General Articles

NECESSARY MEASURE UNDER THE SPS AGREEMENT

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ABSTRACT

One the one hand, the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement") provides the right to take measures necessary for the protection of human, animal or plant life or health. On the other hand, it is also aimed at reducing trade barriers. Necessity is a tool to balance these two competing objectives. However, necessity under the SPS Agreement has not been elaborated deeply. The first question concerning necessity is whether the SPS Agreement requires the necessity of measure. This article identifies the provision containing such requirement. In addition, it tries to propose the meaning of necessary measure under the SPS Agreement. In particular, it shows some differences between the necessity under the SPS Agreement and that under GATT 1994/GATS.

KEYWORDS: *necessity, SPS Agreement, right to protect health and life, appropriate level of protection*

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I. INTRODUCTION

The Appellate Body (hereinafter "AB") of the World Trade Organization (hereinafter "WTO") has never ruled on the meaning of "necessary measure" under the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement").[1] Although in some disputes it did touch upon the first requirement of Article 2.2 of the SPS Agreement which contains the word "necessary," however, it discussed only the relationship between Article 5.6 and that requirement.[2] What might it rule when facing a dispute involving a question of necessity?

In attempting to answer that question, one may rely on the meaning of necessary measure developed under other WTO Agreements such as the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994") and the General Agreement on Trade in Services (hereinafter "GATS"). However, there is still a question as to whether, and to what extent, the concept of necessity developed under other WTO agreements can be adopted into the SPS Agreement, considering some differences among them such as the difference in object and purpose.

More importantly, whether the SPS Agreement truly requires the necessity of measure is still a question. Which provision, if any, requires that SPS measures must be necessary? The AB has indicated that it is Article 2.2, which says in part: "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary . . . ."[3] The indication can be seen, for instance, when the AB ruled that the first requirement of Article 2.2 and Article 5.6 SPS Agreement, which basically requires members to take the least trade-restrictive measure, should constantly be read together;[4] and violation of Article 5.6 might be a violation of Article 2.2.[5] Nevertheless, the AB did not explain how the first requirement of Article 2.2 which contains the word "applied" embodies the necessity of measure. Moreover, some scholars have opined that the necessity requirement in Article 2.2 SPS Agreement deals with the

[1] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 905 (2013).

[2] Appellate Body Report, *India — Measures Concerning the Importation of Certain Agricultural Products*, ¶ 5.212, WTO Doc. WT/DS430/AB/R (adopted June 19, 2015) [hereinafter *India — Agricultural Products* Appellate Body Report]; Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, ¶ 340, WTO Doc. WT/DS367/AB/R (adopted Dec. 17, 2010) [hereinafter *Australia — Apples* Appellate Body Report].

[3] Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

[4] *Australia — Apples* Appellate Body Report, *supra* note 2, ¶ 339.

[5] Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, ¶ 213, WTO Doc. WT/DS18/AB/R (adopted Nov. 6, 1998) [hereinafter *Australia — Salmon* Appellate Body Report]; *India — Agricultural Products* Appellate Body Report, *supra* note 2, ¶ 5.212; *Australia — Apples* Appellate Body Report, *supra* note 2, ¶ 340.

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application of the measure, not with the measure as such.[6] In other words, what it requires to be necessary is the application of the measure. Therefore, further examination is needed to define whether, and how, Article 2.2 contains the requirement of necessary measure.

The necessity of measure is crucial especially because the SPS Agreement contains two competing objectives: to provide the right for members to take measures necessary for the protection of health and life, on the one hand, and to minimize negative trade effects, [7] on the other hand. Improper understanding of the necessity may lead to either poor protection of health and life or high trade barriers.

This article discusses necessary measure under the SPS Agreement. In Section II it will argue that the requirement that SPS measures be necessary can only be found in Article 2.2 of the SPS Agreement. Nonetheless, the requirement is there only if the necessity requirement in that provision is understood as a requirement of necessary application that incorporates necessary measure. After finding the requirement, this article tries to propose the meaning of necessary measure under the SPS Agreement in Section IV. In particular, it will show considerable differences between the necessity under the SPS Agreement and that under other WTO Agreements.[8] In doing so, nonetheless, it will first briefly elaborate the concept of necessity under other WTO Agreements in Section III.

In building the arguments and findings, the author will elaborate relevant provisions of the SPS Agreement in the light of Article 31 and Article 32 of Vienna Convention on the Law of Treaties (hereinafter "VCLT") as required by Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Relevant case law and scholarly writing will be analyzed to build a more accurate understanding, especially in understanding the meaning of necessary measure.

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[6] *See, e.g.*, Lukasz Gruszczynski, *Risk Management Policies Under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 3(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 261, 290-91 (2008); DENISE PRÉVOST, BALANCING TRADE AND HEALTH IN THE SPS AGREEMENT: THE DEVELOPMENT DIMENSION 578 (2009); John J. Barcelo, *Product Standards to Protect the Local Environment—The GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27(3) CORNELL INT'L L.J. 756, 768 (1994).

[7] SPS Agreement, *supra* note 3, pmbl., ¶¶ 1-2, 4.

[8] Other WTO Agreements refer to the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994] and the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

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II. THE NECESSITY REQUIREMENT UNDER THE SPS AGREEMENT

This Section analyzes three relevant provisions of the SPS Agreement, i.e., Article 2.1, Article 5.6, and Article 2.2 to find the requirement that SPS measures be necessary.

A. Article 2.1 of the SPS Agreement—Providing a Right to Take Necessary Measures

Article 2.1 of the SPS Agreement reads: "Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provision of this Agreement."[9] Article 2.1 contains the words "measures necessary." It is obvious that the word "necessary" refers to the measure. Then, is this the provision requiring that SPS measures must be necessary?

The answer to the question above is certainly negative. It is true that the right in Article 2.1 requires that measures be necessary. However, the necessity requirement needed is the one that is enforceable. There has to be a prohibition of unnecessary measures. That is not the case in Article 2.1 since it provides a right, not a prohibition or an obligation.[10] According to Article 2.1, members may take necessary measures if they want. Nevertheless, unnecessary measure is not prohibited—at least it is unknown.

One may argue that Article 2.1 contains an implied obligation not to take unnecessary measures. The first basis that likely suggests such implied obligation is the so-called reciprocal relation between rights and obligation.[11] However, the obligation in this relationship is the cost of having rights. As an example given by William N. Eskridge is that to have rights to be protected by law, someone has to obey the law in return.[12] Turning to the right provided in Article 2.1, the cost will be an obligation to respect other WTO members in exercising the same right, it is not an obligation not to take unnecessary measures. The second likely basis is the view that "everything outside the ambit of rights is prohibited." However, this logic may apply only in case of a rule structured with general obligations along with an exception. An analogous structure is GATT

[9] SPS Agreement, *supra* note 3, art. 2.1.
[10] Barcelo, *supra* note 6, at 769 n.70.
[11] William N. Eskridge, *Relationship Between Obligations and Rights of Citizens*, 69(5) FORDHAM L. REV. 1721, 1722-23 (2001); *see also* GEORGE W. RAINBOLT, THE CONCEPT OF RIGHT 85-86 (2006) (discussing the idea of relational obligation).
[12] Eskridge, *supra* note 11, at 1723.

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which provides obligations and exceptions in Article XX. Any measure that does not fall under Article XX is prohibited.

In addition, one may also use the principle of prohibition of abuse of rights to defend that unnecessary measures are prohibited. Although subject to debate, this principle is found in international law either as a principle or customary international law.[13] In the context of the WTO law, the AB in *US — Shrimp* recognized that this principle was applicable.[14] However, it is doubtful that the principle of abuse of rights can be used to suggest the prohibition of unnecessary measures. The concept of abuse of rights, which has its origin in private law (notably France),[15] commonly refers to situations in which a right is formally exercised in conformity with the conditions laid down in the rule granting the right, but the exercise is unreasonable or harms others, or its legal outcome is against the objective of that right or against the social interests.[16] In short, it is about how a legal rights is exercised. Consequently, in the context of Article 2.1, it is obvious that unnecessary measures do not fall within this principle since the legal right provided thereof are limited to necessary measures. The principle might apply only in case of necessary measures taken, for example, in bad faith or inconsistent with their objectives. In this regard, it is important to distinguish between the limits to the scope of a right and the restrictions regarding the exercise of such right.[17] It is the latter that may lead to abuse of rights. Meanwhile, unnecessary measures clearly fall under the former, thus cannot lead to abuse of rights.

B. Article 5.6 of the SPS Agreement—The "Least Restrictive Measure" Not Amounting to a Necessity Requirement

When read together with its footnote, Article 5.6 basically requires members to take the least restrictive measure to achieve their level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[18] The AB has discussed this obligation. According to

[13] Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47(2) MCGILL L.J. 389, 398-404 (2002).
[14] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).
[15] David Anderson, *Abuse of Rights*, 11(4) JUD. REV. 348, 348 (2006).
[16] *See generally* Byers, *supra* note 13; Annekatrien Lenaerts, *The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law*, 18(6) EUR. REV. PRIV. L. 1211 (2010); H. C. Gutteridge, *Abuse of Rights*, 5(1) CAMBRIDGE L. J. 22 (1933); Vera Bolgar, *Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35(5) LA. L. REV. 1015 (1975).
[17] Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23(1) BERKELEY J. INT'L L. 223, 249 (2005).
[18] Article 5.6 of the SPS Agreement reads as follow:

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AB, there is a violation of Article 5.6 if there is an alternative measure that: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (iii) is significantly less restrictive to trade than the contested SPS measure.[19]

Some scholars opine that even though there is no word "necessary," Article 5.6 contains the test of the necessity of measure.[20] Such opinion is probably inspired by the fact that necessity assessment under Article XX of the GATT 1994 in early case law such as *United States — Section 337* and *Thailand — Cigarettes* used the test of the least trade-restrictive means which basically asked the existence of alternative measure.[21] If the opinion is true, then the necessity requirement is found in Article 5.6.

However, it is highly doubted. The examination under Article 5.6, which is similar to the necessity assessment under Article XX of the GATT 1994 in early case law, touches only the alternative measure without assessing the contested measure.[22] Under such examination, the contested measure will always be presumed to be necessary as long as it is aimed at protection of human, animal or plant life or health if the claimant fails to prove the existence of an alternative measure that is less restrictive and achieves the appropriate level of protection (hereinafter "ALOP") chosen by the respondent. If the contested measure really achieves the ALOP, there will be no problem. Nonetheless, what if, for example, the contested measure apparently achieves no protection at all? How can we say that it is necessary? It may happen since, according to the AB, contribution exists when there is a genuine relationship of ends and means, between the

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

Its footnote provides: "For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."

[19] *Australia — Salmon* Appellate Body Report, *supra* note 5, ¶ 194; *India — Agricultural Products* Appellate Body Report, *supra* note 2, ¶ 5.203.

[20] *See, e.g.*, Gisele Kapterian, *A Critique of the WTO Jurisprudence on "Necessity"*, 59(1) INT'L & COMP. L. Q. 89, 112-13, 112 n.148 (2010); Maxine Kennett et al., *Second Guessing National Level Policy Choices: Necessity, Proportionality and Balance in the WTO Services Negotiations*, CTR. FOR INT'L ENVTL L. 1, 4 (2003), www.ciel.org/Publications/Necessity_3Sep03.pdf.

[21] Peter van den Bossche, *Looking for Proportionality in WTO Law*, 35(3) LEGAL ISSUES ECON. INTEGRATION 283, 287-88 (2008).

[22] Whether a measure fulfils the requirements of Article 5.6 solely depends on the availability of alternative measure that is less restrictive and achieves the chosen appropriate level of protection [hereinafter ALOP]. *See, e.g.*, *Australia — Salmon* Appellate Body Report, *supra* note 5, ¶ 204; *Australia — Apples* Appellate Body Report, *supra* note 2, ¶ 356.

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objective pursued and the measure at issue.[23] It means a contested measure may be found to achieve no protection at all if there is no genuine relationship between the measure and the level of protection pursued. In addition, it should be noted that even the necessity assessment used in early case i.e. the least trade-restrictive means has been revised by the AB. In *Brazil — Retreaded Tyres*, for example, the AB stated that the necessity assessment had to be made to examine relevant factors to the contested measure first and then the finding of that assessment had to be compared with alternative measures.[24] In conclusion, the assessment under Article 5.6 does not amount to the necessity assessment.

C. Article 2.2 of the SPS Agreement—The Necessity Requirement only When the Measure Is Assessed

Article 2.2 of the SPS Agreement reads as follow:

> Members shall ensure that any sanitary or phytosanitary measure *is applied only to the extent necessary* to protect human, animal or plant life or health, is based on scientific principle and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5. (emphasis added)[25]

The first requirement of that provision—"any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health"—is the subject of the discussion in this sub-section.

The AB has indicated that it contains a requirement of necessary measures. The indication can be seen when the AB ruled that the first requirement of Article 2.2 and Article 5.6 should constantly be read together;[26] and violation of Article 5.6 might be a violation of Article 2.2.[27] It is even clearer in *Australia — Salomon* where the AB stated that the establishment or maintenance of an SPS measure which implied or reflected a higher level of protection than the appropriate level of protection determined by an importing Member, could constitute a

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[23] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 210, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil — Retreaded Tyres* Appellate Body Report].
[24] *Id*. ¶¶ 156, 178.
[25] SPS Agreement, *supra* note 3, art. 2.2.
[26] *Australia — Apples* Appellate Body Report, *supra* note 2, ¶ 339.
[27] *Id*. ¶ 340; *Australia — Salmon* Appellate Body Report, *supra* note 5, ¶ 213; *India — Agricultural Products* Appellate Body Report, *supra* note 2, ¶ 5.212. In addition, the appellate body report [hereinafter AB] also stated that the first requirement of Article 2.2 informed Article 5.6: the elements that defined the basic obligation set out in Article 2.2 imparted meaning to Article 5.6. *See Australia — Apples* Appellate Body Report, *supra* note 2, ¶ 339; *India — Agricultural Products* Appellate Body Report, *supra* note 2, ¶¶ 5.12, 5.208.

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violation of the necessity requirement of Article 2.2.[28] However, the first requirement of Article 2.2 contains the word "applied." Consequently, some scholars opine that the requirement thereof deals with the application of the measure.[29]

Whether, and how, Article 2.2 contains the requirement of necessary measure can be answered by examining possible readings of the necessity requirement thereof. According to John J. Barcelo, there are at least four possible readings.[30] Nonetheless, they can be summarized into two main readings:

1. The necessity requirement thereof is the requirement of necessary measure as such.
2. The necessity requirement thereof is the requirement of necessary application.

The first reading above seems to have been used by the Panel in *India — Agricultural Products* since the Panel in that case interpreted the word "necessary" in Article 2.2 by adopting the meaning of necessary measure from other WTO Agreements.[31] Many scholars also support the first reading above.[32]

However, it seems that the first reading is erroneous because of two main reasons. The first reason is that it omits the meaning of the word "applied." This will be a violation of the rules on the treaty interpretation in Article 31 of the VCLT.[33] In addition, it will be inconsistent with the ruling of the AB which says that, in interpreting the WTO agreements, an interpreter has to read the treaty in accordance with the language of the treaty[34] and might not omit any meaning of an article or paragraph.[35]

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[28] *Australia — Salmon* Appellate Body Report, *supra* note 5, ¶ 213 n.166.

[29] *See, e.g.*, PRÉVOST, *supra* note 6, at 578; Gruszczynski, *supra* note 6, at 290-91; Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98(7) MICH. L. REV. 2329, 2354 (2000); LUKASZ GRUSZCZYNSKI, REGULATING HEALTH AND ENVIRONMENTAL RISKS UNDER WTO LAW: A CRITICAL ANALYSIS OF THE SPS AGREEMENT 244 (2010).

[30] Barcelo, *supra* note 6, at 768-71.

[31] *See* Panel Report, *India — Measures Concerning the Importation of Certain Agricultural Products*, ¶¶ 7.605-12, WTO Doc. WT/DS430/R (adopted June 19, 2015) [hereinafter *Agricultural Products* Panel Report]. On the appeal, unfortunately the AB did not touch upon the Panel's interpretation of the necessity requirement in Article 2.2. *See India — Agricultural Products* Appellate Body Report, *supra* note 2, ¶¶ 5.212, 5.244.

[32] *See, e.g.*, Mads Andenas & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective*, 20(1) CAMBRIDGE REV. INT'L AFF. 71, 84 (2007); Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14(1) CHI. J. INT'L L. 93, 138-41 (2013).

[33] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.

[34] The statement of the AB is consistent with the Opinion of the Permanent Court of International Justice which said that a treaty interpreter had to ascertain the intention of the contracting parties first from the wording of the treaty. *See* Article 3, Paragraph 2, of the Treaty of Lausanne,

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The second reason is that the placement of the word "necessary" does not support the first reading. The placement of that word defines what it requires to be necessary. It can be seen in other WTO Agreements. An example is Article 2.2 of the Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement"), which reads in part: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating *unnecessary obstacles* to international trade" (emphasis added).[36] From the placement of the word "unnecessary", it is obvious that it refers to the obstacles; what has to be necessary is the obstacle.[37] The words "prepared" (preparation), "adopted" (adoption) or "applied" (application) in that sentence are not directly the object of necessity test.

The second reading above seems to have no problem, considering the discussion in the previous two paragraphs above. This reading accommodates the meaning of the word "applied." In addition, the

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Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, 19 (Nov. 21), http://www.worldcourts.com/pcij/eng/decisions/1925.11.21_lausanne.htm.

[35] Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 181, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998); *see also* Appellate Body Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 45, WTO Doc. WT/DS50/AB/R (adopted Jan. 16, 1998); Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment*, ¶ 83, WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted June 22, 1998); Appellate Body Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 94, WTO Doc. WT/DS90/AB/R (adopted Sept. 22, 1999); Appellate Body Report, *European Communities — Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, ¶ 83, WTO Doc. WT/DS141/AB/R (adopted Mar. 12, 2001); Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 250, WTO Doc. WT/DS202/AB/R (adopted Mar. 8, 2002); Appellate Body Report, *European Communities — Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, ¶ 98, WTO Doc. WT/DS219/AB/R (adopted Aug. 18, 2003). Moreover, in *Australia — Salmon* the AB stated in part: "It would obviously be wrong to interpret the SPS Agreement in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement". *See Australia — Salmon* Appellate Body Report, *supra* note 5, ¶ 206. Similar statement is also found in its ruling in *US — Gasoline*, where the AB adopted the interpretation of VCLT developed by the International Court of Justice (I.C.J.) in cases such as *Corfu Channel Case* and *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*. *See* Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, 23, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

[36] Agreement on Technical Barriers to Trade art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

[37] VAN DEN BOSSCHE & ZDOUC, *supra* note 1, at 872-73. In addition, the second sentence of Article 2.2 of the TBT Agreement also shows how the placement of the word "necessary" defines what has to be necessary. It reads: "For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risk non-fulfilment would create". Here what has to be necessary is restrictiveness of the technical regulations, not technical regulations (measure) as such. It has been confirmed by the AB in *US — Tuna II (Mexico)*. *See* Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 319, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

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placement of the word "necessary" tells that the application (from the word "applied") needs to be necessary. It is obvious from the words: "is *applied* only to the extent *necessary*." Moreover, Article 712, paragraph 5 Chapter 7 of the North American Free Trade Agreement (NAFTA), which also contains similar language with the first requirement of Article 2.2 of the SPS Agreement, has been said to require necessary application of the measure.[38] Nevertheless, it should be noted that under this reading, it is only the application of the measure that is assessed. Therefore, there is no requirement of necessary measure. It means the discussion in this article so far arrives in a big anomaly: an agreement whose one of the main objectives is to minimize trade barriers does not discipline unnecessary measures. It seems impossible.

It is in the humble opinion of the author to propose another reading. The author proposes that the necessity requirement in Article 2.2 has to be understood as the requirement of necessary application that incorporates necessary measure. To put it differently, necessary application thereof contains necessary measure.[39] The main difference between this reading and the second reading above is that the necessity requirement in this reading consists of two components i.e. the necessity of the application and the necessity of the measure, while that in the second reading above addresses solely the application of the measure.

There are at least three reasons for this reading. First, it seems impossible that the SPS Agreement whose one of the objectives is to reduce trade barriers does not discipline unnecessary measures.[40] In this regard, to restrict unnecessary measures, John J. Barcelo suggests the necessity requirement in Article 2.2 being understood as necessary application that prohibits members to take a measure if its application is more trade-restrictive than required to achieve the level of protection pursued.[41] Nevertheless, this construction still does not directly touch the measure as such. The problem of this idea can be seen from the example he gives, that is, a measure aimed at protecting domestic cattle from disease should not be used to quarantine imported cattle for two years when several

[38] North American Free Trade Agreement, Can.–Mex.–U.S., art. 712(5), Dec. 17, 1992, 32 I.L.M. 289, 605 [hereinafter NAFTA] reads: "Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility". According to John Barcelo, this provision is intended to address the manner in which an existing measure is applied. *See* Barcelo, *supra* note 6, at 768.

[39] Gruszczynski, *supra* note 6, at 291.

[40] Minimizing negative trade effects is one of the objectives of the SPS Agreement as explicitly found in the fourth paragraph of its Preamble. The negotiators of the SPS Agreement even stressed the importance of this objective as they were very aware of the possibility of SPS measures adopted for protectionist purposes. *See* PRÉVOST, *supra* note 6, at 482.

[41] Barcelo, *supra* note 6, at 769.

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days would suffice.[42] Disciplining the duration of the application does contribute to minimizing trade barriers but it does not discipline the measure itself, which might cause more trade barriers than its application.

Second, if the necessity assessment is made only to the application without assessing the measure itself, it is hard to accept that the application is necessary if the measure itself is apparently unnecessary. Using the example given by John J. Barcelo above, it is hard to accept that its application is necessary even if it is only two weeks if the measure employed does not contribute to achieving the ALOP. In addition, it should also be noted that the assessment under the chapeau of Article XX of the GATT 1994, which deals with the application of a measure, has been said to examine not only the application but also the measure itself.[43] If the assessment of the application under Article XX of the GATT 1994 still needs to touch the measure itself, such need should be stronger under the assessment of the application under Article 2.2 of the SPS Agreement. It is because under Article XX of the GATT 1994, a place to examine the measure is already provided in specific exceptions—paragraphs (a) to (j)—while under the SPS Agreement, such structure does not exist.

The last reason is that, unlike the first reading, this reading does not omit the meaning of the word "applied" and is still consistent with the placement of the word "necessary". It is because this reading requires necessary application ("applied") as well as necessary measure.

This sub-section already finds the requirement of necessary measure in the SPS Agreement: it is found in Article 2.2 of the Agreement, as also indicated by the AB. More importantly, it clarifies how Article 2.2 contains such requirement. The next question is what necessary measure means under the SPS Agreement, which will be discussed in the following Sections.

III. THE MEANING OF NECESSARY MEASURE UNDER OTHER WTO AGREEMENTS

To understand the meaning of necessary measure under the SPS Agreement, it is important to see the meaning under other WTO Agreements. There are two relevant Agreements, i.e., GATT 1994 with its Article XX and GATS with its Article IV. They are relevant especially because, like the SPS Agreement, both Article XX(b) of the GATT 1994 and Article IV(b) of the GATS deal with the protection of human, animal, or plant life or health. In addition, unlike the necessity requirement in

[42] *Id.*

[43] *See generally* Arthur E. Appleton, *GATT Article XX's Chapeau: A Disguised "Necessary" Test?: The WTO Appellate Body's Ruling in United States – Standard for Reformulated and Conventional Gasoline*, 6(2) REV. EUR., COMP. & INT'L ENVTL. L. 131 (1997).

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Article 2.2 of the TBT Agreement,[44] the necessity in Article XX of the GATT 1994 and Article IV GATS refers to the necessity of measure. With regard to GATT 1994, it has particular relevance since the SPS Agreement was created with an objective of, among others, elaborating Article XX(b) of the GATT 1994. Such objective is explicitly found in the last paragraph of the preamble of the SPS Agreement. The way the SPS Agreement elaborates the provision was stated by the Panel in *EC — Hormones*. The Panel ruled that the SPS Agreement contained both procedural and substantive obligations additional to those already found in Article XX(b) GATT 1994 that could apply without prior violation of GATT provision.[45] Moreover, the negotiating history of the SPS Agreement provides the reasons why the WTO members want to elaborate the provision.[46]

A. Article XX of the GATT 1994

The meaning of "necessary" under Article XX of the GATT has been developed through several disputes. Nonetheless, it grew from one dispute to another and then became subject to debate and different understanding by some scholars. To understand the necessity under Article XX of the GATT, it is probably better to discuss some disputes that reflect its meaning.

The term "necessary" was first interpreted by the Panel in *United States — Section 337* where it dealt with Article XX(d). In that case, the Panel ruled that an inconsistent measure could not be said necessary if an alternative measure which could reasonably be employed and which was not inconsistent with other GATT provisions was available. It also stated that members had to use a measure which entailed the least degree of inconsistency with other GATT provisions if no consistent measure could be used.[47] This test is usually called the Least Trade Restrictive Means

[44] The notion of necessity is found in the first and the second sentences of Article 2.2 of the TBT Agreement. However, the necessity therein refers to obstacles and restrictiveness respectively.

[45] Panel Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 8.36-41, WTO Doc. WT/DS26/R/USA (adopted Feb. 13, 1998).

[46] *See*, *e.g.*, Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Summary of the Main Points Raised at the First Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, ¶¶ 7-8, GATT Doc. MTN.GNG/NG5/WGSP/W/1 (Oct. 28, 1988); Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Summary of the Main Points Raised at the Eight Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, ¶ 3, GATT Doc. MTN.GNG/NG5/WGSP/W/24 (July 2, 1990); Negotiating Group on Agriculture, *Sanitary and Phytosanitary Issues: Supplementary Communication from the Cairns Group*, ¶ 3, GATT Doc. MTN.GNG/NG5/W/164 (Apr. 18, 1990).

[47] Panel Report, *United States — Section 337 of the Tariff Act of 1930*, ¶ 5.26, WTO Doc. L/6439 – 36S/345 (adopted Nov. 7, 1989).

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(hereinafter "LTRM test").[48] It is worth mentioning that the Panel in that case focused on the inconsistency of the measure, rather than its restrictive effect.[49]

The same test was used by the Panel in *Thailand — Cigarettes* and *US — Gasoline*. In examining necessity under Article XX(b), the Panel in *Thailand — Cigarettes* followed the necessity test developed in *United States — Section 337* and stated that there was no different meaning of "necessary" in Article XX(d) and that in Article XX(b).[50] There are at least two important points in this ruling that deserve attention. First, the Panel's assessment of necessity does not touch the contested measure. Second, according to the Panel, Article XX(b) allows members to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be necessary.[51]

Similarly, the Panel in *US — Gasoline* also used the LTRM test developed in *United States — Section 337*. There are two statements of the Panel that should be highlighted in this case. First, according to the Panel, administrative difficulties in applying or enforcing an alternative measure could not be a sufficient ground to say that such alternative measure was not reasonably available.[52] Second, the Panel stated that it was not the necessity of the policy goal that was to be examined. Rather, the question was whether the inconsistent measure was necessary to achieve the policy goal.[53]

The meaning of "necessary" underwent a major change in two AB Reports adopted in early 2001: the Report in *Korea — Various Measures on Beef* and the Report in *EC — Asbestos*. In *Korea — Various Measures on Beef* (concerning Article XX(d)), the AB did not really ignore LTRM test developed in previous case law; instead, it added other requirements in assessing the necessity. It ruled that the assessment of necessity involved in every case a process of weighing and balancing (hereinafter "WAB")[54] a

[48] According to Filippo Fontanelli, the Least Trade Restrictive Means test used in this case was influenced by the doctrine of proportionality developed in European Union and European Court of Human Rights [hereinafter LTRM test]. *See* Filippo Fontanelli, *Necessity Killed the GATT Art XX GATT and the Misleading Rhetoric About "Weighing and Balancing"*, 5(2) EUR. J. LEGAL STUD. 36, 40 n.10 (2012). Meanwhile, Peter van den Bossche argues that the LTRM test does not reflect full principle of proportionality. *See* van den Bossche, *supra* note 21, at 287.

[49] Jan Neumann & Elisabeth Turk, *Necessity Revisited: Proportionality in World Trade Organization Law After Korea—Beef, EC—Asbestos and EC—Sardines*, 37(1) J. WORLD TRADE 199, 207 (2003).

[50] Panel Report, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 74, WTO Doc. DS10/R - 37S/200 (adopted Nov. 7, 1990).

[51] *Id*. ¶ 73.

[52] Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶¶ 6.26-28, WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter *Gasoline* Panel Report].

[53] *Id*. ¶ 6.22.

[54] According to Peter van den Bossche, the weighing and balancing [hereinafter WAB] process in this case does not reflect full proportionality test. *See* van den Bossche, *supra* note 21, at 289.

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series of factors which prominently *included*[55] the contribution of the measure to achieve the end pursued, the importance of the value or interest protected, and the impact of the measure on trade (restrictiveness).[56] Concerning those factors, it stated that the greater the contribution, the more easily a measure might be considered to be necessary; the more vital or important the interests or values, the easier it would be to prove necessity; and a measure with a relatively slight impact upon imported products might more easily be considered as necessary rather than a measure with intense or broader restrictive effects.[57] In trying to align this test with the LTRM test, it went on to state that WAB process was comprehended in the determination of whether a WTO-consistent or a less WTO-inconsistent alternative measure was reasonably available.[58] There are at least three other important points in this case. First, the AB came to a conclusion that in the context of Article XX(d), the reach of the word "necessary" was not limited to that which was "indispensable" or "of absolute necessity" or "inevitable".[59] Second, the AB did not explain precisely how it did the WAB process; how it compared one factor to another. Finally, it stressed that members had the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations.[60]

The new WAB test developed in *Korea — Various Measures on Beef* was followed by the AB in *EC — Asbestos* (concerning Article XX(b)).[61] Nonetheless, it might be important to highlight some points in *EC — Asbestos*. First, among three factors in WAB process, the restrictiveness of the measure was not deeply examined by the AB. Second, unlike in previous cases where it asked whether the alternative measure was

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Meanwhile, Denise Prévost argues that the WAB process in this case is a kind of strong proportionality test since it seems not to be limited to assessing the means used to achieve the objective (termed "weak proportionality") but instead seems to allow the calling into question of the objective itself by balancing its importance or value against the trade restrictiveness and suitability of the measure. *See* PRÉVOST, *supra* note 6, at 466. In contrast, Donald H. Regan opines that there is actually no WAB since the AB in *Korea — Various Measures on Beef* says that an indispensable measure is (certainly) necessary, which excludes WAB. *See* Donald H. Regan, *The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-benefit Balancing*, 6(3) WORLD TRADE REV. 347, 354 (2007).

[55] This word indicates that there might be other factors that should be taken into account. But the AB didn't explain what they are.

[56] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea — Various Measures on Beef* Appellate Body Report].

[57] *Id.* ¶¶ 162-63.

[58] *Id.* ¶ 166.

[59] *Id.* ¶ 161.

[60] *Id.* ¶¶ 176, 178.

[61] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-containing Products*, ¶¶ 171-72, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter *EC — Asbestos* Appellate Body Report].

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consistent or less inconsistent, the AB in this case provided that alternative measure had to be less trade-restrictive.[62] Third, the AB provided that in determining whether a suggested alternative measure was reasonably available, its difficulty of implementation was one of the factors that had to be taken into account.[63] Fourth, the AB specifically said that it was *undisputed* that members had the right to determine the level of protection of health that they considered appropriate.[64] Lastly, the AB for the first time mentioned the SPS Agreement in its examination of necessity.[65]

In *Brazil — Retreaded Tyres*, the AB added other important points. First, concerning the WAB process, it stated that it was a holistic operation that involved putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment.[66] In determining whether a measure was necessary or not, all relevant factors had to be assessed. If this analysis yielded a preliminary conclusion that the measure was necessary, this result had to be confirmed by comparing the measure with its possible alternatives, which might be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.[67] Second, the AB ruled that to be necessary a measure had to bring a material contribution to the achievement of the objective, not merely marginal or insignificant.[68]

B. Article XIV of the GATS

The elaboration of the necessity test under GATS is not as much as that under GATT 1994. The meaning of the word "necessary" in Article XIV of the GATS might be well explained by discussing *US — Gambling*. In this

[62] *Id.* ¶ 172.
[63] *Id.* ¶ 170.
[64] *Id.* ¶ 168. However, some scholars opine that the right to choose level of protection is not actually protected in this case due to WAB process. *See generally* Michael Ming Du, *Autonomy in Setting Appropriate Level of Protection Under the WTO Law: Rhetoric or Reality?*, 13(4) J. INT'L ECON. L. 1077 (2010); Regan, *supra* note 54, at 362.
[65] *EC — Asbestos* Appellate Body Report, *supra* note 61, ¶¶ 167, 178. The AB cited the SPS Agreement to rule that there is no requirement to quantify risk under GATT 1994 and to rule that responsible and representative governments may act in good faith on the basis of what may be a divergent opinion coming from qualified and respected sources.
[66] *Brazil — Retreaded Tyres* Appellate Body Report, *supra* note 23, ¶ 182. It should be noted that the AB, again, didn't explain how exactly it compare one factor to another. Nonetheless it stated here that the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values at stake. *See Brazil — Retreaded Tyres* Appellate Body Report, *supra* note 23, ¶ 210.
[67] *Id.* ¶¶ 156, 178. It should be noted that in another paragraph the AB provided that the WAB analysis began with an assessment of the relative importance of the interests or values furthered by the challenged measure. *See id.* ¶ 143.
[68] *Id.* ¶¶ 150-51, 210. It should be noted that the AB ruled that the contribution might be evaluated either in quantitative or qualitative terms. *See id.* ¶¶ 146-47.

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case, the Panel and the AB simply adopted the necessity test from Article XX of the GATT 1994 and followed the new method developed since *Korea — Various Measures on Beef*. Nonetheless, there were at least two relevant points added by the AB. First, it ruled that the WAB process began with an assessment of the relative importance of the interests or values furthered by the challenged measure.[69] Second, concerning the alternative measure, it stated that it might be found not to be reasonably available where it was merely theoretical in nature, for instance, where the responding member was not capable of taking it or where the measure imposed undue burden on that member such as prohibitive cost or substantial technical difficulties.[70]

C. Common Features of the Jurisprudence on the Necessity

Although the necessity test in every dispute is not really the same or similar, as seen above, there are some common features found in (some of) those disputes:

1. From early disputes, we learn that the necessity of a measure depends mainly on the existence of an alternative measure (LTRM test).
2. Since *Korea — Various Measures on Beef*, we learn that necessity assessment involves WAB process.
3. In WAB process, relevant factors have to be considered in deciding whether a measure is necessary or not. Such relevant factors include:
   (a) The importance of the value or interest at stake (value).
   (b) The contribution of the measure to achieve the objective pursued (contribution).
   (c) Trade impact of the measure (restrictiveness).
4. The WAB also involves the assessment of whether an alternative measure that is less trade restrictive or WTO-consistent or less WTO-inconsistent and achieves the level of protection set by the respondent is reasonably available or not, and the comparison between the contested measure and the alternative measure.
5. Whether an alternative measure is reasonably available can be informed by some factors e.g., difficulty of its implementation, the amount of its cost, and the capacity of the enforcing member.

[69] Appellate Body Report, *United States — Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶ 306, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).
[70] *Id.* ¶ 308.

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IV. THE MEANING OF NECESSARY MEASURE UNDER THE SPS AGREEMENT

The common features of the necessity test above are useful in understanding the meaning of necessary measure under the SPS Agreement. The task now is to convert those features to the SPS Agreement. In doing so, however, there are two points that first need to be clarified: first, the ordinary meaning of the word "necessary" and second, the distinctive feature the SPS Agreement which influences the meaning of necessary measure thereof.

With regard to the first point, according to Oxford Dictionary, the word "necessary" means "[n]eeded to be done, achieved, or present; essential."[71] Meanwhile, the Law Dictionary provides in part that "the word 'necessary' does not always import an absolute physical necessity, so strong that one thing, to which another may be termed 'necessary,' cannot exist without that other."[72] Another definition provides that "necessary" means: "1) essential, 2) less forcefully, it can mean convenient, useful or making good sense."[73] From these three definitions, it can be inferred that: first, whether something is necessary or not depends on how far it contributes and on how costly it is in achieving the objective pursued; and second, something that is necessary is essential but not necessarily absolutely needed in achieving the objective pursued.

With regard to the second point—the distinctive feature of the SPS Agreement, it should be noted that the SPS Agreement explicitly provides the right to choose ALOP for the protection of health and life. In fact, to provide sufficient scope for members to protect human, animal or plant life or health is one of the objectives of the Agreement as seen from its Preamble. More importantly, the Preamble provides that the ALOP chosen by each member may never be changed by anyone else.[74] It is worth mentioning that such privilege was not found in the Preamble of the initial drafts of the SPS agreement.[75] The WTO members inserted that right into

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[71] *Definition of Necessary in English*, ENG. OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/necessary (last visited May 15, 2017).

[72] *What Is Necessary?*, LAW DICTIONARY, http://thelawdictionary.org/necessary/ (last visited Jan. 12, 2017). This definition is similar with that given by the AB in *Korea — Various Measures on Beef (2000). See Korea — Various Measures on Beef* Appellate Body Report, *supra* note 56, ¶ 161.

[73] *Necessary*, FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/necessary (last visited Jan. 12, 2017).

[74] SPS Agreement, *supra* note 3, pmbl., ¶ 6. It can also be seen, for instance, in Article 5.6 of the SPS Agreement.

[75] *See, e.g.*, Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Draft Text for a Decision by Contracting Parties on Sanitary and Phytosanitary Measures*, 2-3, GATT Doc. MTN.GNG/NG5/WGSP/W/26/Rev.1 (Oct. 29, 1990) [hereinafter *Draft Text for a Decision by Contracting Parties on Sanitary and Phytosanitary Measures*].

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the draft agreement during the later stage of the negotiation to ensure that the protection of health and life would never be undermined.[76] In addition, the privilege to set the ALOP was so essential that the members also made other important amendments to the draft agreement to strengthen it. First, they omitted the obligation to take into account economic considerations when determining the ALOP.[77] These changes implied that no factor or object could prevail over sanitary or phytosanitary protection determined by the members according to their own ALOP. Second, they changed the provision containing the obligation to take measures that were not more trade-restrictive than required, which is currently in Article 5.6, by adding the words: "to achieve their appropriate level of sanitary or phytosanitary protection."[78] Lastly, they added a footnote to Article 3.3 of the SPS Agreement to clarify that there was a scientific justification if . . . a member determined that the relevant international standards, guidelines or recommendation were not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.[79]

In contrast, the text of GATT 1994 or GATS does not explicitly provide the right to choose ALOP. Such right is recognized under GATT 1994/GATS through case law.[80] In fact, it has been said that the rulings of the WTO Panels and AB providing such right do not reflect the text of Article XX of the GATT 1994. Rather, they are influenced by the SPS Agreement.[81] The fact that, for example, the AB in *EC — Asbestos* mentioned its previous ruling under the SPS Agreement might be a sign of how the SPS Agreement influences the interpretation of GATT 1994.[82]

In the light of the elaboration of the two points above, the common features of necessity assessment can be converted to the SPS Agreement. To start with, it is essential to examine the three elements of the necessity assessment in the WAB process.

A. Elements of the Necessity Assessment

The first element of necessity assessment according to the jurisprudence above is contribution. There is no doubt that this element is relevant in the necessity assessment under the SPS Agreement since

[76] PRÉVOST, *supra* note 6, at 504.
[77] *Id.*
[78] *Id.* The initial drafts did not contain those words. *See, e.g.*, *Draft Text for a Decision by Contracting Parties on Sanitary and Phytosanitary Measures*, *supra* note 75.
[79] PRÉVOST, *supra* note 6, at 504.
[80] In the case of health and life, the relevant case law is *EC — Asbestos*.
[81] *See* Kapterian, *supra* note 20, at 114-15; Du, *supra* note 64, at 1079.
[82] In *EC — Asbestos* the AB cited the SPS Agreement to rule that there is no requirement to quantify the risk in GATT 1994 and to rule that responsible and representative governments may act in good faith on the basis of what may be a divergent opinion coming from qualified and respected sources. *See EC — Asbestos* Appellate Body Report, *supra* note 61, ¶¶ 167, 178.

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"necessary" is about *the degree of contribution* and cost of something in achieving an objective, according to its ordinary meaning.

The second element is the importance of value or interest. This element is highly doubted to be relevant. Recalling the inferences on the ordinary meaning of "necessary" above, whether something is necessary or not depends on how far it contributes and how costly it is in achieving the objective pursued. It is clear that the question is only about the *means*. For example, to decide whether an import ban is necessary to protect snakes, the answer has nothing to do with whether snakes are important even if they might obviously be less important. The necessity of SPS measure is no different. If an appraisal of the value or interests being protected is truly needed in deciding which measures are acceptable, it is beyond the scope of the necessity of measure and should be addressed somewhere else. In fact, even under GATT 1994 some Panels,[83] as well as some scholars,[84] do not agree on the inclusion of this element in the necessity assessment.

It is also important to note that during the negotiation of the SPS Agreement, there was a proposal to provide the right for members to take measures for the protection of other objects such as environment.[85] However, members decided that the right was limited to the protection of human, animal or plant life or health to avoid unnecessary adverse effect to trade. This means that health and life have been decided to be important, thus should not be questioned anymore.[86]

The last element is restrictiveness. Again, the ordinary meaning of "necessary" implies that whether something is necessary or not depends on how far it contributes and on *how costly* it is in achieving the objective pursued. It follows that restrictiveness is another relevant element since it plays a big role in defining whether a measure is costly or not to achieve the ALOP. Moreover, it should be noted that one of the objectives of the SPS Agreement is to minimize trade barriers. It implies a requirement to examine restrictiveness of the measure.

B. Alternative Measure

Another feature of the necessity assessment is the question of the availability of alternative measure that is less trade restrictive and achieves the level of protection set by the respondent. According to the ordinary meaning of "necessary," it might be possible that more than one measures

[83] *See, e.g.*, *Gasoline* Panel Report, *supra* note 52, ¶ 6.22.
[84] *See, e.g.*, Regan, *supra* note 54, at 355-56.
[85] *See, e.g.*, Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Draft Text on Sanitary and Phytosanitary Measures*, 12-13, GATT Doc. MTN.GNG/NG5/WGSP/7 (Nov. 20, 1990).
[86] Gruszczynski, *supra* note 6, at 290-92.

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are categorized as necessary all together. Nevertheless, since one of the objectives of the SPS Agreement is to minimize trade barriers, the measure taken to achieve the ALOP should be the one with minimum trade barriers. Therefore, the assessment of alternative measure is also relevant under the SPS Agreement.

The next question is what "reasonably available" under the SPS Agreement means. In this regard, its meaning under GATT 1994/GATS should not be different from that under the SPS Agreement since there is no special feature of the SPS Agreement that invites any difference. Difficulties and cost of implementation, and the capacity of the enforcing member are relevant factors in deciding whether an alternative measure is reasonably available or not.

C. Assessment Process

The necessity assessment should use the two-step assessment employed in *Brazil — Retreaded Tyres*: first, the assessment of the contested measure; and second, confirmation (comparison between the contested measure and alternative measure). It seems more accurate than the single step used in early disputes which examines only alternative measures.[87] The question now is: how should the WTO adjudicating body carry out the assessment in each of the steps? How should it compare the two relevant elements of the assessment?

The current assessment under GATT 1994/GATS uses the WAB method. However, this method seems relevant only in the first step of the assessment, i.e., in the assessment of the contested measure. It is relevant since the first step should be a separate assessment of the contested measure: examining whether the contested measure can be categorized as necessary according to its ordinary meaning, which is the extent of contribution and cost of a means. Its contribution is weighed against its restrictiveness to define the necessity of the contested measure. For instance, if the contested measure is very costly (highly restrictive such as import ban) but contributes little or almost nothing in achieving the ALOP, then such measure might be considered unnecessary without even examining the alternative measure. However, in real cases it might be difficult to decide whether its contribution weighed against its cost amounts to a necessary measure especially since "necessity" is not necessarily

[87] Note that Lukasz Gruszczynski proposes that the necessity assessment under the SPS Agreement should be limited only to the examination of alternative measure. Moreover, he argues that restrictiveness and contribution, at least in the examination of the challenged measure, are not relevant. However, he comes to these conclusions with an expectation that the challenged measure is already examined somewhere else, i.e., under the assessment of sufficiency of scientific evidence in the second prong of Article 2.2 of the SPS Agreement. This means his hypotheses cannot apply in an independent assessment of necessity. *See id.* at 292-93.

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absolute, according to its ordinary meaning. Thus the WAB may come into play to judge the contested measure on a case-by-case basis.

If the contested measure is categorized as necessary, it will be compared to the alternative measure in the second step of the assessment. However, in the second step the WAB method is not relevant due to two absolute requirements that an alternative measure must fulfil. The first requirement is that for an alternative measure to be accepted, the extent of its contribution may not in any case be below the chosen ALOP. If an alternative measure whose contribution is below the ALOP is accepted, the WTO adjudicating body implicitly changes the chosen level of protection. As discussed above, the ALOP must not be changed by anyone else other than the member setting the ALOP, not even WTO adjudicating body. The second requirement is that, according to the jurisprudence on necessity, an alternative measure must be less trade restrictive than the contested measure. If, and only if, the proposed alternative measure fulfils these two requirements, it can be accepted. This means that comparing the contested and the alternative measure in the second step of the assessment should be easy and there is no space for WAB. On the one hand, if the contribution of the alternative measure is not able to reach the ALOP (below the ALOP), the alternative will not be accepted regardless of its restrictiveness and the contested measure will be necessary.[88] On the other hand, if its contribution is able to reach or higher than the ALOP, then the decisive factor will be its restrictiveness. If it is less restrictive than the contested measure, the alternative will be accepted and the contested measure will be unnecessary, and vice versa.

This Section has tried to elaborate the meaning of necessary measure under the SPS Agreement. It is important to note that the WTO Panel in *India — Agricultural Products* has seemingly ruled that the meaning of necessary measure under the SPS Agreement was the same as that under GATT 1994 or GATS.[89] However, this article has shown that there are some differences. The meaning under GATT 1994/GATS cannot entirely be imported into the SPS Agreement.

V. CONCLUSION

The meaning of necessary measure under the SPS Agreement has not been subject to deep scrutiny of the WTO Panels or AB, compared to that under other WTO Agreements. Meanwhile, understanding necessary measure is crucial especially because the SPS Agreement contains two

[88] *Id.*
[89] *Agricultural Products* Panel Report, *supra* note 31, ¶¶ 7.605-12.

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competing objectives: minimization of trade barriers and providing the right to protect health and life.

In understanding necessary measure in the SPS Agreement, the first question that arises is where, if any, the requirement to take only necessary measure in the SPS Agreement is found. This article has shown that it is true that the requirement is and can only be found in Article 2.2. Nevertheless, the requirement is there only if the necessity requirement thereof is understood as a requirement of necessary application that incorporates necessary measure. If the necessity requirement in Article 2.2 is understood as merely the necessity of application, it does not discipline unnecessary measures. Moreover, if it is understood as necessity of the measure, such interpretation is inconsistent with the rules on treaty interpretation.

Meanwhile, the requirement to take only necessary measures is not found in Article 2.1 of the SPS Agreement mainly because it provides a right, not obligation. It is also erroneous to say that it contains implied obligation. It basically says that members may take necessary measures if they want, but does not tell whether unnecessary measures are prohibited or not. Similarly, the requirement to take only necessary measures is not found in Article 5.6. Although that provision contains some elements of the necessity, it is narrower than necessary measure since it basically deals only with alternative measure.

After defining which provision requires members to take only necessary measures, the following question is what necessary measure under the SPS Agreement means. In defining the meaning of necessary measure, one thing that has to be noted is the fact that the SPS Agreement strongly protects the chosen ALOP. In the light of such strong protection, accompanied by the ordinary meaning of "necessary," this article has shown that there are some differences between the meaning of necessary measure under the SPS Agreement and that under GATT 1994/GATS. There are only two elements of the necessity under the SPS Agreement i.e. contribution and restrictiveness. Another element that is common under GATT 1994/GATS, the importance of value of interests, is not relevant. Inclusion of this element is not supported by the ordinary meaning of "necessary" as well as the negotiating history of the SPS Agreement. Meanwhile, the assessment of alternative measure that is also common under GATT 1994/GATS is relevant under the SPS Agreement, too. It is mainly because one of the objectives of the SPS Agreement is to minimize trade barriers.

Moreover, the WAB that is common under GATT 1994/GATS is relevant only in the first step of the necessity assessment: the assessment of the contested measure. It is relevant since there is no formula to decide whether the result of weighing the contribution against the restrictiveness

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of the contested measure amounts to a categorized-necessary measure. The WAB, however, is not relevant in the second step of the assessment: the comparison between the contested and alternative measure. It is mainly because of two absolute requirements of alternative measure: first, it has to be less trade restrictive than the contested measure and second, the extent of its contribution may not be below the chosen ALOP. If, and only if, the alternative measure meets these requirements, it can be accepted and the contested measure will be found unnecessary. Therefore, there is no space for WAB.

Some findings in this article might bring implications for the future application and enforcement of the SPS Agreement. For example, while the claimants in dispute settlement so far rely on Article 5.6 to challenge restrictiveness of SPS measures, they apparently can invoke the necessity requirement in Article 2.2, which is broader than Article 5.6. Moreover, it has to be noted that the necessity in Article 2.2 requires both necessary measure and necessary application. This means that the WTO members adopting an SPS measure have to ascertain that their measure and its application are necessary.

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