

December 2020

Right to Health in GATS: Can the Public Health Exception Pave the Way for Complementarity?

Swati Gola
University of Exeter, School of Law

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

 Part of the [Health Law and Policy Commons](#), [Health Services Administration Commons](#), [International Law Commons](#), [International Public Health Commons](#), [International Trade Law Commons](#), [Quality Improvement Commons](#), [Tax Law Commons](#), and the [Telemedicine Commons](#)

Recommended Citation

Swati Gola, *Right to Health in GATS: Can the Public Health Exception Pave the Way for Complementarity?*, 33 Pace Int'l L. Rev. 75 (2020)
Available at: <https://digitalcommons.pace.edu/pilr/vol33/iss1/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

RIGHT TO HEALTH IN GATS: CAN THE PUBLIC HEALTH EXCEPTION PAVE THE WAY FOR COMPLEMENTARITY?

Swati Gola*

TABLE OF CONTENTS

I.	Introduction	76
II.	Services Having Implications for Health in GATs and the Right to Health.....	80
	A. Health Services under GATS	80
	B. A Hypothetical Scenario	84
III.	The Right to Health and the Public Exception in GATs.....	90
	A. Methodology for Interpretation and VCLT Article 31(3)(c).....	91
	B. The Three-Tiers Test to Justify the Public Health Measure	98
	1. Tier 1: The challenged measure aims to protect human life or health.....	99
	2. Tier 2: The challenged measure is ‘necessary’ ..	101
	3. Tier 3: Chapeau of article xiv and good faith	109
IV.	Conclusion.....	112

* Lecturer, School of Law, University of Exeter. Swati's keen interest in socio-legal implications of trade laws led to a PhD in the area of international trade in healthcare services and the right to health from University of Manchester. Swati is interested in assessing the impact of trade liberalization on human rights. She has written papers on intellectual property rights in India, Socio-Legal Implications of Reproductive Tourism in India and Medical Tourism and Health Equity.

I. INTRODUCTION

The inclusion of health-related and other services impacting human health, such as sanitation, water, and environmental services, in the General Agreement on Trade in Services (GATS) has been met with vehement criticism and resistance.¹ Despite the potential liberalization of health-related services to supplement and complement World Trade Organization (WTO) Members' public health services through enhanced quality and efficiency of supplies and increased foreign exchange earnings,² WTO Members have been reluctant to commit themselves to full liberalization in service sectors that have direct or indirect health implications.³ The low level of commitments, even after 25 years of inception of GATS, are indicative of skepticism of whether liberalization of healthcare services through GATS restricts the public health policies and affects the provision of healthcare services, which are pertinent for the right to health. It further indicates wariness that if a Member liberalizes services in sectors that have implications for human health, it may lose the regulatory freedom to devise health policy measures

¹ See David Woodward, *The GATS and Trade in Health Services: Implications for Health Care in Developing Countries*, 12 REV. INT'L POL. ECON. 511, 515–16 (2005); Allyson M. Pollock & David Price, *The Public Health Implications of World Trade Negotiations on the General Agreement on Trade in Services and Public Services*, 362 LANCET 1072, 1072–73 (2003).

² David P. Fidler et al., *Draft Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective* ¶¶ 47–53 (2006) (working paper) (on file with the Globalization, Trade and Health Working Paper Series); WHO & WTO, WTO AGREEMENTS & PUBLIC HEALTH: A JOINT STUDY BY THE WHO AND WTO SECRETARIAT 119–120 (2002).

³ As of January 2000, less than 40% of WTO members had committed to liberalize health-related service sectors opposed to the 90% commitment in tourism and related services and the 70% commitment in financial services. Rudolf Adlung & Antonia Carzaniga, *Health services under the General Agreement on Trade in Services*, 79 BULL. WORLD HEALTH ORG. [WHO] 352, 353 (2001), [https://www.who.int/bulletin/archives/79\(4\)352.pdf?ua=1](https://www.who.int/bulletin/archives/79(4)352.pdf?ua=1). As per this author's collation of data based on WTO databases, as of January 2020, only 49 of the 164 WTO members (counting the European Union Member States collectively) have made commitments in hospital services; of those, 23 Members have also made commitments in other health human services, whereas only two Members have made commitments exclusively in other human health services. In terms of health-related professional services, only 52 WTO Members have made commitments in medical and dental services and the number is even lower (22) for services provided by midwives, nurses, and physiotherapists.

according to their public health needs.⁴ The fundamental importance of healthcare services and regulatory freedom to device public health policies is evident in the current Covid-19 pandemic. For example, Spain chose to nationalize all its hospitals and healthcare services provision⁵ and the United Kingdom (UK), on the other hand, planned to rent private hospital beds in order to meet the demands of the pandemic.⁶

The call for embracing the human rights agenda from within international trade law is not new. After the Second World War, the two regimes, international human rights and international trade law, seem to have evolved in isolation for “the lack of communication and dialogue between these two traits of liberalism”⁷ Scholarship exploring the tension between human rights and international trade and economic regulations followed.⁸ Former WTO director Pascal Lamy conceded that “trade and human rights go hand in hand, although progress still needs to be made to ensure better coherence between principles and realities.”⁹ Several scholars have scoped the international trade and human rights regimes, identifying areas of tension and means of possible reconciliation.¹⁰ Whereas some

⁴ Adlung & Carzaniga, *supra* note 3, at 363.

⁵ Jon Henley, Kim Willsher & Ashifa Kassam, *Coronavirus: France imposes lockdown as EU calls for 30-day travel ban*, GUARDIAN (Mar. 16, 2020, 3:52 PM), <https://www.theguardian.com/world/2020/mar/16/coronavirus-spain-takes-over-private-healthcare-amid-more-european-lockdowns>.

⁶ Nigel Nelson & Sean Rayment, *Coronavirus: 8,000 private hospital beds rented to NHS for £2.4million per day*, MIRROR (Mar. 15, 2020, 11:06 AM), https://www.mirror.co.uk/news/politics/coronavirus-nhs-steps-up-fight-21694418?utm_source=linkCopy&utm_medium=social&utm_campaign=sharebar.

⁷ Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT'L ECON. L. 111, 113 (2002).

⁸ See, e.g., Thomas G. Weiss, *The United Nations: Before, During and After 1945*, 91 INT'L AFFAIRS 1221, 1227–28 (2015) (discussing the changes the United Nations undertook after World War II in response to the need for inter-governmental organization).

⁹ Pascal Lamy, Director-General, WTO, Speech to the United Nations Institute for Training and Research: Trade and Human Rights Go Hand in Hand (Sept. 26, 2010).

¹⁰ See, for example, Siobhán McInerney-Lankford, *Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective*, 1 J. HUM. RTS. PRAC. 51, 51–55, 66–67 (2009), for a discussion regarding the tension between human rights and international trade development, including a demonstration on how “human rights could be integrated more

scholars built their thesis upon the values common to both regimes,¹¹ others identified methods to prevent or resolve any normative conflict through the application of rules of public international law,¹² and some scholars even went on to claim that the WTO jurisprudence has already accommodated human rights into the utilitarian trade rules.¹³ However, as Howse and Teitel noted, it is imperative “to identify some fairly *precise and specific* interconnections between the legal concepts and doctrines in the treaty texts of both regimes.”¹⁴ Whereas the scholarship thus far has looked at human rights and international trade regimes in general and has attempted to identify how one can complement the other, this paper approaches this issue from the standpoint of integrating a right to health measure in GATS compliance through an interpretation of the public health exception under Article XIV(b).¹⁵

systemically into development policy and practice.”

¹¹ See, for example, Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT’L L. 621, 621–22 (2002), which promotes the integration of human rights and economic law, deviating from the one-sided focus on liberalization; and ROBERT HOWSE & RUTI G. TEITEL, *BEYOND THE DIVIDE: THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE WORLD TRADE ORGANIZATION* 7 (2007), <https://library.fes.de/pdf-files/iez/global/04572.pdf>, which suggests that the structure of a WTO treaty safeguards the consistency between economic goals and human purposes and intrinsic values.

¹² See, for example, Makau W. Mutua & Robert L. Howse, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* 53 (Buffalo Legal Stud. Rsch. Paper No. 2010-008, 2010) in 2001 HUM. RTS. IN DEV. Y.B. 1999/2000 51–82 (Hugo Stokke & Anne Tostensen eds.) who contend that practices of inter-nation business must be held accountable to existing human rights law in addition to trade and investment agreements; and Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L L. 753, 753 (2002), who asserts that “WTO law must evolve and be interpreted consistently with international law, including human rights law.”

¹³ See, for example, Stephen Joseph Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT’L L. 1, 2 (2004), which argues that the WTO has not only remained neutral as to human rights law, but also that decent progress has been made with regard to fitting the norms of human rights into the utilitarian trade rules; and M. Gregg Bloche, *WTO Deference to National Health Policy: Towards An Interpretive Principle*, 5 J. INT’L ECON. L. 825, 826–27 (2002), which proposes that the WTO system already considers health as a *de facto* principle based on the weight accorded to health in prior trade disputes and the recognition of a “right to health.”

¹⁴ HOWSE & TEITEL, *supra* note 11, at 7.

¹⁵ See generally General Agreement on Trade in Services art. XIV(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization,

This paper demonstrates how a right to health approach in the interpretation of the public health exception outlined in GATS Article XIV(b) can bring about a harmonious application of international human rights and international trade law regimes. Focusing on the interpretive value of the right to health for the public health exception in GATS, it examines whether a WTO Member, who has committed itself under GATS to fully liberalize all service sectors that have implications for health (e.g., hospital and other healthcare services), still retains the regulatory space to undertake measures to fulfill their right to health obligations and can justify a public health measure as incompatible with GATS obligations when undertaken to fulfill its right to health obligation. This paper argues that a right to health approach to an interpretation of the public health exception in GATS can bring complementarity between international human rights and international trade law regimes. A good faith and harmonious interpretation of the public health exception in GATS, taking into account the right to health, further advances systemic integration and responds to the challenge of fragmentation of public international law.

Specifically, the first part of this article introduces various services that have implications for human health, particularly health-related services, and illustrates how their regulation for right to health purposes may lead to a potential violation of GATS commitments. The second part explores the general rule of treaty interpretation as a way to integrate the right to health in the public health exception. Thereafter, this paper examines where and how the right to health can play an evidentiary and interpretive role in the three-tier test to be satisfied by the WTO Member raising the public health exception.

The inquiry of this article is limited to the normative relationship between the right to health and the public health exception from the perspective of a WTO Member who is also a

Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS] (“[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . necessary to protect human, animal or plant life, or health . . .”).

State Party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Since very few WTO Members have committed themselves to this area of trade,¹⁶ the discourse in this paper helps the responding Member by identifying potential legal strategies to strengthen the argument for the right to health interpretation of the health exception in GATS. Given that the burden of proof lies on the State raising the health exception,¹⁷ it is judicious for health policy experts and Member States to formulate legal strategies to work within the international legal framework that GATS and related rules of international law create while responding to their public health needs.

II. SERVICES HAVING IMPLICATIONS FOR HEALTH IN GATS AND THE RIGHT TO HEALTH

A. *Health Services under GATS*

Several services included in GATS—hospital services, medical and dental services, services provided by midwives, nurses and physiotherapists—have direct implications on human health, while others, environmental services, for example, have indirect implications on human health.¹⁸ GATS provides a flexible legal framework for international trade in services wherein the services can be provided across States in four different ways, known as modes of supply:

¹⁶ *Health and social services, Current commitments and exemptions*, WTO, https://www.wto.org/english/tratop_e/serv_e/health_social_e/health_social_e.htm (last visited Nov. 22, 2020).

¹⁷ WTO, WTO ANALYTICAL INDEX: GATS – ARTICLE XIV (JURISPRUDENCE) § 1.4.4, ¶ 22, at 9 (2020), https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf [hereinafter GATS ART. XIV JURIS.].

¹⁸ See WORLD BANK GROUP [WBG], INTERNATIONAL TRADE IN HEALTH SERVICES AND THE GATS: CURRENT ISSUES AND DEBATES 11 (Chantal Blouin, Nick Drager & Richard Smith eds., 2006).

TABLE 1: TRADE IN HEALTH-RELATED SERVICES VIA FOUR MODES OF DELIVERY¹⁹

INTERNATIONAL TRADE IN HEALTH-RELATED SERVICES	MODE 1 (CROSS-BORDER TRADE)	MODE 2 (CONSUMPTION ABROAD)	MODE 3 (COMMERCIAL PRESENCE)	MODE 4 (MOVEMENT OF NATURAL PERSONS)
HOW SERVICES ARE DELIVERED	BOTH THE SERVICE PROVIDERS AND CONSUMERS DO NOT LEAVE THEIR RESPECTIVE COUNTRIES.	CONSUMER PHYSICALLY TRAVELS FROM ONE COUNTRY TO ANOTHER TO OBTAIN A SERVICE.	A SERVICE SUPPLIER OFFERS A SERVICE IN ANOTHER COUNTRY THROUGH, E.G., AN AGENCY, BRANCH, SUBSIDIARY OR JOINT VENTURE.	PEOPLE TEMPORARILY ENTER ANOTHER COUNTRY IN ORDER TO PROVIDE A SERVICE.
EXAMPLES	TELEMEDICINE: A FOREIGN MEDICAL SPECIALIST SENDS ADVICE VIA INTERNET TO DOMESTIC DOCTORS OR HOSPITALS, E.G., TELE-RADIOLOGY; TELE-PATHOLOGY.	MEDICAL TOURISM, WELLNESS TOURISM; PATIENTS SEEKING AFFORDABLE HIGH-QUALITY TREATMENT OR ALTERNATIVE TREATMENT TRAVEL TO THE COUNTRY OF SERVICE PROVIDER.	JOINT VENTURE BETWEEN FOREIGN AND DOMESTIC PARTNERS TO ESTABLISH A HOSPITAL, CLINIC OR DIAGNOSTIC FACILITY OR MANAGEMENT OF THESE FACILITIES.	HEALTHCARE PROFESSIONALS (DOCTORS, NURSES, SPECIALISTS ETC.) AND SUPPORTING PERSONNEL MOVE OVERSEAS TO PROVIDE HEALTH RELATED SERVICES.

¹⁹ This table has been created by the author's collation of data throughout her research for this paper.

Some of the GATS obligations are horizontal in that they apply across all service sectors and in all modes of delivery whether or not a Member has liberalized that sector.²⁰ Examples include Article II's non-discrimination rule of most-favored-nation,²¹ Article VIII's competition principles on monopoly and exclusive service suppliers,²² and Article XIII's government procurement of services.²³ On the other hand, specific obligations relating to market access and national treatment apply only when a Member wishes to liberalize a service sector and makes specific commitments in specific modes of delivery in that sector.²⁴

Some of the GATS obligations are horizontal in that they apply across all service sectors and in all modes of delivery whether or not a Member has liberalized that sector. The market access obligation requires a Member to accord foreign services and service supplier treatment under the terms, limitations, and conditions agreed and specified in its Schedule.²⁵ National treatment requires that no measure, be it "in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form[.]"²⁶ should "modif[y] the conditions of competition in favour of domestic services or service suppliers[.]"²⁷ or act to the detriment of foreign "like services or service suppliers" unless such conditions are specified in the schedule of commitment.²⁸

²⁰ *The General Agreement on Trade in Services (GATS): objectives, coverage and discipline*, 7. *What are the basic obligations under GATS?*, WTO, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Nov. 22, 2020).

²¹ Article II of GATS: Most-Favoured-Nation Treatment (MFN obligation) requires a Member to treat all services and service suppliers equally regardless of country of ownership or origin, while also allowing Members to enter into Economic Integration Agreements or recognize the standards and regulations of one or more trading partners provided it fulfills certain conditions. See GATS, *supra* note 15, art. II.

²² *Id.* art. VIII.

²³ *Id.* art. XIII.

²⁴ *Id.* arts. XI, XVII.

²⁵ *Id.* art. XVI(2).

²⁶ *Id.* art. XXVIII(a).

²⁷ *Id.* art. XVII(3); Woodward, *supra* note 1, at 513.

²⁸ GATS, *supra* note 15, art. XVII(1); Woodward, *supra* note 1, at 513.

When a Member makes a “full commitment” in both market access and national treatment, it commits itself not to impose any quantitative restriction on the foreign service providers, and to treat “like” foreign and domestic services and service suppliers equally and not to introduce any measure that favors domestic services or service suppliers.²⁹ Therefore, if a WTO Member commits to fully liberalize a service sector that has implications on human health, it is then obliged to treat the foreign service suppliers like the domestic services suppliers. The Member is further obliged to give the foreign service suppliers full access to its domestic market without any of the quantitative restrictions listed in Article XVI(2), which requires Members not to:

1. Limit the number of service providers;³⁰
2. Limit the value of service transactions;³¹
3. Limit the total number of service operations or total quantity of service output;³²
4. Limit the number of natural persons employed in a particular service sector;³³
5. Take measures that restrict or require specific types of permissible legal entities;³⁴ and
6. Limit the participation of foreign capital.³⁵

At the same time, the aforementioned services’ resulting implications on human health, particularly health-related services, are crucial for the maintenance of a functioning and affordable public health system mandated by the right to health obligation.³⁶ According to the Committee on Economic, Social and Cultural Rights (CESCR), a State Party to ICESCR is under a legal

²⁹ GATS, *supra* note 15, arts. II, XVII.

³⁰ *Id.* art. XVI(2)(a).

³¹ *Id.* art. XVI(2)(b).

³² *Id.* art. XVI(2)(c).

³³ *Id.* art. XVI(2)(d).

³⁴ *Id.* art. XVI(2)(e).

³⁵ *Id.* art. XVI(2)(f).

³⁶ General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Comm. on Econ., Soc. & Cultural Rts. on Its Twenty-Second Session, April 25–May 12, 2000, ¶ 1, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment No. 14].

obligation to provide sufficient as well as functioning public healthcare facilities, goods, and services that include not only hospitals, clinics, other health-related buildings, adequately qualified and trained medical professionals, and essential drugs, but also the basic necessities for good health such as safe and potable drinking water and adequate sanitation facilities.³⁷ Subsequently, a State party to both the WTO and the ICESCR is faced with the challenging task of balancing the seemingly competing obligations arising from the respective international legal regimes.

B. A Hypothetical Scenario

By way of illustration, let us imagine that a WTO Member, Country X, has fully liberalized the healthcare services sector and, as such, is now obligated to grant full market access to foreign hospitals and other health-related service providers and treat them “like” domestic hospitals and other health-related services providers. Consequently, foreign healthcare service providers have established tele-medicine and tele-pathology services, as well as opened tertiary hospitals, providing ambulatory and inpatient care in Country X. Because Country X is also a party to ICESCR, it is bound to provide functioning public hospitals and other health-related services, including medical services.

To begin with, not every public health measure necessarily violates GATS obligations. For example, let us imagine that Country X provides certain subsidies to strengthen the financial support to its public sector hospitals. This measure does not violate Country X's GATS obligations since there is no GATS provision prohibiting subsidies in the service sector. Moreover, services are excluded from the scope of the Subsidies and Countervailing Measures (SCM) Agreement, which specifically prohibits trade-distorting subsidies by WTO Members.³⁸ The SCM Agreement expressly refers to the purchases of goods but

³⁷ *Id.* ¶ 11.

³⁸ Agreement on Subsidies and Countervailing Measures art. 3, Dec. 31, 1999, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

omits reference to the purchase of services.³⁹ Acknowledging the trade-distortive effect of subsidies in certain circumstances, Article XV of GATS provides for further negotiations to develop necessary multilateral disciplines.⁴⁰ “However, [currently], no concrete proposals have been submitted to date in the negotiations under Article XV.”⁴¹ As it stands, a Member which considers itself to be adversely affected by another Member’s measure may request a consultation with that Member,⁴² but “[w]ithin the Agreement’s current structure, it would not be possible to challenge such measures” granting subsidies.⁴³ Thus, if the financial support to its public health sector by Country X is deemed trade-distortive by another Member, the only means of recourse available to the affected Member is to request a consultation.

As noted earlier, GATS Article XVI sets out specific obligations for Members that have undertaken specific market access commitments in their schedules.⁴⁴ Article XVI(1) specifically obliges Members to accord services and service suppliers of other Members “no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”⁴⁵ The Appellate Body (AB) in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US—Gambling II)* emphasized that a full market access commitment given in a particular sector or sub-sector extends to the whole of that sector, including all of its sub-sectors.⁴⁶ Similarly, a full market access commitment given for supply of a service applies to any means of delivery included in Mode

³⁹ Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 7.968, WTO Doc. WT/DS353/R (adopted Mar. 23, 2012).

⁴⁰ GATS, *supra* note 15, art. XV(1).

⁴¹ Rudolf Adlung, *Public Services and the GATS*, 27 (WTO Staff Working Paper No. ERSD-2005-039, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=922256.

⁴² GATS, *supra* note 15, art. XV(2).

⁴³ Adlung, *supra* note 41, at 26.

⁴⁴ GATS, *supra* note 15, art. XVI(2)(a)–(f).

⁴⁵ *Id.* art. XVI(1).

⁴⁶ Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 219, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter *US—Gambling II*].

1—i.e., cross-border supply of services via telecommunication.⁴⁷

Suppose that in order to tackle the issue of brain drain,⁴⁸ or to ensure that there are enough doctors and nurses in the public sector hospitals, Country X has decided to limit the number of medical practitioners—such as doctors, nurses and clinicians—in the private sector hospitals for both domestic and foreign subsidiaries. Because Country X did not specify any limitations in its schedule of commitments, its GATS obligation does not allow it to apply any quantitative restrictions.⁴⁹ It is required under GATS Article XVI(2)(d) not to limit “the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service” unless it is specified in its schedule.⁵⁰ Medical professionals, including doctors, nurses, clinicians, paramedical staff, patient attendants, and medical lab technicians are natural persons necessary and directly related to supply of hospital services.⁵¹ Since Article XVI(2)(d) specifically prohibits quantitative limitations on “the total number of natural persons”⁵² that may be employed in a service sector or by a service supplier, the public health measure to restrict the number of medical practitioners in the private sector hospitals is inconsistent with the market access commitment undertaken by Country X.

Whereas market access obligation under GATS Article XVI(2) applies to six quantitative measures identified therein,⁵³ the national treatment measure extends generally to “all

⁴⁷ *Id.* ¶ 220.

⁴⁸ See Rep. of the High Comm’r on Liberalization of Trade in Services and Human Rights, Sub-Comm’n on the Promotion and Protection of Hum. Rts. on Its Fifty-Fourth Session, ¶ 44, U.N. Doc. E/CN.4/Sub.2/2002/9 (2002), for a discussion on brain drain, i.e., where scarce human resources, like trained medical professionals, move to the private sector for better remuneration and infrastructures to the detriment of the poor.

⁴⁹ See GATS, *supra* note 15, art. XX.

⁵⁰ *Id.* art. XVI(2)(d).

⁵¹ See Rupa Chanda, *Trade in Health Services*, 80 BULL. WORLD HEALTH ORG. 158, 159 (2001).

⁵² GATS, *supra* note 15, art. XVI(2)(d).

⁵³ *Id.* art. XVI(2)(a)–(d).

measures affecting the supply of services.”⁵⁴ Suppose that Country X imposes a differential taxation system where a specific tax is imposed only on private health services providers (i.e., private sector hospitals, tele-medicine services, tele-pathology/radiology services) for both domestic and foreign subsidiaries in order to generate revenues to fund the public sector hospital services which cater to the healthcare needs of the poor population at a very nominal cost. At first glance, it may be argued that there is no violation of a national treatment commitment by Country X since it applies to both domestic and foreign private hospitals alike and public services are exempted in GATS. However, the scope of GATS is very wide as the Agreement applies to any measures taken by the government at any level—central, regional or local—including the measures taken by non-governmental bodies in the exercise of powers delegated by any of these governmental authorities,⁵⁵ having an effect on trade in service in “any service in any sector.”⁵⁶

Although “service[s] supplied in the exercise of governmental authority” are excluded, they ought not to be supplied on a commercial basis or in competition with one or more service suppliers.⁵⁷ Given the textual ambiguities and interpretive controversy regarding the meaning of “governmental authority,” “commercial basis,” or “competition,” it is not clear whether the supply of healthcare services at a very low subsidized rate would fall within the sectoral scope of GATS.⁵⁸ The mere fact that the services are provided for a fee, no matter how nominal or notional, would likely classify them as being provided on a commercial basis. Since the public hospitals in Country X provide services at a nominal cost, they are not exempt from the application of GATS rules. Since Country X is obligated not to discriminate between domestic and foreign services and service suppliers, the question is whether domestic public hospital

⁵⁴ Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, ¶ 7.652, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012) [hereinafter *China—Electronic Payment Services*].

⁵⁵ GATS, *supra* note 15, art. I(3)(a)(i), (ii).

⁵⁶ *Id.* art. I(3)(b); Adlung, *supra* note 41, at 6.

⁵⁷ GATS, *supra* note 15, art. I(3)(c).

⁵⁸ See Markus Krajewski, *Public Services and Trade Liberalization: Mapping the Legal Framework*, 6 J. INT’L ECON. L. 341, 351–53 (2003).

services are “like” foreign private hospital services. To this end, the “likeness” analysis is crucial to determining whether Country X has acted inconsistently with the non-discrimination obligations under the WTO.

The “likeness” analysis under GATS includes “considerations relating to both the service[s] and the service supplier[s] . . .”⁵⁹ In *Argentina—Measures Relating to Trade in Goods and Services (Argentina—Financial Services)*, the AB noted that the criteria for assessing “likeness” in the context of trading goods, including that consumers’ tastes and habits or consumers’ perceptions and behaviors with respect to the products, may also be employed in assessing “likeness” in the context of services, provided that they are adapted to the specific characteristics of the trade in services.⁶⁰ Accordingly, a test of “likeness” or “substitutability” to services implies a determination of whether the service consumer considers the services or service suppliers to be descriptively identical and/or directly substitutable.⁶¹ The AB observed that an analysis of the nature and extent of a competitive relationship is an essential prerequisite for a “likeness” analysis.⁶² Where the services are determined to be “essentially or generally the same in competitive terms, those services [are found to] be ‘like’ for purposes of GATS Article XVII.”⁶³ In most States, health-related services, such as hospital services and diagnostic or laboratory services, are increasingly provided by both public and private sector service providers on a user-fee basis where the service consumers choose the services on the basis of availability, quality, price, portability of medical insurance, and ability to move freely between the two sectors.⁶⁴

⁵⁹ Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 6.29, WTO Doc. WT/DS453/12 (adopted May 9, 2016) [hereinafter *Argentina—Financial Services*].

⁶⁰ *Id.* ¶¶ 6.30–6.33.

⁶¹ Fidler et al., *supra* note 2, ¶ 101.

⁶² *Argentina—Financial Services*, *supra* note 59, ¶¶ 6.31–6.32.

⁶³ *China—Electronic Payment Services*, *supra* note 54, ¶ 7.702.

⁶⁴ See, e.g., Roosa Tikkanen, et al., *International Health Care System Profiles: United States*, COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/united-states> (discussing the mixed public and private health system used in the United States).

In the healthcare services market of Country X, public hospital services, provided for on a user-fee basis, coexist with private hospital services. Since the determination of “likeness” depends on the degree of competitiveness and substitutability,⁶⁵ application of “consumer perception,” “properties, nature and quality,” “end-use” and “substitutability” criterion set out by the Panel in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (EC—Asbestos)*,⁶⁶ will result in a finding of direct “competitive relationship” and “likeness” between the domestic public sector hospitals and the foreign private sector hospitals. Following the Panel’s reasoning in *European Communities—Regime for the Importation, Sale and Distribution of Bananas (EC—Bananas I)*, where “each of the different service activities taken individually is virtually the same . . . to the extent that the entities provide these like services, they are like service suppliers[.]”⁶⁷ domestic public hospital services providers are “like” foreign private hospital services providers. Thus, it is more than likely that, if disputed, the differential tax measure by Country X to finance its public hospital services will be deemed to violate the national treatment obligation of GATS.

Nonetheless, as the Panel in *China—Certain Measures Affecting Electronic Payment Services (China—Electronic Payment Services)* noted:

[E]ven if relevant services are determined to be “like” and a measure of a Member is found to result in less favourable treatment of “like” services of another Member, it may still be possible to justify that measure under one of the general exceptions set out in Article XIV of the GATS.⁶⁸

These exceptions, *inter alia*, affirm a Member’s right to take

⁶⁵ See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 98–99, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter *EC—Asbestos*].

⁶⁶ *Id.* ¶¶ 99, 101.

⁶⁷ Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.322, WTO Doc. WT/DS27/R/ECU (adopted Sept. 25, 1997).

⁶⁸ *China—Electronic Payment Services*, *supra* note 54, at 179 n.895.

measures for the protection of human life or health. This observation is in line with the General Agreement on Tariffs and Trade (GATT) Panel determination in 1987 in *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (Japan—Alcoholic Beverages)*.⁶⁹ In that case, while discussing Japan's claim that discriminatory or protective taxes on various alcoholic beverages could be justified as designed to meet the objective of taxation, the Panel noted that "[t]he 'general exceptions' provided for in GATT Article XX might also justify internal tax differentiations among like or directly competitive products, for instance if 'necessary to protect human . . . life or health['] (Article XX(b))."⁷⁰ Therefore, even if the public health measures are found to be inconsistent with its market access and national treatment obligations, Country X can justify these measures on the basis of the public health exception under GATS to which we turn now.

III. THE RIGHT TO HEALTH AND THE PUBLIC EXCEPTION IN GATS

Recognizing the importance of certain non-trade interests and obligations for a State, the general exception clause—Article XIV—“affirm[s] the right of Members to pursue various regulatory objectives identified [therein] even if, in doing so, Members act inconsistently with [the] obligations set out in the . . . Agreement[].”⁷¹ The AB in *Argentina—Financial Services* affirmed a Member's right to pursue national policy objectives as recognized in the preamble of GATS,⁷² which covers a wide array of objectives, and Members retain the right to use various means to pursue these objectives.⁷³ “Through these . . . exceptions, the

⁶⁹ See Report of the Panel, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, ¶ 5.11, L/6216 (Nov. 10, 1987), GATT B.I.S.D. (34th Supp.), at 83 (1987).

⁷⁰ *Id.* ¶ 5.13.

⁷¹ *Argentina—Financial Services*, *supra* note 59, ¶ 6.113; see also GATS, *supra* note 15, art. XIV.

⁷² *Argentina—Financial Services*, *supra* note 59, ¶¶ 6.87–6.93 (“In the Panel's view, Members' right to regulate the supply of services to meet national policy objectives, 'as enshrined in the preamble to the GATS,' confirms the relevance of the regulatory framework in the context of trade services.”).

⁷³ See GATS, *supra* note 15, pmb. (“Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given

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."⁷⁴ It is important to note that the pursuit of a Member's national policy objective does not necessarily involve a breach of its GATS obligations.⁷⁵ Therefore, unless the measure imposed is inconsistent with its GATS obligations—i.e., modifies the conditions of competition to the detriment of like services or service suppliers of another Member—the Member imposing that measure would not need to invoke any exceptions.⁷⁶ For example, if the differential tax measure of Country X does not modify the conditions of competition to the detriment of foreign hospital services and service suppliers, it would not need to invoke the exception. In terms of health policy, as well as the right to health measures, Article XIV(b) is most relevant for our analysis as it provides an exception for non-compliant measures that are “necessary to protect human, animal or plant life or health[.]”⁷⁷ It is in the interpretation of the public health exception that the right to health can provide interpretive and evidentiary value as the following discussion demonstrates.

A. Methodology for Interpretation and VCLT Article 31(3)(c)

In accordance with Article 3(2) of the WTO Dispute Settlement Understanding, Dispute Settlement Bodies (DSBs) can only apply WTO Agreements to disputes, and those Agreements are nonetheless to be interpreted “in accordance with customary rules of interpretation of public international law.”⁷⁸ “Interpretation is the very first technique [used by] international judge[s] . . . to ensure the consistency of the rules which [they] appl[y].”⁷⁹

asymmetries existing with respect to the degree of development of services regulations in different countries, the need of particular developing countries to exercise this right . . .”).

⁷⁴ *Argentina—Financial Services*, *supra* note 59, ¶ 6.114.

⁷⁵ *See id.* ¶ 6.117.

⁷⁶ *See id.*

⁷⁷ *See* GATS *supra* note 15, art. XIV(b).

⁷⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU Agreement].

⁷⁹ Jean d'Aspremont, *Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of*

As the ICJ stated in the *Right of Passage Over Indian Territory* case, “[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.”⁸⁰ The act of interpretation thus entails the act of selecting the pertinent meaning from the plethora of potentially different meanings.

The scope of possible meanings of the words are restricted by Article 3(2) since “the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”⁸¹ However, the general rule of interpretation, as set forth in the Vienna Convention on the Law of Treaties (VCLT),⁸² provides a pathway to integrate the right to health in the interpretation of the general exceptions clauses in WTO Agreements.⁸³

It is true that right to health is not a part of the applicable law in WTO dispute settlement, nor can a defense against the claim of a violation of GATS be based solely on the right to health, yet the right to health can be raised in the argument when interpreting the public health exception in GATS.⁸⁴ Moreover, interpretation does not “add” anything to the instrument being interpreted but instead constructs the meaning by a legal technique that takes into account other institutional and normative contexts.⁸⁵ Indeed, the Office of the United Nations High Commissioner for Human Rights has noted that “general exception clauses provide a mechanism to raise human rights argument within WTO . . . [and] are thus a means of ensuring WTO law can be interpreted and implemented with due regard for

Conflict of Norms-Resolution, in THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 3, 6 (Malgosia Fitzmaurice & Panos Merkouris eds., 2013).

⁸⁰ *Right of Passage Over Indian Territory* (Port. v. India), Preliminary Objections, 1957 I.C.J. 125, 142 (Nov. 26).

⁸¹ DSU Agreement, *supra* note 78, art. 3(2).

⁸² Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁸³ See Off. of the U.N. High Comm’r for Hum. Rts., *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, at 4–5, U.N. Doc. HR/PUB/05/5 (2005) [hereinafter OHCHR].

⁸⁴ *Id.* at 6–8.

⁸⁵ *Id.* at 4–5.

international human rights norms”⁸⁶

In assessing the potential role of the right to health in the interpretation of the public health exception in GATS, Article 31(3)(c) of the VCLT is of particular importance. It states that “[a]ny relevant rules of international law applicable in the relations between the parties” must be taken into account.⁸⁷ Advancing one of the earliest and most fundamental principles of international law—*pacta sunt servanda*—Article 31(3)(c), thus, places “treaty interpretation against the whole background of international law.”⁸⁸ The phrase “any relevant rules of international law” provides wide authority “to examine public international law sources.”⁸⁹ These relevant rules assist in interpretation of the treaty terms by providing “a contemporary interpretation of the ordinary meaning of a term.”⁹⁰ The absence of any restrictions, and the use of the word “any” in general, gives a wide meaning to the phrase “any relevant rules” and must be taken to refer to any recognized source of international law that can be of assistance in the process of interpretation.⁹¹ “[C]orrespond[ing] with the notion of sources of international law as in Article 38 para. 1 of the ICJ-Statute⁹² . . . [the applicable rules] . . . may be general, regional or local customary rules, as well as bilateral or multilateral treaties, and even general principles of international law” so long as they are in force at the time of treaty interpretation.⁹³ Consequently, “in the interpretation of WTO provisions, Art. 31(3)(c) directs [WTO] panels and the Appellate Body to take account of [all WTO] treaty

⁸⁶ *Id.* at 3.

⁸⁷ VCLT, *supra* note 82, art. 31(3)(c).

⁸⁸ MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 432 (2009).

⁸⁹ Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and other Treaties*, 35 J. WORLD TRADE 1081, 1087 (2001).

⁹⁰ VILLIGER, *supra* note 88, at 432.

⁹¹ VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 549 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) [hereinafter VCLT COMMENTARY].

⁹² See Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

⁹³ VILLIGER, *supra* note 88, at 433.

provisions” as well as human rights law.⁹⁴ As the International Law Commission stated, all international law exists in a systemic relationship with other law, and, accordingly, a tribunal “must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say ‘other’ international law.”⁹⁵ Referring to the international legal system as a whole as part of the context of every treaty concluded under international law, Article 31(3)(c) lays the foundation for “the systemic approach to treaty interpretation.”⁹⁶ Article 31(3)(c) is thus as an expression of the principle of “systemic integration,”⁹⁷ where all treaty rights and obligations exist alongside rights and obligations established by other treaty provisions, and the rules of customary international law and their relationship is approached through a process of reasoning that “makes them appear as parts of some coherent and meaningful whole.”⁹⁸ The principle of systemic integration points to the need to take the wider normative environment into account, which means that specific norms must be read against other norms bearing upon those same facts as the treaty under interpretation.⁹⁹ Using this principle in treaty interpretation “achieve[s] . . . harmonisation of rules of international law.”¹⁰⁰ The right to health provides the wider normative environment that the principle of systemic

⁹⁴ JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 254–55 (2003).

⁹⁵ International Law Comm’n, *Fragmentation of Int’l Law: Difficulties Arising from the Diversification and Expansion of Int’l Law—Report of the Study Group of the Int’l Law Comm’n*, ¶ 423, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC Study Group Report].

⁹⁶ VCLT COMMENTARY, *supra* note 91, at 553.

⁹⁷ ILC Study Group Report, *supra* note 95, ¶ 413; see generally RICHARD K. GARDINER, TREATY INTERPRETATION 299–314 (2d ed. 2015); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT’L & COM L. Q. 279 (2005); Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*, in 17 QUEEN MARY STUDIES IN INT’L LAW SERIES 13–101 (2015); and Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction*, in 124 CAMBRIDGE STUD. IN INT’L AND COMPAR. L SERIES 167–170 (2016), for commentary on Article 31(3)(c) particularly in the context of systemic integration.

⁹⁸ ILC Study Group Report, *supra* note 95, ¶ 414.

⁹⁹ *Id.* ¶¶ 415–16.

¹⁰⁰ McLachlan, *supra* note 97, at 318.

integration points to in the context of treaty interpretation.¹⁰¹ Since the public health measures of Country X—that are to be justified under Article XIV(b)—do have a bearing on the right to health obligation of Country X, a right to health-based interpretation of the public health exception for justification of the public health measures undertaken by Country X follows the principle of integration.

The question arises as to which “other” rules of international law are considered “applicable in the relations between the parties” when the composition of membership does not match between different treaty regimes.¹⁰² For example, in *EC–Bananas II*, the Appellate Body reviewed the Lomé Convention in its interpretation of the Lomé waiver incorporated within GATT 1994, which was concerned with special rights and obligations of a group of WTO Members.¹⁰³ This ruling demonstrates a willingness by the DSBs to consider non-WTO agreements that it deemed “applicable in the relations between the parties” in order to resolve a dispute.¹⁰⁴ On the other hand, the panel in *European Communities–Measures Affecting the Approval and Marketing of Biotech Products (EC–Biotech)* narrowly interpreted “applicable in the relations between the parties” to exclude the 1992 Convention on Biodiversity and the 2000 Biosafety Protocol from consideration.¹⁰⁵ The Panel ultimately held that only those rules which are applicable in the relations between WTO Members are to be taken into account when interpreting WTO agreements.¹⁰⁶ This narrow interpretation of “parties” would imply all WTO Members.¹⁰⁷ Given that WTO membership extends to non-sovereign members, for example, the EU, “it cannot possibly have exactly the same

¹⁰¹ *See id.* at 282.

¹⁰² *Id.* at 313–14.

¹⁰³ Appellate Body Report, *European Communities–Regime For the Importation, Sale and Distribution of Bananas*, ¶¶ 179–88, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).

¹⁰⁴ *See id.*

¹⁰⁵ Panel Report, *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.68–7.75, WTO Doc. WT/DS291/R (adopted Nov. 21, 2006).

¹⁰⁶ *Id.* ¶ 7.71.

¹⁰⁷ *Id.* ¶ 7.68.

membership as any other international treaty.”¹⁰⁸

To require a non-WTO rule, used to interpret WTO obligations, to have identical membership, or at least WTO membership, would therefore frustrate the application of the principle of systemic integration.¹⁰⁹ This narrow approach to the interpretation of “applicable in the relations between the parties” in Article 31(3)(c) has not only been rejected by the ILC but also by the International Court of Justice (ICJ).¹¹⁰ The ILC noted that “the unlikeness of a precise congruence in the membership of . . . multilateral conventions [will make it] unlikely that *any* use of conventional international law could be made in the interpretation of such conventions[,]” which is “contrary to the legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers.”¹¹¹ In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)* opinion, the ICJ observed that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”¹¹² Later, in the *Oil Platforms* case, the ICJ once again held that “[t]he court cannot accept that [a specific treaty rule] was intended to operate wholly independently of the relevant rules of international law[;]” thus, making the application of the relevant rules of international law an integral part of the task of interpretation entrusted to the Court.¹¹³ The European Court of Human Rights (ECHR), too, has freely “drawn from the international normative environment” in interpreting the European Convention on Human Rights.¹¹⁴

¹⁰⁸ OHCHR, *supra* note 83, at 8.

¹⁰⁹ See Marceau, *supra* note 12, at 781.

¹¹⁰ HOWSE & TEITEL, *supra* note 11, at 7.

¹¹¹ ILC Study Group Report, *supra* note 95, ¶ 471.

¹¹² *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

¹¹³ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 41 (Nov. 6).

¹¹⁴ For additional cases from the European Court of Human Rights, see Jean-Marc Sorel & Valérie Boré Eveno, *Interpretation of Treaties, 1969 Vienna Convention: Article 31*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES 804, 828 & n.154 (Olivier Corten & Pierre Klein eds., 2011).

The AB in *US–Gasoline II* made it clear that the WTO Agreement “is not to be read in clinical isolation from public international law[.]”¹¹⁵ thus, fulfilling its obligation to take into account “any relevant rules of international law applicable . . . between the parties.”¹¹⁶ A broad reading of “between the parties” does not restrict the application of international law to only when it applies to all WTO Members.¹¹⁷ This approach was adopted by the AB in *United States–Import of Certain Shrimp and Shrimp Products (US–Shrimps)*, which examined the use of the term “natural resources” in a number of multilateral environmental agreements, including the Convention on International Trade in Endangered Species 1973.¹¹⁸ The AB did not refer to all the parties, and the fact that not all the disputants ratified or signed these conventions did not pose any problems.¹¹⁹ Similarly, references to a number of Regional and Bilateral Trade Agreements were made in the AB Report on *United States–Tax Treatment for “Foreign Sales Corporations”: Recourse to Article 21.5 of the DSU by the European Communities (US–FSC)* to interpret “foreign-source income” in the context of the Subsidies and Countervailing Measures Agreement.¹²⁰ Therefore, the interpretation of “the parties” as referring to a large number of WTO Members is in line with the WTO jurisprudence. Given that 84% of WTO Members are also bound by the ICESCR obligations, the right to health can be seen as a relevant rule of international law applicable in the relations between the parties.¹²¹

¹¹⁵ Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, 17, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *US–Gasoline II*].

¹¹⁶ OHCHR, *supra* note 83, at 5.

¹¹⁷ *Id.* at 8.

¹¹⁸ Appellate Body Report, *United States–Import of Certain Shrimp and Shrimp Products*, ¶ 25, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US–Shrimps*].

¹¹⁹ See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT’L L. 605, 608 (2010).

¹²⁰ Appellate Body Report, *United States–Tax Treatment for “Foreign Sales Corporations”: Recourse to Article 21.5 of the DSU by the European Communities*, ¶¶ 141–45 & n.123, WTO Doc. WT/DS108/AB/RW (adopted Jan. 29, 2002).

¹²¹ Holger P. Hestermeyer, *Economic, Social, and Cultural Rights in the World Trade Organization: Legal Aspects and Practice*, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND

B. The Three-Tiers Test to Justify the Public Health Measure

The DSBs have repeatedly acceded that protection of human life and health is both vital and of “highest importance”¹²² and that “[m]embers have the right to determine the level of protection of health that they consider appropriate in a given situation.”¹²³ Given the textual similarities between GATT Article XX and GATS Article XIV, the AB in *US–Gambling II* found the case law of GATT Article XX to be relevant for the analysis under GATS Article XIV.¹²⁴ Consequently, GATT jurisprudence on Article XX is important for analyzing and interpreting GATS Article XIV(b);¹²⁵ especially, for the lack of GATS case-law analyzing the public health exception.¹²⁶

The burden of proof that is necessary to establish that the challenged measure meets all the requirements of the exception lies with the Member that invoked an exception clause to justify its measure that would otherwise violate the GATS obligation.¹²⁷ Therefore, if challenged, the onus to prove that its public health measures are justified under GATS Article XIV(b) lies with Country X in the previous scenario, requiring it to satisfy a three-tiered test developed by the Panel in *United States–Standards for Reformulated and Conventional Gasoline (US–Gasoline I)*.¹²⁸ The impugned measure must first pursue one of the policy objectives outlined in the exceptions; “second, the impugned measure must be ‘necessary’ to achieve” that policy objective;

CHALLENGES 260, 264 (Eibe Riedel, Gilles Giacca, & Chrisophe Golay eds., 2014).

¹²² See, e.g., Panel Report, *Indonesia–Measures Concerning the Importation of Chicken Meat and Chicken Products*, ¶ 7.225, WTO Doc. WT/DS484/R (adopted Nov. 22, 2017) [hereinafter *Indonesia–Chicken*]; Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 179, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil–Retreaded Tyres*].

¹²³ *EC–Asbestos*, *supra* note 65, ¶ 168.

¹²⁴ *US–Gambling II*, *supra* note 46, ¶ 291.

¹²⁵ Fidler et al., *supra* note 2, ¶ 466.

¹²⁶ See *id.* ¶ 465.

¹²⁷ GATS ART. XIV JURIS., *supra* note 17, ¶ 22.

¹²⁸ Panel Report, *United States–Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter *US–Gasoline I*]. Although the dispute related to the health exception in GATT Article XX(b), the test prescribed is relevant for analysis of GATS Article XX(b), following the Appellate Body’s reasoning in *US–Gambling II*, *supra* note 46, ¶¶ 283–84.

and finally, “the impugned measure must satisfy the requirements of the ‘chapeau,’” which would be the opening clause, of Article XIV.¹²⁹ Since Country X is a WTO Member and also a State Party to the ICESCR, it would be contextually relevant for the DSB to examine the relationship between the challenged measure and the WTO Member’s health policy objectives by reference to the WTO Member’s obligations to respect, protect, and realize progressively “to the maximum of its available resources,”¹³⁰ “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹³¹

1. Tier 1: The challenged measure aims to protect human life or health

Country X would first need to show that its non-complying public health measures fall within Article XIV(b), that is, that the measure relates to the protection of human, animal, and plant life or health.¹³² The Panel in *EC–Asbestos* followed the approach in *US–Gasoline I* to first examine whether the European Communities measure was designed to protect human health, i.e., the measure is designed to achieve a health objective.¹³³ In *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries (EC–Tariff Preferences)*, the Panel held that European Communities’ Drug Arrangements failed to establish the link between the market access improvement and the protection of human health in the European Communities.¹³⁴ Thus, Country X will first need to prove that its measures restricting the number of medical practitioners in the private sector and the differential tax measures are aimed at the protection of public health.

¹²⁹ SARAH JOSEPH, *BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE* 107 (2011).

¹³⁰ G.A. Res. 2200A (XXI), art. 2, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1996) [hereinafter G.A. Res. 2200A–ICESCR].

¹³¹ *Id.* art. 12(1).

¹³² See GATS, *supra* note 15, art. XIV(b).

¹³³ *EC–Asbestos*, *supra* note 65, ¶ 8.184.

¹³⁴ Panel Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.206–7.207, WTO Doc. WT/DS246/R (adopted Apr. 20, 2004) [hereinafter *EC–Tariff Preferences*].

The terms “to protect” and “human life or health” in their ordinary meanings are very broad and have considerable potential to accommodate human rights, particularly, with the right to health.¹³⁵ So far, there is very limited direction on the term “to protect” in WTO jurisprudence. In *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (EC—Seals)*, the AB expounded on “to protect” to “impl[y] a particular focus on the protection from or against certain dangers or risks”¹³⁶ thus, limiting it to an identifiable danger or risk. There is no evidence of an agreed interpretation of the full scope of this term in the *travaux préparatoires*, nor is there any “evidence to suggest that the scope of this exception is limited to sanitary measures”¹³⁷ It is clear that human health is a value that, as WTO adjudicators have concluded, is both vital and of the utmost importance.¹³⁸ By signing the ICESCR, parties bound “themselves to respect, protect and fulfill economic, social and cultural rights” preceding human values “underlying the rights as fundamental—having priority over less fundamental, or secondary, human interests.”¹³⁹ A right to health approach would thus give more specific definition to terms that are relatively vague.

The CESCR expounded the normative content of the right to health in its General Comment 14.¹⁴⁰ The right to health entails an obligation to *protect*, which imposes positive duties on State Parties, for example, to adopt legislation or take other measures.¹⁴¹ It further requires State Parties:

¹³⁵ OHCHR, *supra* note 83, at 5.

¹³⁶ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.197, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 16, 2014) [hereinafter *EC—Seal Products*].

¹³⁷ OHCHR, *supra* note 83, at 11.

¹³⁸ HOWSE & TEITEL, *supra* note 11, at 21.

¹³⁹ *Id.*; see generally U.N. Comm. on Econ., Soc., & Cultural Rts., Fact Sheet No. 16 (Rev. 1), art. 2(3) (July 1991), <https://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf> (“Most frequently, obligations are divided into ‘layers’ reflecting duties to (a) respect, (b) protect, (c) promote, and (d) fulfil each of the rights contained in the Covenant.”).

¹⁴⁰ General Comment No. 14, *supra* note 36, ¶ 6.

¹⁴¹ *Id.* ¶ 35.

- To ensure equal access to healthcare and health-related services, whether provided by the public or private healthcare sector;¹⁴²
- To ensure that medical professionals meet adequate standards of education, skills and ethical codes;¹⁴³
- To ensure that privatization of the healthcare sector does not jeopardize the availability, accessibility, acceptability and quality of healthcare facilities, goods and services;¹⁴⁴
- To control the trading of medical equipment and medicines by third parties;¹⁴⁵ and
- To ensure that third parties do not limit people's access to healthcare services.¹⁴⁶

A right to health approach to interpreting “to protect” in GATS Article XIV(b) therefore suggests that the objective of the measures taken by Country X to ensure availability of medical practitioners and functioning public sector hospital services is “to protect” human life and health.

2. Tier 2: The challenged measure is ‘necessary’

To pass the second-tier of the test, Country X would need to demonstrate that its public health measures meet all the requirements of Article XIV(b), that is, that the non-complying measures are “necessary” to protect human life or health.¹⁴⁷ The “necessity test,” developed through GATT XX(b) jurisprudence, was first applied by the Panel in the analysis of GATS Article XIV(c) in *US–Gambling I*.¹⁴⁸ Whereas Members retain the right to regulate and pursue their policy objectives, a non-conforming measure is permissible only if it is “necessary” to achieve those

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶ 41.

¹⁴⁶ *Id.* ¶ 35.

¹⁴⁷ See GATS, *supra* note 15, art. XIV(b).

¹⁴⁸ Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.536, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).

policy objectives.¹⁴⁹ The “necessity test” thus balances the freedom of Members to choose the measures to achieve the regulatory objectives they set with the overly trade restrictiveness of those measures.¹⁵⁰

The requirement that the public health measure must be “necessary” to protect “human life or health” entails interpretation of what is “necessary.” To determine the necessity of a measure, “a panel must assess all the relevant factors,” including the contribution made by the measure in achieving the policy objective, its trade restrictiveness, and possible less trade-restrictive alternatives.¹⁵¹ A comprehensive necessity analysis is a sequential process that “begins with an assessment of the ‘relative importance’ of the interests and values furthered by the challenged measure,” followed by “weighing and balancing” of all the relevant factors and, finally, comparing the challenged measure with possible less trade-restrictive alternatives.¹⁵²

The assessment of the relative importance of interests or values that underlie the challenged measure does not mean that the policy objective’s necessity is to be examined.¹⁵³ Rather, it is the necessity of the measure to achieve the intended policy objective that is under examination.¹⁵⁴ However, the more vital or important the interest that the challenged measure aims to protect, the easier it is for the measure to be accepted as necessary.¹⁵⁵ As noted earlier, GATT jurisprudence has acknowledged that the protection of human life or health is of vital

¹⁴⁹ *Id.*

¹⁵⁰ Working Party on Domestic Relations, *Note by the Secretariat: “Necessity Tests” in the WTO*, ¶ 4, WTO Doc. S/WPDR/W/27 (Dec. 2, 2003) [hereinafter “*Necessity Tests*” in the WTO].

¹⁵¹ *Brazil–Retreaded Tyres*, *supra* note 122, ¶ 156.

¹⁵² Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 242, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) (quoting *US–Gambling II*, *supra* note 46, ¶¶ 306–07) [hereinafter *China–Publications and Audiovisual Products*].

¹⁵³ “*Necessity Tests*” in the WTO, *supra* note 150, ¶ 12.

¹⁵⁴ *Id.*

¹⁵⁵ Appellate Body Report, *Colombia–Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.71, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016) [hereinafter *Colombia–Textiles*].

importance.¹⁵⁶

A right to health approach could further substantiate the challenged measure's objective to protect human life or health with evidentiary value.¹⁵⁷ According to the CESCR, the right to health entails "the following interrelated and essential elements[.]"¹⁵⁸

- (a) "Availability [of] functioning public health and healthcare facilities, goods and services[.]"¹⁵⁹
- (b) Accessibility of these health facilities, goods and services "must be within safe physical reach. . . [and] must be affordable" for everyone without discriminating;¹⁶⁰
- (c) "All health facilities, goods and services must be respectful of medical ethics and culturally appropriate[.]"¹⁶¹ and
- (d) "[M]ust also be scientifically and medically appropriate and of good quality."¹⁶²

As noted earlier, the right to health requires the State to provide a sufficiently functioning public healthcare system comprising not only of goods and services but also comprising of the healthcare personnel, the essential drugs, and the basic necessities of health, such as safe and potable drinking water and adequate sanitation facilities.¹⁶³ States must take all necessary steps to raise adequate revenue and mobilize resources for health, and, to that end, taxation, according to the UN Special Rapporteur, is "an instrument with which States may ensure adequate funds are available for health through progressive financing, as required under the right to health."¹⁶⁴ Availability

¹⁵⁶ *Brazil-Retreaded Tyres*, *supra* note 122, ¶ 179.

¹⁵⁷ DIANA DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT 194 (2015).

¹⁵⁸ General Comment No. 14, *supra* note 36, ¶ 12. Although their precise nature will vary depending on the State party's development level. *Id.*

¹⁵⁹ *Id.* ¶ 12(a).

¹⁶⁰ *Id.* ¶ 12(b).

¹⁶¹ *Id.* ¶ 12(c).

¹⁶² *Id.* ¶ 12(d).

¹⁶³ *Id.* ¶ 4.

¹⁶⁴ Interim Rep. of the Special Rapporteur on the Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,

of a sufficiently functioning public healthcare sector thus calls for an adequate number of medical staff as well as financial resources to maintain the provision of good quality services to the populace.¹⁶⁵ To the extent that the public health measures taken by Country X are grounded in those obligations, the differential tax measure, as well as the measure imposing quantitative restriction on the number of medical practitioners in the private sector, can be proven to be of vital importance to Country X.

The contribution of the measure to achieve the objective pursued is the next step in the “holistic” weighing and balancing part of the necessity analysis.¹⁶⁶ Here, again, a right to health approach forms the basis for scrutinizing the actual contribution of the challenged measure to the objective.¹⁶⁷ Although not enough as a standalone component, “[t]he greater the contribution, the more easily a measure might be considered to be ‘necessary.’”¹⁶⁸ Therefore, in order to be necessary, a measure has “to make a *material contribution* to the achievement of its objective.”¹⁶⁹ Contribution is determined through an assessment of the relationship “between the objective pursued and the measure at issue.”¹⁷⁰ A trade restrictive measure may still be found to be necessary if it makes a “material contribution” to the achievement of its objective.¹⁷¹

The Member seeking to prove that the challenged measure is necessary may submit evidence or data to establish that the contribution made by the measure is material.¹⁷² Depending on

transmitted by Note from the Secretary-General, pt. III, § A(1), ¶ 15, U.N. Doc. A/67/302 (Aug. 13, 2012).

¹⁶⁵ MARJOLEIN DIELEMAN & JAN WILLEM HARNMEIJER, IMPROVING HEALTH WORKER PERFORMANCE: IN SEARCH OF PROMISING PRACTICES, WHO 2–3 (2006), https://www.who.int/hrh/resources/improving_hw_performance.pdf.

¹⁶⁶ DESIERTO, *supra* note 157, at 192.

¹⁶⁷ *Id.* at 194.

¹⁶⁸ *Colombia–Textiles*, *supra* note 155, ¶ 5.72 (quoting Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 163, WTO Doc. WT/DS98/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001)).

¹⁶⁹ *EC–Seal Products*, *supra* note 136, ¶ 5.213 (quoting *Brazil–Retreaded Tyres*, *supra* note 122, ¶ 150).

¹⁷⁰ *Brazil–Retreaded Tyres*, *supra* note 122, ¶ 210.

¹⁷¹ *Indonesia–Chicken*, *supra* note 122, ¶ 7.227 (citing *Brazil–Retreaded Tyres*, *supra* note 122, ¶ 172; *EC–Seal Products*, *supra* note 136, ¶ 5.215).

¹⁷² *EC–Seal Products*, *supra* note 136, ¶ 5.215.

the nature, quantity, and quality of the data, the Panel may conduct its analysis in either “quantitative or qualitative terms.”¹⁷³ The Panel’s reliance on scientific data in *EC–Asbestos* was justified by the AB, which further stressed that there is no requirement to quantify the risk under GATT Article XX and that the risk may be analyzed in quantitative or qualitative terms.¹⁷⁴ A right to health discourse is useful for qualitative analysis as it provides the normative content to the DSBs to understand “the responding Member’s duties under the ICESCR [as well as] to map how the responding Member’s policy measures . . . [are] programmatically shaped and circumscribed by these [obligations.]”¹⁷⁵

Since the burden to prove that the challenged trade-restrictive measure is necessary rests with the responding Member, it would be insufficient for Country X to claim that its measures (i.e., differential tax measure as well as a quantitative restriction on healthcare professionals in the private sector) are aimed at fulfilling its right to health obligation. Country X will need to substantiate its claim services with quantitative or qualitative evidence to showcase that its inconsistent measures under GATS materially contributed to its public health objectives. The degree of contribution of the measure to achieve the objective must be clear.¹⁷⁶ While “a panel must always assess the actual contribution made by the measure to the achievement of the objective pursued[,]”¹⁷⁷ the contribution need not be “immediately observable” and “could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”¹⁷⁸ “The Appellate Body in *Brazil–Retreaded Tyres*. . . assess[ed the necessity] of a measure that formed part of a broader policy scheme . . . that was not . . . likely [to have] an immediately discernible impact on its objective.”¹⁷⁹ Yet, “[t]he Appellate Body

¹⁷³ *Id.*

¹⁷⁴ *EC–Asbestos*, *supra* note 65, ¶¶ 167–68.

¹⁷⁵ DESIERTO, *supra* note 157, at 195.

¹⁷⁶ *Colombia–Textiles*, *supra* note 155, ¶ 5.116.

¹⁷⁷ *China–Publications and Audiovisual Products*, *supra* note 152, ¶ 252.

¹⁷⁸ *Id.* ¶ 253 (quoting *Brazil–Retreaded Tyres*, *supra* note 122, ¶ 151).

¹⁷⁹ *EC–Seal Products*, *supra* note 136, ¶ 5.213; see also *Brazil–Retreaded Tyres*, *supra* note 122, ¶ 151, for the Appellate Body’s discussion regarding the

sought to determine whether the measure was 'apt to make a material contribution' to its objective . . . by assessing the extent to which it was apt to do so at some point in the future."¹⁸⁰ Following the CESCR interpretation, the right to health obligation requires Country X to have a well-functioning public healthcare system providing equal access to health facilities, goods, and services.¹⁸¹ Thus, the contribution of the challenged measures may be indicative of the measure's material contribution to the achievement of the health policy objective. Because the ICESCR calls for a progressive realization of the right to health over a period of time,¹⁸² the contribution of the challenged measures may not be immediately apparent. However, so long as they are accessible at some point in the future, Country X can claim that they make a material contribution in achieving its public health objectives.

In addition, the Office of the UN High Commissioner recommends that the DSBs may call upon human rights experts to ensure that human rights norms and standards are interpreted consistently, and to provide evidence that the challenged measure under the public health exception addresses the right to health.¹⁸³ Since DSBs do not have expertise in human rights issues, seeking expert evidence from human rights treaty bodies would be useful to assess whether there is a genuine basis for the right to health argument raised in justification of the public health exception under GATS Article XIV(b). Such an approach has already been taken in the Report of the Panel in *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand–Cigarettes)*, wherein WHO experts were consulted on the effects of smoking and whether Thailand's import ban on foreign cigarettes was an appropriate response to tackle the health problem faced.¹⁸⁴ Similarly, the comments and reports of the

consideration of public health and environmental policy objectives.

¹⁸⁰ *EC–Seal Products*, *supra* note 136, ¶ 5.213 (quoting *Brazil–Retreaded Tyres*, *supra* note 122, ¶ 150).

¹⁸¹ General Comment No. 14, *supra* note 36, ¶ 12.

¹⁸² G.A. Res. 2200A–ICESCR, *supra* note 130, art. 2(1).

¹⁸³ OHCHR, *supra* note 83, at 15–16.

¹⁸⁴ Report of the Panel, *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 27, DS10/R (Oct. 5, 1990), GATT B.I.S.D. (37th Supp.), at 200 (1990) [hereinafter *Thailand–Cigarettes*].

CESCR's, particularly, General Comment 14, which elaborates and provides the normative content and the core minimum obligation to ensure the satisfaction of minimum essential levels of the right to health under Article 12 of the ICESCR,¹⁸⁵ can be used as an expert doctrine for the interpretation of the right to health obligations of the responding Member. It is important to note that the human rights expertise here is to assist the DSBs in assessing whether the challenged measure has a genuine underpinning in the right to health, that is, whether the measure could, in fact, be considered a bona fide measure in furtherance of the right to health and if so, whether it is necessary to achieve the stated health policy objective.¹⁸⁶ What is more, the DSBs here are not determining whether the Member has violated its right to health obligation but "what is necessary in terms of relaxation of *WTO* disciplines for the Member to *fulfill* its duties under the ICESCR."¹⁸⁷

Weighing and balancing exercises further entails an assessment of trade restrictiveness of the challenged measure, which requires the panel to assess the degree of restrictions, not merely whether or not the measure involves some restrictions on trade.¹⁸⁸ A "material contribution made by [a] measure" can still outweigh a trade restriction to the highest degree.¹⁸⁹ However, there is no "pre-determined threshold" of materiality to ascertain the contribution of the measure to the objective.¹⁹⁰ Moreover, "a measure's contribution is . . . only one component of the necessity calculus . . . mean[ing] that whether a measure is 'necessary' cannot be determined by the level of contribution alone . . ."¹⁹¹

A measure cannot be justified as necessary "if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is

¹⁸⁵ General Comment No. 14, *supra* note 36, ¶¶ 7–29, 43–44.

¹⁸⁶ OHCHR, *supra* note 83, at 15–16.

¹⁸⁷ HOWSE & TEITEL, *supra* note 11, at 9.

¹⁸⁸ *Colombia–Textiles*, *supra* note 155, ¶¶ 5.73, 5.104. For an example of the Appellate Body's application of this rule, see *id.* ¶¶ 5.95–5.117.

¹⁸⁹ *Indonesia–Chicken*, *supra* note 122, ¶ 7.227.

¹⁹⁰ *EC–Seal Products*, *supra* note 136, ¶ 5.213.

¹⁹¹ *Id.* ¶ 5.215.

available to it.”¹⁹² The same reasoning applies to the examination of reasonably available, less trade-restrictive alternative measures in GATS Article XIV(B).¹⁹³ The responding Member is not required to show that there are no reasonably available alternatives to achieve its objective.¹⁹⁴ The burden to identify the alternative measure lies with the complaining party.¹⁹⁵ To be reasonably available, an alternative measure has to be more than “merely theoretical in nature, for instance, where the responding Member is not capable of taking it”¹⁹⁶ Although such alternative measure may involve “some change or administrative cost,” it should not impose an “undue burden” unless “prohibitive costs or substantial technical difficulties” are imposed on the responding Member.¹⁹⁷

Since the responding Member has a right to choose the level of health protection it deems appropriate, a less trade-restrictive alternative measure is not reasonably available if it does not meaningfully contribute to achieving the party’s desired level of protection.¹⁹⁸ Therefore, it is not for Country X to show that there are no reasonably available alternatives that would achieve its objectives; and additionally, not only must any alternative be both practically and financially feasible, but it must also provide an equivalent contribution to the achievement of its health policy objectives fulfilling its right to health obligation.¹⁹⁹

In a nutshell, for public health measures of Country X to be considered “necessary” to achieve the health policy objectives as

¹⁹² *Thailand–Cigarettes*, *supra* note 184, ¶ 74 (quoting Report of the Panel, *United States–Section 337 of the Tariff Act of 1930*, L/6439 (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.), at 345, ¶ 5.26 (1989)).

¹⁹³ *See Brazil–Retreaded Tyres*, *supra* note 122, at ¶ 7.152.

¹⁹⁴ *E.g.*, *id.* ¶ 5.149.

¹⁹⁵ *E.g.*, *id.*

¹⁹⁶ *US–Gambling II*, *supra* note 46, ¶ 308.

¹⁹⁷ *China–Publications and Audiovisual Products*, *supra* note 152, ¶¶ 318, 327 (quoting *US–Gambling II*, *supra* note 46, ¶ 308). However, it is for the responding Member to establish that the alternative measure would impose an undue burden on it. *Id.* ¶ 327 (citing *US–Gambling II*, *supra* note 46, ¶ 308).

¹⁹⁸ *See EC–Seal Products*, *supra* note 136, ¶ 5.279.

¹⁹⁹ *See id.* ¶ 5.723 (“[A] responding Member cannot be expected to accept an alternative measure that makes less of a contribution to its objective than the challenged measure.”).

identified under GATS Article XIV(b), the contribution of those measures has to be weighed against their trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by them, and be assessed against any reasonably available, less trade-restrictive alternative measure. The foregoing analysis establishes how a right to health approach can assist the DSBs in defining “to protect,” determining “relative importance” of the interests or values, assessing the “appropriateness” of the level of the health protection, and the contribution of the public health measures undertaken by Country X.

3. Tier 3: Chapeau of article xiv and good faith

The third and final analytical step to satisfy the requirements of GATS Article XIV(b) is to prove that the challenged measures meet all the requirements contained in the introductory paragraph—also known as the chapeau—of Article XIV.²⁰⁰ The chapeau of Article XIV (which is substantially identical to the chapeau of GATT Article XX) requires that the impugned measures “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”²⁰¹ The chapeau aims to prevent the abuse of the exceptions by ensuring that a Member exercising its right under the exception does not “frustrate the rights accorded” under GATS to the other Members.²⁰² The AB made clear in *US–Gasoline II* that the chapeau focuses on the manner in which the measure is applied and not on the content thereof.²⁰³

The central question the chapeau raises is whether the non-compliant measures have been “applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.”²⁰⁴ The burden to prove that it has not abused its right under the exception

²⁰⁰ Fidler et al., *supra* note 2, ¶ 470.

²⁰¹ *Id.*

²⁰² *US–Gambling II*, *supra* note 46, ¶ 339.

²⁰³ *US–Gasoline II*, *supra* note 115, at 22.

²⁰⁴ *Id.*

lies with the State invoking it.²⁰⁵ The doctrine of *abus de droit*,²⁰⁶ which prohibits the abusive exercise of a State's rights, has been applied by the AB in *US–Shrimps* as a good faith principle in the reading of chapeau of GATT Article XX.²⁰⁷ The requirement that a measure must not be applied arbitrarily or unjustifiably is thus an obligation on the WTO Members to act in good faith.²⁰⁸

Despite the lack of a definition in positive terms, most commentators concede that “[t]he principle of good faith has a great deal of normative appeal” and is a well-accepted fundamental norm in many domestic and international legal systems.²⁰⁹ Although not a source of obligation in itself where none would exist,²¹⁰ the concept of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations”²¹¹ The principle of good faith is also incorporated in VCLT Article 26—the *Pacta Sunt Servanda*—which obligates the parties to a treaty to perform the same in good faith.²¹² The ICJ affirmed the obligation to act in good faith as “a general principle of law” and also as “a part of international law.”²¹³ The AB similarly identified good faith as “at once a general principle of law and a principle of general international law.”²¹⁴ Good faith plays an important role in WTO law, on different levels and under different guises.²¹⁵

²⁰⁵ *Id.* at 22–23.

²⁰⁶ A French term, meaning “abuse of right.” *Abus de droit Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/a/abus-de-droit/> (last visited Dec. 8, 2020).

²⁰⁷ *US–Shrimps*, *supra* note 118, ¶¶ 38, 158.

²⁰⁸ *Id.* ¶ 158.

²⁰⁹ Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, 340 (2006).

²¹⁰ *Border and Transborder Armed Actions (Nicar. v. Hond.)*, Judgment, 1988 I.C.J. 69, ¶ 94 (Dec. 20).

²¹¹ *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20).

²¹² VCLT, *supra* note 82, art. 26.

²¹³ *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 I.C.J. 9, 34, at 53 (July 6) (separate opinion by Lauterpacht, J.).

²¹⁴ *US–Shrimps*, *supra* note 118, ¶ 158.

²¹⁵ See, for example, Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 24.4, 24.5, 48.2, 58, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, which explicitly mention good faith.

In its application of good faith, WTO jurisprudence has made references to *Pacta Sunt Servanda* in a number of cases.²¹⁶ Not only has the AB viewed “good faith [as] . . . an ‘organic’ and ‘pervasive’ general principle . . . that underlies all treaties,” but in several decisions the AB panel presumed good faith, corresponding to the traditional understanding of good faith in general international law.²¹⁷ This principle includes a “general obligation” on the State parties to a treaty to perform that treaty in good faith, that is, “to refrain from acts which would defeat the object and purpose of a treaty to which they are members”²¹⁸ The good faith requirement in the chapeau calls for the public health measures of Country X (even though necessary to protect human life or health), to be applied in a non-arbitrary manner, not discriminating between trade partners and, above all, not to be a disguised restriction on trade in services.²¹⁹ It is easier for a public health measure grounded in the right to health obligation to pass the scrutiny of the chapeau if the objective to fulfill the right to health obligation is not used to guise trade protectionism. Even if the public health measures fail to pass the test laid out in the chapeau, it does not mean that the measures are not necessary to achieve the right to health objectives, but only that Country X will have to apply the measures in a consistent and non-discriminatory manner.

Finally, the principle of good faith not only requires the Members to apply the measures in good faith but also serves as a mechanism of accountability of the treaty interpreter.²²⁰ VCLT Article 31(1) calls for interpretation in good faith, establishing a general standard of behavior for treaty interpreters by

²¹⁶ *US–Shrimps*, *supra* note 118, ¶ 38; Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶ 278, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002); Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 296, WTO Doc. WT/DS217/AB/R, WT/DS234/AB/R (adopted Jan. 27, 2003).

²¹⁷ Helge Elisabeth Zeitler, ‘Good Faith’ in the WTO Jurisprudence—Necessary Balancing Element or an Open Door to Judicial Activism?, 8 J. INT’L ECON. L. 721, 724 (2005).

²¹⁸ *Id.* at 730.

²¹⁹ *Id.* at 733 n.212.

²²⁰ Eric De Brabandere & Isabelle Van Damme, *Good Faith in Treaty Interpretation*, in GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 37 (Andrew D. Mitchell, M. Sornarajah, & Tania Voon eds., 2015).

requiring that they act reasonably and fairly.²²¹ The principle of good faith can thus help the interpreters to justify choices in applying articles 31(3)(c) of the VCLT,²²² and take into account the right to health raised by Country X in assessing the justification of its measures inconsistent with the provisions of GATS. A good faith interpretation of GATS Article XIV(b), consistent with the notion of systemic interpretation,²²³ accommodates the application of the right to health as an interpretive as well as an evidentiary tool as the discussion above has demonstrated.

IV. CONCLUSION

This paper set out to demonstrate how a right to health approach in the interpretation of the public health exception in GATS Article XIV(b) can bring about a harmonious application of international human rights and international trade law regimes, which have long evolved in isolation. The paper raised the argument from the perspective of a WTO Member that is also a State Party to ICESCR. It addressed whether a WTO Member that has committed itself to fully liberalize all the services sectors having implications for health (such as hospital and other healthcare services, environmental services, and professional services) still retains the regulatory space to undertake measures to fulfill its right to health obligations. The foregoing analysis has expounded how such a Member can justify a public health measure as incompatible with GATS obligations when undertaken to fulfill its right to health obligation through raising the public health exception in GATS Article XIV(b).

First of all, not every public health measure affecting international trade in services is necessarily inconsistent with the GATS obligations. However, if a public health measure is challenged by another Member for violating the GATS obligations, the responding Member can justify its measure as necessary to

²²¹ *Id.* at 38.

²²² *Id.* at 38–39.

²²³ See generally Van Damme, *supra* note 119, at 624–25, 632–33, 622 n.147, for a discussion on the principle of harmonization, which requires a treaty to be read in harmony and consistently within the broader context of international customary treaty law; and EIRIK BJORGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* 63–74 (2014), for an evolutionary interpretation on good faith.

protect human life or health. In doing so, the responding Member will need to prove that its public health measures are not arbitrary trade-restrictive measures in disguise, and are, in fact, necessary to achieve its policy objectives that aim to protect human life or health. This paper argued that, in its defense, the responding Member can raise its right to health obligation to prove:

- That a public health measure is a vital and important health policy objective under GATS Article XIV(b);
- That a right to health approach can assist the DSBs to interpret seemingly vague terms such as “to protect” by providing a wider normative environment as well as specificity;
- That in determining “necessity” of the challenged measure, the right to health approach can provide evidentiary value in assessing the “material” contribution of the measure to the achievement of the health policy objective, to which end the acknowledged human rights experts may also be called to provide evidence that the challenged measure fulfilled the right to health requirement; and
- That a public health measure to fulfill a right to health obligation has better chances of passing the test in the chapeau of GATS Article XIV if the responding State can prove that its measure shows a good faith application of the right to health and is not a discriminatory and disguised trade restriction.

The analysis in this paper has also provided WTO Members with potential legal strategies to strengthen their defense if their public health measures undertaken to fulfill their right to health duties are challenged under GATS. Having a better understanding of the international legal framework that GATS and related rules of public international law create will allow the WTO Members to respond better to their public health needs by utilizing the flexibilities, regulatory space, as well as the limitations and exceptions provided within GATS.

Lastly, a right to health approach to the interpretation of

the public health exception furthers, through systemic integration, the compatibility of the two regimes. Although a Member cannot justify the measure as inconsistent with its GATS obligations solely on the basis of the right to health, the right to health approach can assist the DSBs in defining concepts, determining the necessity of health policy objectives, and assessing the contribution of the measure towards the achievement of the health policy objectives. Some scholars caution that such an “extreme . . . approach could lead to the modification of the treaty.”²²⁴

It is worth noting that the human rights approach to the interpretation of the general exception in WTO treaties does not mean that these exceptions are interpreted through direct application of the human rights treaties. As demonstrated in this paper, the right to health approach does not require the DSBs to determine whether or not the Member has violated its right to health obligation but whether it is necessary to relax the GATS disciplines for the Member to fulfill its right to health obligation. Furthermore, the application of the right to health as an evidentiary and interpretive tool through VCLT Article 31(3)(c) does not add anything to GATS Article XIV(b) but constructs its meaning through a legal technique that takes into account wider normative context. A right to health approach will not only reinforce the intention of the parties that remained in the text but also develop complementarity between the two regimes and address in part fragmentation of public international law.

²²⁴ Sorel & Boré Eveno, *supra* note 114, at 826.