ¶¶ 137-144.
46 Appellate Body Report, EC – Asbestos, ¶ 93.
47 Appellate Body Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, ¶ 128, WTO Doc. WT/DS371/AB/R (adopted July 15, 2011).
48 Du, *supra* note 3, at 146.
49 Zhou, *supra* note 4, at 1086.

from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product".[50]

The latter was clarified by the Appellate Body in *US– Clove Cigarettes* that the term did not introduce an examination of protectionist or policy concerns. Instead, it represents an inquiry of "*causation*" between the measure and the effect, which was amended into "*a genuine relationship*" test between the measure at issue and the disparate impact.[51]

Hence, despite the fact that after a bumpy interpretative case law road, the Appellate Body has excluded an examination of SATAP in paragraph 4 of Art. III, the "*genuine relationship*" test as well as the application of "*less favourable treatment*" especially in the *Thailand– Cigarettes* and *EC– Seal Products* cases, provide crucial input in the analysis of the SATAP, as it shall be presented afterwards.[52]

C. Identifying the mess

Even without further explanation, the mess is already evident. The jurisprudential waltz over the importance of Art. III:1 in interpreting the "*less favourable treatment*" in paragraph 4, causes a lot of distraction and evidently does not lead to a satisfactory examination of the paragraph 1 principle as such.

It seems that the Appellate Body has not clarified the boiling point at which the protectionist scope of a measure violates the principle of Art. III:1. Indeed, the introduction of tools, such as the design, architecture, revealing structure and application of the measure, does not provide guidance in this regard.[53] In contrast, the "*genuine relationship*" test introduced in the examination of the "*less favourable treatment*" can provide an interesting scope in this assessment by examining whether this protectionist effect is

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[50] Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, ¶ 96, WTO Doc. WT/DS302/AB/R (adopted May 19, 2005); D.H. Regan, "How to Think about PPMs (and Climate Change)", in *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* 91-123 [T. Cottier, O. Nartova and S.Z. Bigdeli (eds.), Cambridge University Press, 2009].

[51] Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WTO Doc. WT/DS406/AB/R ¶ 182 (adopted April 24, 2012).

[52] Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R ¶ 5.115 (adopted June 18, 2014).

[53] Horn, *supra* note 30, at 56-57.

responsible or can be considered linked to this dissimilar taxation or the detrimentally "*less favourable treatment*" (if it is accepted that it applies).[54]

However, the fact that the Appellate Body has deliberately left the main principle of Art. III undetermined, at least to its minimum standard of application, creates confusion to Art. III internally, since the proclaimed non-application of the SATAP to Art. III:4 requires a different standard, lower or higher, than the relevant standard of dissimilar taxation in Art. III:2 second sentence. This is due to the fact that the Appellate Body in *EC– Asbestos* in essence said that the principle of Art. III:1 is violated by a mere finding of "*no less favourable treatment*" in Art. III:4, while the second sentence of Art. III:2 violates the aforementioned principle only if the SATAP standard is met.[55] Furthermore, confusion is created with the application of Art. XX as the proclaimed *effet utile* in the interpretation of Art. III and Art. XX (main argument against a lenient for regulatory purposes interpretation) requires an equal footing in the application of the standards which we shall analyze afterwards.[56]

In addition, the SATAP standard requires protectionist effect and not necessarily trade effect, despite the limitation on the utility of protectionist intent, while "*less favourable treatment*" requires an examination of adverse impact on competitive opportunities for foreign products without any demonstration of actual trade effects.[57] This finding taken into consideration with the dictum of the Panel in *Chile – Alcoholic Beverages* that the scope of Art. III:2 being the examination of whether equal competitive conditions have been provided, muddies the waters in terms of the distinction between the SATAP standard and the "*less favourable treatment*".[58] It seems that the examination of both cases is the same: the design, structure and expected operation of the measure should reveal either a protectionist effect (which in essence provides more favourable conditions) or detrimental impact on competitive conditions.

However, WTO case law has not fully revealed what is considered as protectionist effect or, in general, what is consider as "*protection*".[59] WTO jurisprudence so far has failed to address this, but rather felt confident in

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[54] This aspect will be further explored.
[55] Zhou, *supra* note 4, at 1085.
[56] Du, *supra* note 3, at 150.
[57] Appellate Body Report, Thailand – Cigarettes, ¶ 134; GATT Panel Report, US – Superfund, ¶ 250.
[58] Panel Report, Chile – Taxes on Alcoholic Beverages, WTO Doc. WT/DS87/R, WT/DS110/R (adopted January 12, 2000), as modified by Appellate Body Report WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R, ¶ 7.143; Appellate Body Report, Korea-Alcoholic Beverages, ¶ 120.
[59] Horn, *supra* note 30, at 58.

identifying a violation of SATAP without specifically identifying the standard itself.[60] Yet, this is especially crucial when examining the SATAP in light of an obligation to behave with "*regulatory autonomy*" as was established already from *US– Superfund*.[61] This requires an identification of different modes of behaviour that abide by this notion of regulatory autonomy that are distinct from market and effect-based approaches. This question constitutes the heart of the present analysis.

III. USING ART. XX GATT 1994 AS A JUSTIFICATION IN NATIONAL TREATMENT VIOLATIONS

Art. XX of the GATT reads as follows:

> "*General Exception*
>
> *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*
>
> …
>
> *(b) necessary to protect human, animal or plant life or health*
>
> …
>
> *(g) relating to the conservation of exhaustible natural resources if such measures are ''made effective'' in conjunction with restrictions on domestic production or consumption.*"

Art. XX of the GATT constitutes the "*general exception clause*" of the Treaty which enables members to invoke non-trade values in order to justify violations of the various GATT provisions.[62] In such, Article XX will be invoked to justify this GATT-inconsistency but only under very specific

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[60] *Ibid*., Ehring L., "De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment — Or Equal Treatment?", 36(5) Journal of World Trade, 921-977 (2002).

[61] Gatt Panel Report, US – Superfund.

[62] Van den Bossche, *supra* note 6, at 1092-1093; T. Cottier and T. Payosova, "Common Concern and the Legitimacy of the WTO in Dealing with Climate Change", in *Research Handbook on Climate Change and Trade Law* 28 (Edward Elgar Publishing, 2016).

circumstances, which are exhaustively listed in the various sub-paragraphs and are "*conditional*" to the *chapeau* of the article.[63]

Article XX, thus, enables imposing trade restrictive or discriminatory measures on the conditions that they satisfy the said requirements.[64] The requirements generally represent the power of Member States to balance trade liberalization, market access and non-discrimination, on one hand, and other societal values and interests, on the other hand.[65]

In specific, the Appellate Body has interpreted Art. XX as a provision introducing a two-tiered test.[66]

First, in *US – Gasoline*, the Appellate Body introduced the examination of provisional justification, i.e. the measure at issue must abide by the requirements of the particular exceptions strictly listed on paragraphs (a) to (j) of Article XX.[67]

Secondly, the measure at issue must also satisfy the requirements imposed by the introductory clause of Article XX. The purpose of the *chapeau* is to prevent the abuse of the exceptions in Art. XX, so that it embodies the recognition on the part of WTO Members, of the need to maintain a balance between the right of a State to invoke an exception on the one hand, and the substantive rights of the other Members States on the other hand.[68]

This bifurcated examination by the Appellate Body stands upon the reasoning that it is not possible to consider a measure under the *chapeau* without first analyzing in terms of the specific exception clause.[69] In specific, the paragraphs regulate the capability to apply a measure, while the *chapeau*

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[63] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 157, WTO Doc. WT/DS58/AB/R (adopted November 6, 1998); Van den Bossche, *supra* note 6, at 1094.

[64] Appellate Body Report, EC-Seals, ¶ 7.611; A. Gourgourinis, "Common but Differentiated Responsibilities in Transnational Climate Change Governance and the WTO: A Tale of Two 'Interconnected Worlds' or a Tale of Two 'Crossing Swords'?", in *Research Handbook on Climate Change and Trade Law* 47-48 (Edward Elgar Publishing, 2016).

[65] Van den Bossche, *supra* note 6, at 1094; Panel Report, Argentina – Measures Relating to Trade in Goods *and Services*, WTO Doc. WT/DS453/R and Add.1 (adopted May 9, 2016), as modified by Appellate Body Report WTO Doc. WT/DS453/AB/R, ¶ 7.743.

[66] B. Condon, "GATT Article XX and Proximity of Interest: Determining the Subject Matter of Paragraphs b and g", 143 (2005); L. Bartels, "The Chapeau of Article XX GATT: A New Interpretation", 1-2 (2005).

[67] Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, ¶ 58, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

[68] Appellate Body Report, US – Shrimp, ¶ 158.

[69] W. Davey, *Non-Discrimination in the World Trade Organization: The Rules and Exceptions* 366 (Leiden: Brill).

regulates the method of application of the measure.[70] It should be noted, however, that a Panel is not considered to make a legal mistake when examining first the *chapeau* according to recent case law.[71]

Hence, for the purpose of the present analysis, the paragraphs (b) and (g) shall be examined first (mainly to examine the "*necessity*" test and the "*related to*" standard) and afterwards the conditions placed by the chapeau.

A. "Necessary" and "related to"

1. The "'necessity"' requirement

A WTO Member in order to successfully invoke the exception to Art. XX (b), must prove the measure at issue must be necessary to protect health. A Panel in order to determine whether a measure is "*necessary*" within the meaning of Art. XX(b) of the GATT, 1994, must take into consideration relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective and its trade restrictiveness.[72] Then, the Panel should examine, if there is any other alternative measure less trade restrictive, which is able to equally contribute to the invoked policy objective.[73] This comparison that leads to a determination of "*necessity*" must be conducted in light of the importance of the interests or values at stake.[74]

This analysis requires the Panel to pursue a "*weighing and balancing*" examination by holistically considering the different variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment.[75] After this preliminary assessment, the Panel should analyze the different possible alternatives which may be less trade restrictive.[76]

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[70] Appellate Body Report, US – Shrimp, ¶¶113-115; Appellate Body Report, US – Gasoline, ¶ 22.

[71] Appellate Body Report, Indonesia – Importation of Horticultural Products, Animals and Animal Products, ¶¶ 5.100-5.101, 6.7 ,WTO Doc. WT/DS477/AB/R, WT/DS478/AB/R, and Add.1 (adopted November 22, 2017).

[72] Davey, *supra* note 69, at 383.

[73] Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶ 307, WTO Doc. WT/DS285/AB/R (adopted April 20, 2005).

[74] Appellate Body Report, EC – Asbestos, ¶ 172; Van den Bossche, *supra* note 6, at 1116.

[75] Report of the Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice relating to GATT Article XX, Paragraphs (b), (d) and (g), WTO Doc. WT/CTE/W/203 (March 8, 2002); Appellate Body Report, US – Gambling ¶¶ 306-307.

[76] Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, ¶ 307, WTO Doc. WT/DS332/AB/R (adopted December 17, 2007).

In this regard, it should be noted that the Appellate Body has concluded that the more important the societal value pursued by the measure at issue (e.g., human life and health) and the more this measure contributes to the protection or promotion of this value, the more easily the measure at issue may be considered to be "*necessary*" within the meaning of Art. XX(b).[77] On the other hand, the more trade restrictive a measure is, the more difficult it is to consider that measure "*necessary*".[78]

Without further examination of the different issues that are pertinent for a successful invocation of Art. XX(b), the existence of protectionist effect of a measure is considered pertinent in the analysis of more trade restrictiveness than necessary.[79] In specific the Appellate Body in *Korea – Beef* found that a "*measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effect*".[80]

It still seems that the protectionist effect, at least as introduced by the SATAP, cannot be considered as directly relevant. Rather the "*less favourable treatment*" within the meaning of detrimental impact on competitive opportunities does pose as more relevant, as the restrictiveness is directly envisaged in the later standard, rather than the SATAP where the protection of the domestic industry does not *prima facie* hinder a necessity finding, where Panels seek to find restrictiveness rather than protectionism.[81] Even if the occurrence of one may lead to the occurrence of the other and vice versa, in principle it constitutes a different quest.

2. The "'relating to"' standard

Art. XX (g) of the GATT allows WTO members to take GATT-inconsistent measures with the view of protecting and conserving exhaustible natural resources, as long as these measures are taken "*relating to*" the conservation of exhaustible natural resources, and made effective "*in conjunction with*" restrictions on domestic production or consumption.[82]

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77 B. Condon, "Climate changes and Unresolved Issues in WTO Law", 12(4) Oxford Academic Journal of International Economic Law 19 (September 2009).

78 Davey, *supra* note 69, at 384.

79 Appellate Body Report, Brazil – Tyres, ¶ 143; R. Howse and E. Turk, "The WTO Impact on Internal Regulations: A Case Study of the Canada–EC Asbestos Dispute", in Trade and Human Health and Safety 77, 113-115 [G.A. Bermann and P.C. Mavroidis (eds.), Cambridge University Press, 2006].

80 Appellate Body Report, Korea – Beef, ¶ 163.

81 Appellate Body Report, US – Gambling, ¶ 306.

82 Mavroidis, *supra* note 10, at 268.

In interpreting the term "*relating to*" under Art. XX(g), the Appellate Body focused on the design and the structure of the measure at issue concluding that a substantial relationship between the measure and the conservation of exhaustible natural resources should be substantiated in order to successfully invoke paragraph (g).[83] This means, according to the Appellate Body, the term "*relating to*" requires an examination of "*the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources*".[84] This requires "*a substantial, close and genuine relationship of ends and means*" and an examination of the relationship between the general structure and design of the measure, and the policy goal it purports to serve.[85]

In fact, the requirement of "*relating to*" must be satisfied only if there is a substantial relationship between the measure at issue and the conservation of exhaustible natural resources; in other words, if the measure at issue genuinely aims at this purpose.[86] For instance, a measure which merely aims incidentally or inadvertently at the conservation of exhaustible natural resources should not satisfy the mentioned requirement since no genuine or substantial relationship is forged between the measure and the resource at issue.[87]

However, the examination of this should not be based upon empirical effects since sub-paragraph (g) does not require an evaluation of the actual effects of the concerned measure, according to the Appellate Body in *China–Rare Earths*.[88] Rather the inquiry of whether a measure is "*related*" to the conservation of an exhaustible natural resource should be based on consideration of the measure's predictable effects.[89] These effects are those inherent in and discernible from, the design and structure of the measure.[90]

The examination of paragraph (g), and the *genuine relationship of means and end* between the measure at issue and the environmental goal entail an inquiry upon the direct aim of the measure. In this regard a protectionist measure, i.e., aimed at protecting the domestic industry as such,

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[83] Appellate Body Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, ¶¶ 7.290 and 7.379, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted August 29, 2014).

[84] Appellate Body Report, US – Shrimp ¶ 136.

[85] Appellate Body Reports, China – Measures Related to the Exportation of Various Raw Materials, ¶ 355, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted February 22, 2012).

[86] Matsushita, *supra* note 8, at 725-726.

[87] Panel Report, Brazil-Taxation, ¶ 7.977; Appellate Body Report, China-Rare Earths, ¶ 5.90.

[88] Appellate Body Report, China – Rare Earths, ¶¶ 5.98-5.100.

[89] Appellate Body Report, US – Gasoline, ¶ 21.

[90] Appellate Body Report, China – Rare Earths, ¶ 5.113.

notwithstanding the possible positive effects on environmental protection, would fall short of this prerequisite. In contrast, a measure that places detrimental burden on competitive opportunities for imported products in the meaning of Art. III:4 GATT, is not directly examined in the term "*relating to*" as no obligation exists to find a less trade restrictive measure.[91]

B. The chapeau of Art. XX

The introductory sentence of Art. XX ("*chapeau*") sets an additional round of prerequisites that have to be met, in order for the measure to abide by this delicate line of equilibrium set therein.[92]

Specifically, in order for an exception under Art. XX to be justified, the measures should not be applied in a manner which would constitute:

- a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or
- a disguised restriction on international trade

The prerequisites are disjunctive and not accumulative, which means that the measure falls short of the *chapeau*, if either an arbitrary/unjustifiable discrimination or a disguised restriction is proven.[93] The Appellate Body still found that each term should be read side-by-side as each term impacts the meaning of the other one.[94] 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 Art. XX by hidden/disguised protectionist motives and policies.[95] Yet it should be noted that the *chapeau* of Art. XX does not prohibit discrimination per se, but rather arbitrary and unjustifiable discrimination.[96]

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[91] The obligation for even-handedness is found in a later part of para (*g*). Hence, the examination as such of restrictiveness against foreign products is not covered in the "relating to"; Panel Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WTO Doc. WT/DS431/R and Add.1, WT/DS432/R and Add.1, WT/DS433/R and Add.1 (adopted August 29, 2014), upheld by Appellate Body Reports WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R , WT/DS433/AB/R, ¶ 7.417.

[92] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Art. 21.5 of the DSU by Malaysia, ¶ 118,WTO Doc. WT/DS58/AB/RW (adopted November 21, 2001).

[93] Van den Bossche, *supra* note 6, at 1159.

[94] Appellate Body Report, US – Gasoline, ¶ 66.

[95] Appellate Body Report, US – Gasoline, ¶ 20; Bartels, *supra* note 66, at 2.

[96] Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, ¶ 23, (adopted 1996).

Moving to our main focus which is the unjustifiable discrimination–since arbitrariness and the disguised restriction on trade are not directly linked to the issue of protectionism, attention should be given to the manner a measure is applied.[97] In order to detect the manner, we should examine the architecture, construction and the structure of the measure alongside with the ratio, reasoning and the way of thinking behind it.[98] So, the rationale of the discrimination must be assessed in light of the contribution of the discrimination to achieving the legitimate objective provisionally found to justify the measure at issue.[99]

In specific, discrimination is justifiable, if a rational nexus exists between the environmental objective and the discrimination imposed by the measure.[100] In contrast, if the discrimination arising from the application of the measure cannot be explained by the public policy at issue, but rather bears no relation to the said policy or even goes against it, then it would constitute an unjustifiable discrimination.[101]

In *US – Shrimp*, the Appellate Body that the section in question did not meet the requirements of the *chapeau* due to the fact that the applicable certification under its sub-sections, imposed preconditions that were tailored to the needs o the domestic industry, all while allowing the possibility that countries with equally turtle-safe regulatory programmes were denied certification under the section.[102] Hence, a measure that inexplicably restricts its protective operation for foreign products, for the sole reason that they are foreign, does not indeed have a rational connection with its environmental objective.

C. Identifying the mess Vol. II

The common phrase we see in most of the different standards in both Art. III and Art. XX is the examination of the design, structure and operation of the measure. As such this analytical tool is not bothersome; after all, in most cases throughout the WTO Agreements, the Adjudicating Bodies have scrutinized the different measures holistically by examining all the different

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97 Appellate Body Report, EC – Seal Products, ¶ 5.302.

98 Appellate Body Report, EC – Seal Products, ¶ 5.302; Zleptnig, *supra* note 8, at 98.

99 Appellate Body Report, Brazil – Tyres, ¶ 226; A. Davies, "Interpreting the Chapeau of GATT Article XX in Light of the 'New' Approach in Brazil – Tyres", 43(3) Journal of World Trade 515-516 (2009).

100 Appellate Body Report, EC – Seal Products, ¶ 5.318.

101 Appellate Body Report, Brazil – Tyres, ¶ 227; R. Wolfrum, "Article XX General Exceptions [Chapeau]", in WTO-Trade in Goods 464, 475 (R. Wolfrum, P.T. Stoll and H.P. Hestermeyer (eds.), Brill, 2011).

102 Appellate Body Report, US – Shrimp, ¶ 177.

features, i.e., design, structure and operation.[103] The mess is identified in the level of scrutiny that is required in each instance in the pursuit of regulating protectionist effect/intent.

In some instances, the case law is clear. For example, the differentiation between the term "*necessary*" in (b) and "*relating to*" has been clarified with the aid of the early case law. The Appellate Body has confirmed that the term "*necessary*" in paragraph (b) of Art. XX requires a higher level of scrutiny than the term "*relating to*" in paragraph (g).[104] In specific, Art. XX(g) not only covers measures that are necessary or essential for the conservation of exhaustible natural resources, but also covers a wider range of measures.[105] However, while a trade measure does not have to be necessary or essential to the conservation of an exhaustible natural resource, it has to be genuinely linked to the conservation of an exhaustible natural resource in order to be considered as "*relating to*" conservation within the meaning of Art. XX(g).

In contrast, the case law has not been clear as to the exact impact of a violation of the SATAP in terms with the "*genuine link of means and ends*" in sub-clause (g) and the justifiability of the *Chapeau*. In contrast, we consider that the "*necessity*" requirement mainly deals with a cross examination of the trade restrictiveness of the measure and its impact to the cause, rather than examining the purity of the link to its alleged cause. The latter can be supported by the rejection of the "*apt to*" standard in sub-clause (b) which would lead to such an examination. For this reason after all, even while examining the qualitative impact of the measure to the cause rather than the quantitative, as provided mainly by the Appellate Body in *Brazil – Tyres*, it still remains an examination of contribution – even if not strictly material – to the cause rather than its genuineness to the said cause.[106] In essence, the "*genuine link*" and the justifiability demanded by Art. XX, place the burden to prove the *honesty* of the measure to its cause, rather than its impact as in the "*necessity*".

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[103] Eg., Appellate Body Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, ¶ 7, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011); Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000, ¶ 375, WTO Doc. WT/DS217/AB/R, WT/DS234/AB/R (adopted January 27, 2003); Panel Report, European Communities – Protection of Trade Marks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States, ¶ 3499, WTO Doc. WT/DS174/R (adopted April 20, 2005).

[104] Panel Report, China – Rare Earths, ¶ 7.417.

[105] Davey, *supra* note 69, at 405.

[106] Appellate Body Report, Brazil – Tyres, ¶ 146; Panel Report, Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products, ¶ 7.229, WT/DS484/R and Add.1 (adopted November 22, 2017).

In this note, the Appellate Body clarified that the discrimination examined under the *chapeau* of Art. XX may not be the same as the discrimination found to be inconsistent with the relevant provisions of the GATT 1994.[107] In contrast, the relevant discrimination for the analysis under the *chapeau* of Art. XX is the same as the detrimental impact caused by the relevant regulatory distinctions in the context of Art. 2.1 Technical Barrier to Trade Agreement (TBT).[108] This, however, clarified the level of "*less favourable treatment*" required, not the level of protectionist effect, which, as we saw, has been considered distinct.

Hence, it has not become apparent to what extent a protectionism effect of a measure violates the SATAP standard in Art. III:1 of the GATT; however, this protectionist effect does not corrode the "*genuine link*" between the measure at issue and environmental protection, and in any event, does not violate the justifiability requirement.

IV. THE "THEORY" OF INHERENT BALANCE AS APPLIED IN WTO CASE LAW

In multiple cases, the Appellate Body has invoked the term "*balance*" that the WTO Agreements derives from and seeks for. In specific, the case law reveals a standard approach that examines the specific relationship between provisions which must be "*ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments*".[109]

In addition, the main object and purpose in various WTO Agreements entails the term "*balance*".[110] For example, the Appellate Body in *US – Clove Cigarettes*, has established that the TBT Agreement set out the balance "*between, on the one hand, the desire to avoid creating unnecessary*

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[107] Appellate Body Report, US – Gasoline, ¶ 23.

[108] Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, ¶ 202, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

[109] Appellate Body Report, China – Rare Earths, ¶ 5.55.

[110] Clearly stipulated in Art. 3.3 of the DSU [DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994)].

obstacles to international trade and, on the other hand, the recognition of Members' right to regulate".[111] In a different context, the Appellate Body highlighted that "*through these flexibilities and exceptions, the GATS seeks to strike a balance between a Member's obligations assumed under the Agreement and that Member's right to pursue national policy objectives*".[112] On the same footing, in *US – DRAMS*, the Adjudicating Body reiterated that "*the object and purpose of the SCM Agreement... reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures*".[113]

With such pronouncements in mind, the Appellate Body has interpreted the various provisions. In essence, this "*balance*" is invoked as an interpretative tool that takes into account different elements of customary international law, as enshrined in Art. 31.1 of the Vienna Convention of the Law of Treaties ("VCLT"), mainly the context, immediate or broad, as well as the object and purpose, as the Appellate Body clarified in *China – Rare Earths*.[114] Therefore, it seems that instead of clarifying which specific hermeneutical "*gizmo*" is used, the "*inherent balance theory*" places the burden upon the interpreter to examine how each term should be examined not only in light of the internal system of each provision and the specific Covered Agreement, contextually and teleologically,[115] but also in light of the external system in regards to the relationship between the specific object and purpose, and the relevant contexts of each Covered Agreement. In this regard, principles of interpretation such the *effet utile* and the *harmonious interpretation*, as introduced by the WTO case law, add additional width and depth in this analysis, especially in the application of cross-referencing between different contexts and object and purposes.[116] In all, the "*theory*" of inherent balance seeks via the various aforementioned tools, to sustain, enforce and promote the notion of "*balance*" that transpires the WTO system.

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[111] Appellate Body Report, US – Clove Cigarettes, ¶ 96.

[112] Appellate Body Report, Argentina – Measures Relating to Trade in Goods and Services, ¶ 6.114, WTO Doc. WT/DS453/AB/R and Add.1 (adopted May 9, 2016).

[113] Appellate Body Report, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, ¶ 115, WTO Doc. WT/DS296/AB/R (adopted July 20, 2005).

[114] Vienna Convention on the Law of Treaties, Art. 31.1, May 23, 1969, 1155 UNTS 331; Appellate Body Report, China – Rare Earths, ¶ 5.55.

[115] i.e. Object and purpose.

[116] I. Damme, Treaty Interpretation by the WTO Appellate Body 287 (London: Oxford University Press, 2010); Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear, ¶¶ 81, 95, WTO Doc. WT/DS121/AB/R (adopted January 12, 2000); Appellate Body Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, ¶ 81, WTO Doc. WT/DS98/AB/R (adopted January 12, 2000).

As such, the case law has interpreted the term "*less favourable treatment*" in Art. 2.1 of the TBT widely, so as to technically include considerations of Art. XX of the GATT such as the "le*gitimate regulatory distinction*" and "*even-handedness*".[117] In contrast, the very same wording, "*less favourable treatment*" in GATS has been interpreted narrowly as "*regulatory aspects or concerns that could potentially justify such a measure are more appropriately addressed in the context of the relevant exceptions*", which are available in the GATS and not in the TBT.[118] Lastly, this has lead the Compliance Panel in *Thailand– Cigarettes* to rule that the inherent balance in the Customs Valuation Agreements (CVA) provide for a degree of discretion to the customs authorities that enables them to pursue legitimate regulatory objectives without deviating from the provisions of the CVA; thus, excluding the applicability of Art. XX of the GATT.[119]

As an outline of this assessment, the Appellate Body has established an aura of balance that runs through the various provisions of the covered Agreements.[120] In essence, without having to resort to the *effet utile* principle at all times, the Adjudicating Bodies have tried to distinguish the interpretation and application of each provision as part of comprehensive multilateral system of rights and obligations. We should be, for example, aware of the interpretation followed by the Appellate Body in the "*likeness*" in Art. III:2 and III:4, by slowly squeezing out the accordion of likeness in accordance to the scope of the measure (narrow likeness/in excess Art. III:2, first sentence, then a little "less narrow likeness"/"less favourable treatment" Art. III:4, and then directly competitive/substitutable/dissimilar taxation with *de minimis* in the Art. III:2, second sentence).[121]

V. USING THE THEORY OF INHERENT BALANCE IN ARTS. III:1-4 AND XX OF THE GATT 1994

With these in mind, the examination of the level of allowed protectionism should be read in light of the inherent balance of the GATT and specifically Art. III, which according to the Appellate Body is "*on the one hand, the*

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[117] Van den Bossche, *supra* note 6, at 1743.

[118] Appellate Body Report, Argentina – Financial Services, ¶ 6.115.

[119] Panel Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines – Communication from the Panel, ¶ 7.7.56, WTO Doc. WT/DS371/RW and Add.1, (circulated to WTO Members November 12, 2018) (appealed by Thailand January 9, 2019).

[120] Appellate Body Report, US – Shrimp, ¶¶ 159-160; Appellate Body Report, EC-Seal Products, ¶ 5.296; Appellate Body Report, Thailand – Cigarettes, ¶ 173.

[121] Appellate Body Report, Japan – Alcoholic Beverages, ¶ 114.

desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate", if applied in conjunction with the general exception of Art. XX.[122] In other words, the aforementioned balance is found in the TBT in Art. 2.1 alone, while in the GATT the balance is expressed in the national treatment obligation of Art. III and its qualification in Art. XX, as an exception. Hence, in order to sustain the inherent balance of the GATT regarding both the internal balance between Arts. III and XX of the GATT and the external balance of the GATT, in specific the balance between the rights and obligations provided therein and those provided in TBT, the interpretation followed in the relevant provisions of TBT, i.e. Art. 2.1, should be dissimilar to the one ought to be followed in Art. III GATT.

Starting from Art. III, the Appellate Body has been clear that "*the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures*", which in the case of Art. III:2, second sentence, in light of the SATAP standard, is "*requiring equality of competitive conditions and protecting expectations of equal competitive opportunities*".[123] Yet, this interpretation does not add any essence to the SATAP standard.

Indeed, a pure examination of competitive conditions is identical to the "*less favourable treatment*" standard in Art. III:4 which, as we have seen, has been reduced to a purely economic-competitive impact assessment. The latter was verified by the Appellate Body in *US – Tuna* (21.5) in its examination of the term "*less favourable treatment*" in Art. 2.1 of the TBT and in Art. III:4 of the GATT, where the analysis of the former's standard included general regulatory concerns while the latter was simply satisfied by an occurrence of detrimental competitive conditions.[124]

However, should the latter be true, the SATAP standard as an additional requirement that supervenes the mere competitive impact assessment under "*less favourable treatment*", should include an additional rationale-requirement. Otherwise, the emphasis given by the Appellate Body in *EC – Seals*, that the absence of a reference to Art. III:1 in Art. III:4 must be given meaning, would be meritless.[125] Therefore, the SATAP standard should be one step further than the "*less favourable treatment*" in the scale between national

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[122] Appellate Body Report, US – Clove Cigarettes, ¶ 96.
[123] Appellate Body Report, Korea – Alcoholic Beverages, ¶ 119.
[124] Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico, ¶¶ 7.338-7.339, WTO Doc. WT/DS381/AB/RW and Add.1 (adopted December 3, 2015).
[125] Appellate Body Report, EC – Seal Products, ¶ 5.115.

treatment obligations and regulatory discretion, in order to sustain the inherent balance of Art. III of the GATT.

It should be noted that the Appellate Body had been clear that any legitimate regulatory objective can be pursuit in Art. XX; hence, any attempt to read, at least identical to Art. XX's manner, the capability to examine regulatory objectives in the SATAP would be groundless according to the case law. This is also reaffirmed by applying the "*theory*" of inherent balance, as any such attempt would fundamentally alter the scales of the GATT in favour of Member States' right to regulate at the expense of the multilateral rules system, but also would disturb the balance of TBT or SPS which give a wider regulatory discretion but under specific circumstances such as the definition of technical regulation.

On the other side of the scales, it seems that the "*relating to*" does bear the highest standard of protectionism. In other words, the protection of the domestic industry should be of such a character that practically corrodes the genuine relationship between the measure at issue and the protection of the environment. Practically, the protectionist effect should be identified of such character that any tie to environmental protection would be considered incidental or pretentious, rather than genuine, substantial and close. Besides, there is no need to over scrutinize a measure that envisages protectionist effects, in its *relation to* the policy objective at issue, since the obligation of even-handedness enshrined in paragraph (g) would do the trick. In addition, this pretentious character of the measure should be evident without examining its application, according to the Appellate Body in *Indonesia – Animal Products*.[126]

Moving one step further from this side of the scales, the justifiability of the discrimination applied by the measure, as provided for by the *Chapeau*, constitutes the intermediate standard between the aforementioned "*relating to*", which requires an insuperable "*amount*" of protectionism and the SATAP standard. In WTO case law, measures have been found to fall short of the assessment of justifiability, either due to violations of due process or lack of transparency or calibration to the goals at issue.[127] The common theme is that these inaccuracies of the measures could not be rationally tied to the regulatory policy pursuit at issue. Hence, should the protection offered to domestic industry as a form of discrimination lack any rational connection to the legitimate goal; then the measure is unjustifiably discriminatory.

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[126] Appellate Body Report, Indonesia – Animal Products, ¶ 5.96.

[127] Appellate Body Report, US – Shrimp; Appellate Body Report, China – Rare Earths; Appellate Body Report, US – Clove Cigarettes.

Therefore, coming back to the SATAP standard, we have seen that the "*less favourable treatment*" in Art. III:4 is restricted to an examination of competitive opportunities, notwithstanding the governmental rationale. In contrast, Art. XX (g) allows protectionism at least to the point that does not corrode the link with the legitimate goal of environmental protection, while the *Chapeau* excludes measures that protect the domestic industry in an irrational manner in terms of its relations to the policy objective invoked. In other words, protectionism is not considered a legitimate policy objective that can be pursued under Art. XX of the GATT; yet, it is allowed at least to a relative "*amount*". For example, should the domestic industry fabricate a unique eco-friendly form of moped motorcycles, then the WTO Member is allowed to protect it up to the point that it is rationalized by the goal of environmental protection, despite the fact that intent/effect of protectionism is evident. In contrast, under Art. III:4 the measure would most probably have detrimental impact to the competitive opportunities of the foreign goods; thus, providing for "*less favourable treatment*".

In this regard, we can discern a gap between the under-scrutinizing standards of Art. XX of the GATT where protectionism should be overwhelmingly evident and Art. III:4 where a simple instance of protectionist effect is enough, in as much as detrimental impact to the competitive opportunities of the foreign goods. By examining the inherent balance of the GATT and Art. III, specifically, we can see that the gap between these two is the SATAP standard, since it constitutes an additional requirement of Art. III in order to find a violation; yet, it constitutes a prior step before the examination of regulatory concerns in Art. XX of the GATT.

In the WTO case law, the standard of Art. III:1 was found to be violated when the domestic industry was either primarily excluded from the application of a measure or primarily able to void its application.[128] In essence, the measure should constitute the invisible veil of protection over the domestic production. The differentiation to the "*less favourable treatment*" standard is the intent/effect, which is encompassed in the phrase "*so as*". Interestingly enough, the ordinary meaning of the phrase, in accordance with Art. 31.1 of the VCLT, is "*with the purpose or result*".[129] Bearing these in mind, we shall examine the phrase, in light of the aforementioned gap, in the inherent balance of Art. III and Art. XX of the GATT, that is one step prior of Art.

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[128] See the analysis of Appellate Body Report, Japan – Alcoholic Beverages and Appellate Body Report, Korea – Alcoholic Beverages.

[129] Vienna Convention on the Law of Treaties, Art. 31.1, May 23, 1969, 115 UNTS 331; Collinsdictionary.com. (n.d.). So as definition and meaning | *Collins English Dictionary*, <https://www.collinsdictionary.com/dictionary/english/so-as>.

XX, i.e., examination of regulatory concerns, and one step further from pure examination of detrimental competitive impact of Art. III:4.

A Panel should scrutinize the measure (design, structure etc.) in order to find the objective justification behind the measures. If the application of the measure or its effects, can be explained by the protectionist purpose, among else, then the SATAP standard is violated. To be clear, the Panel should not examine the measure similarly to Art. XX of the GATT; rather, it should take one step back and examine the effects of the measure and whether they could be among else be explained by protectionist regulatory purpose. Hence, a Panel should interpret the term "*so as*" in light of the inherent balance set, as "*with the purpose or result, among else*". The SATAP should be the basis of examination to affirm whether the dissimilar taxation violates the core of national treatment, i.e., equality of competitive conditions.

In other words, the SATAP should constitute an imaginative strainer though which the measure is examined in order to find whether protectionism remains part of the measure at issue despite a purification process in light of an alleged regulatory purpose. For example, if a measure is examined in light of the scope of environmental protection and the measure seems to protect the domestic industry, then the strainer test points towards a violation of the SATAP standard. This means that the SATAP should be used as a rule of reason by the Panels to conclude whether the measure as such or as applied can reasonably lead to a formation of a protective shield, which in the context of Art. III of the GATT is "*better competitive conditions*".[130] With the view to verify the aforementioned, "*protection*" should be interpreted in light of the inherent balance of Art. III and mirror the interpretation followed in Art. III:4 in the "*less favourable treatment*". Hence, instead of detrimental impact on competitive opportunities, that is in Art. III:4, "*protection*" should be considered the establishment of *beneficial competitive conditions*, which are of course more than *de minimis* and apply exclusively or predominantly to the domestic producers/industry.

In this regard, both the effects and the subjective proclamations will be relevant evidence. Besides, if we examine the definition of protectionism, "*theory or practice of shielding a country's domestic industries from foreign competition*", we can deduce that protectionism entails: an examination of

[130] On issues of regulatory protectionism see further the classic article: A. Sykes, "Regulatory Protectionism and the Law of International Trade", 66(1) The University of Chicago Law Review 1-46 (1999).

a more subjective contrast to free trade, and amore objective observation of the formation of the aforementioned protective shield.[131]

VI. CONCLUSION

The scope of the present analysis was to examine how the different national treatment standards interact with each other and with Art. XX of the GATT, in light of the assertions of the Appellate Body that the WTO Agreements are characterized by inherent balance. This balance, if examined as a proper "*theory*", includes various elements and principles of interpretation as introduced in international customary law that enables the interpreter to look beyond the mere text, context or object-purpose. Rather, the balance struck in each Covered Agreement either internal or external with other Covered Agreements, pave the path on which these elements should be used. Hence, the inherent balance "*theory*" could also be used as an informal test to verify whether the interpretation followed is on par with the WTO system.[132]

In this regard, the regulatory purpose of protectionism/protection of domestic industry has been taken as the basis of regulatory autonomy which is differently scrutinized in the GATT. Following the inherent balance of the GATT, it seems that starting from Art. III:4 towards Art. XX of the GATT, the space to promote such measure increases. Indeed, Art. III:2, first sentence, and III:4 heavily scrutinize the protectionist application of a measure, while Art. XX examines protectionism in a different and much more lenient perspective.

In this delicate balance between multilateral obligations and regulatory discretion, Art. III:1 stands in the middle. The SATAP standard introduced therein acts as a strainer of regulatory intent, by examining whether protectionist effect or intent can reasonably be concluded to exist in light of the application of the measure. This examination must be conducted, among else, using the design, structure and overall application of the measure, with a view of verifying the existence of such a protectionist effect or intent. It is clarified that there is no need to conclude whether the SATAP requires protectionist effect, intent or both. Rather, since the standard is neither an

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[131] R. Allen, et al., *The Concise Oxford Dictionary of Current English* (Oxford: Clarendon Press, 1990); M. Beise, T. Oppermann, and G. Sander, GrauzonenimWelthandel. Protektionismusunterdemalten GATT alsHerausforderung an die neue WTO 61 (Baden-Baden: Nomos, 1998); Zleptnig, *supra* note 8, at 22.

[132] We emphasize on the informal, as usually Art. 32 of VCLT is used as verification of the interpretative result of Art. 31. Hence, if considered a part of the interpretative process, the inherent balance should be examined before resorting to Art. 32.

effect-based examination as Art. III:4 nor easily discernible by pure intention, a Panel should examine both instances in order to conclude whether the measure as such or as applied can reasonably lead to a formation of a protective shield.

On a final note, it should be mentioned that the present examination of regulatory discretion and freedom of Member States to set up their regulatory concerns is quite peculiar. Indeed, the fact that protectionism cannot be considered a legitimate regulatory goal such as human health or public morals, places this policy objective under heavy surveillance that only under specific circumstances can scrutiny be avoided in the multilateral trading system. Hence, the fact that protectionist effect or intent is either heavily scrutinized (under Art. III:4 or Art. III:2, first sentence) or more than moderately scrutinized (under Art. III:1 and Art. III:2, second sentence) should not be seen as placing a general rule of thumb towards minimizing the legality of such legitimate regulatory concerns. Rather, especially under the proposed SATAP, legitimate regulatory goals would pass the proposed strainer test, should they avoid introducing protectionist elements which are not reasonably on par with such legitimate regulatory goals.