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ENVIRONMENT-RELATED CASE LAW UNDER GATT ARTICLE XX

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Ludivine Tamiotti, Counsellor
Secretary to the CTE/CTESS
Trade and Environment Division
World Trade Organization
E-mail: ludivine.tamiotti@wto.org



WORLD TRADE ORGANIZATION
ORGANISATION MONDIALE DU COMMERCE
ORGANIZACIÓN MUNDIAL DEL COMERCIO

Outline of Today's Presentation

GATT ARTICLE XX

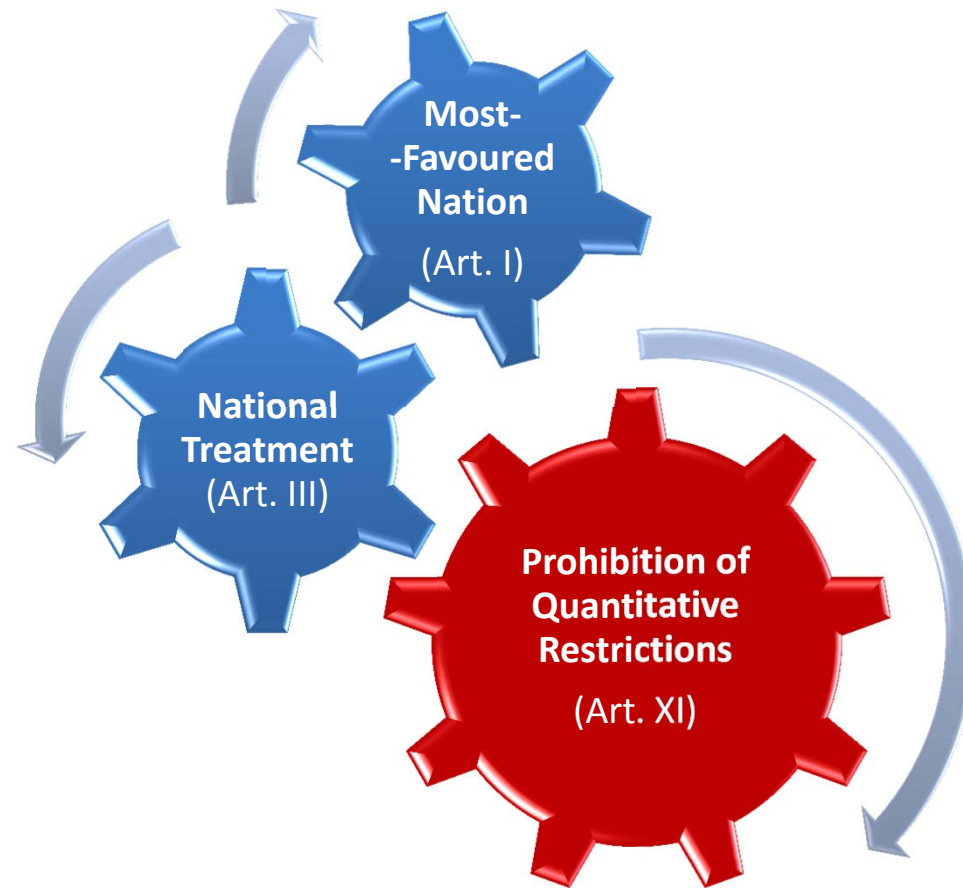
ARTICLE XX AND THE TBT AGREEMENT

GATT ARTICLE XX



WORLD TRADE
ORGANIZATION

Fundamental Principles



Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) Necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Can inconsistent measures be justified?

Inconsistency?



Right to Seek
Justification
under Art. XX

Burden of proof under GATT Article XX

Complainant

- *Prima facie* case of violation of GATT provision

Defendant

- Falls within scope of one of the subparagraphs

Complainant

- Necessity test in Article XX(b): identify less trade restrictive alternatives reasonably available

Defendant

- Meets the requirements of the chapeau

In what order should the elements of Article XX be examined?

Article XX

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(b) **Necessary** to protect *human, animal or plant life or health*;

...

(g) **relating** to the *conservation of exhaustible natural resources* if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...

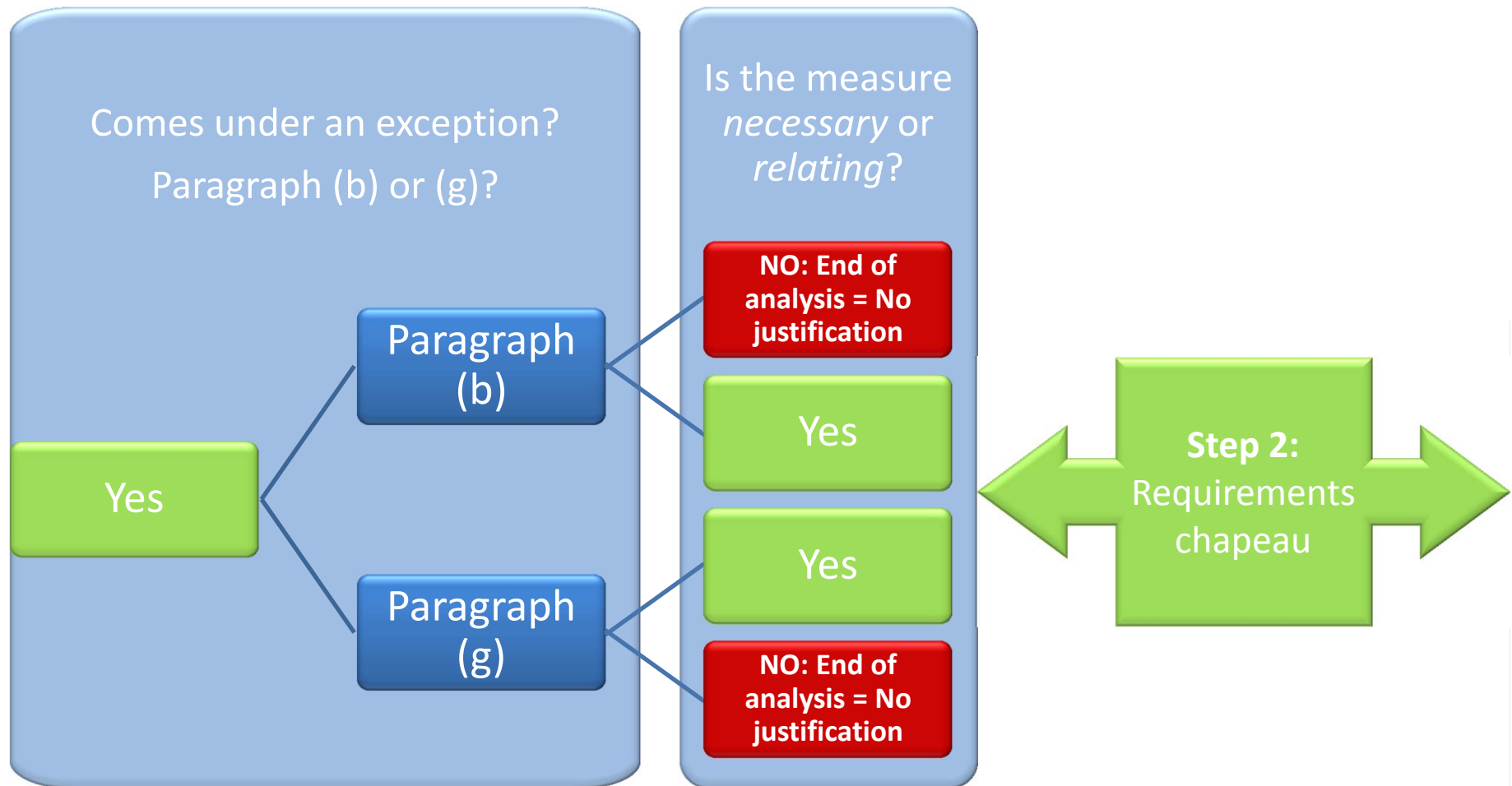


In what order should the elements of Article XX be examined?

Step 1: Is the measure covered by one of the exceptions?

Step 2: Does the measure meet the requirements of the chapeau?

Step 1: Applicability



Identification of the policy

(examples taken from GATT and WTO case law)

Paragraph b

Against the consumption of cigarettes

Protect the life and health of dolphins

Against air pollution

Reduce health risks linked to waste tyres

Against health risks linked to asbestos

Paragraph g

Conservation of tuna stocks

Conservation of salmon and herring

Conservation of dolphin stocks

Conservation of petroleum

Conservation of sea turtles

Conservation of clean air

Scope of Article XX(b)

Necessary to protect human,
animal or plant life or health



“A policy that seeks to reduce
exposure to a risk [...] insofar as the
risk exists”



Evaluation of the risk by the panel
(margin of discretion)

Scope of Article XX(g)

Conservation

The preservation of the environment, especially of natural resources

Exhaustible natural resources

Dolphins, tuna stocks, petroleum, salmon, clean air, mineral resources, sea turtles

Evolutionary v. static concept

CITES, UNCLOS, CBD

“Sufficient nexus”

Scope of Article XX(a)

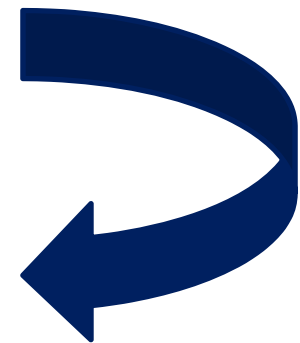
To protect public morals

Public morals =
standards of right and
wrong conduct

Content characterized by wide
degree of variation

Right to determine appropriate
level of protection

“Members may set different levels of
protection even when responding to similar
interests of moral concern”



Meaning of the phrase “to protect” under Article XX(a) and XX(b)

Article XX(b)

- May imply a particular focus on the protection from or against certain dangers or risks.
- May lend itself to scientific or other methods of enquiry

Article XX(a)

- Different subject matter
- Methods used in Article XX(b) irrelevant for identifying and assessing public morals
- No need to identify the existence of a risk.

Differences in the type of analysis

Article XX

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...

(g) **relating** to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...

(d) **necessary** to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

The necessity test

Weighing and balancing

Confirmation:
Comparison
reasonably available
alternatives

Restriction
on trade

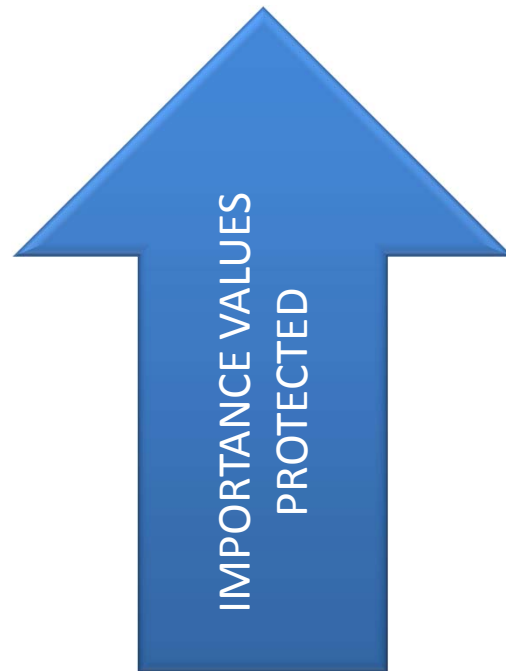
Protected
values

Contribution

“Holistic
necessity
analysis”

Protected Values

“The more *vital* or *important* [the] **common interests** or **values** are, the *easier* it would be to accept [the measure] as **'necessary'**”

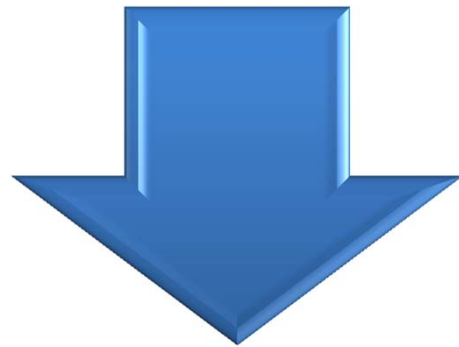


Trade Restrictiveness

The *slighter* the **trade impact**, the *more easily* the measure will be considered **necessary**



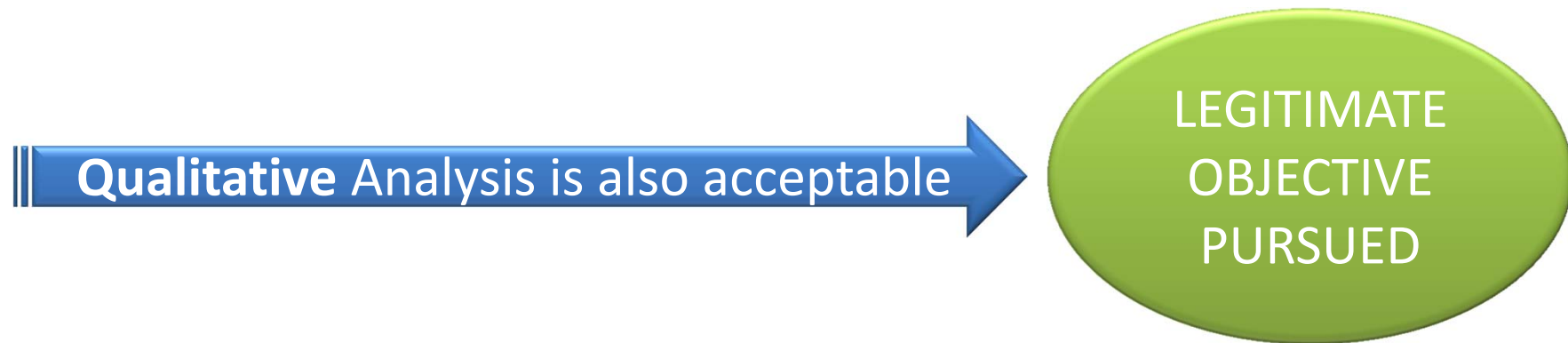
Necessary



Trade Impact

Contribution

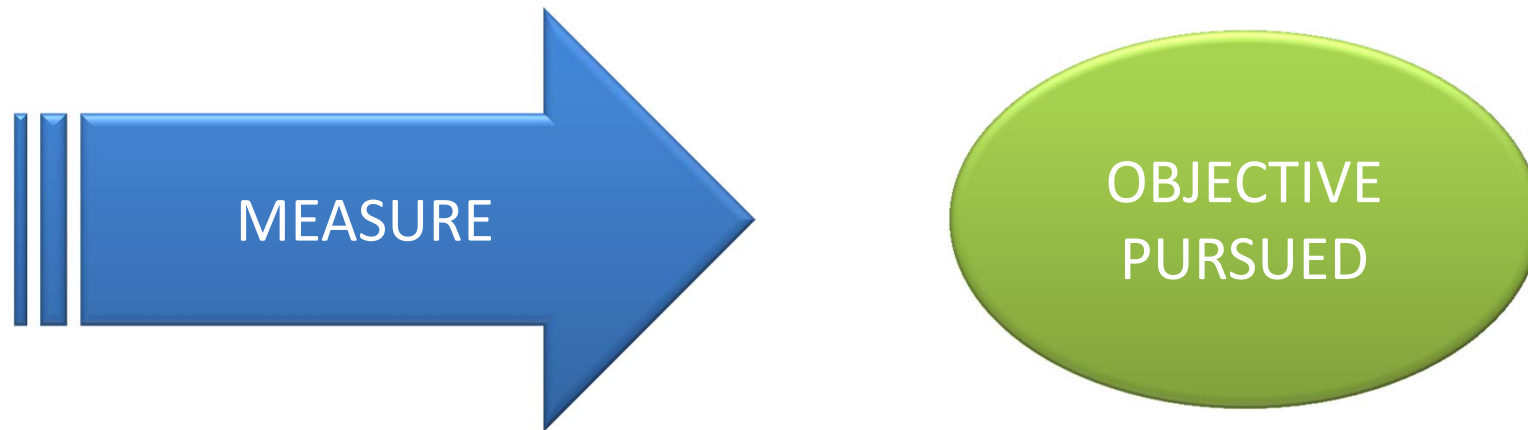
Apt to make a contribution



Quantitative analysis is *not*
indispensable

Contribution

Contribution Exists: Genuine relationship of ends and means



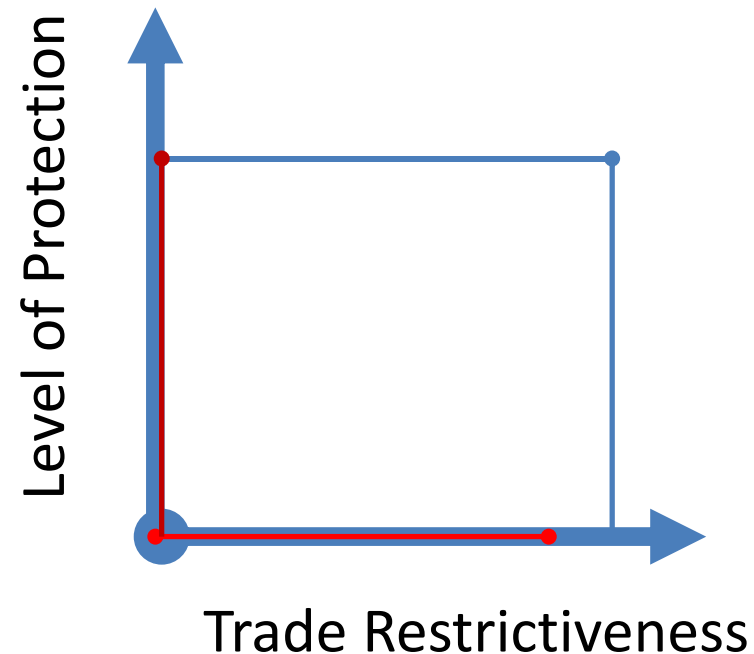
Contribution

“Certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures”.

Certain preventive actions [...] “can only be evaluated with the benefit of time”.

Alternative

Is there a **reasonably available alternative** that would achieve the **same level** of protection with **less-trade restrictive effects**?



A measure “relating to”

I.e. not merely
incidentally aimed
at the objective

Must be
primarily
aimed at
achieving the
given policy
objective



Must exhibit
a *substantial*
relationship
with the
policy
objective

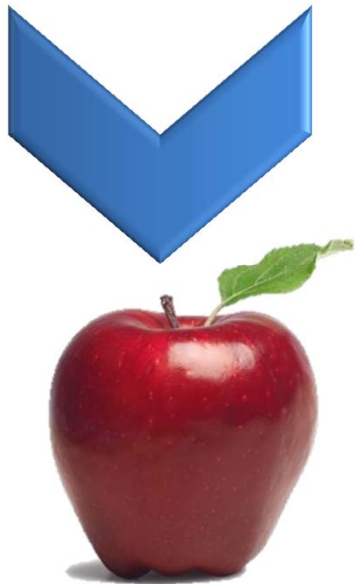


RELATING

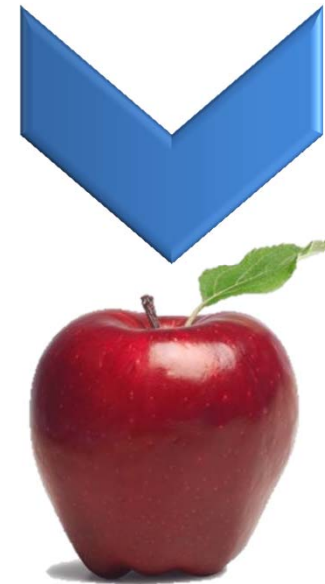
Close and genuine
relationship of
ends & means

Restrictions must *also* apply to domestic production

“Made effective in conjunction with restrictions on **domestic production or consumption**”



Imported

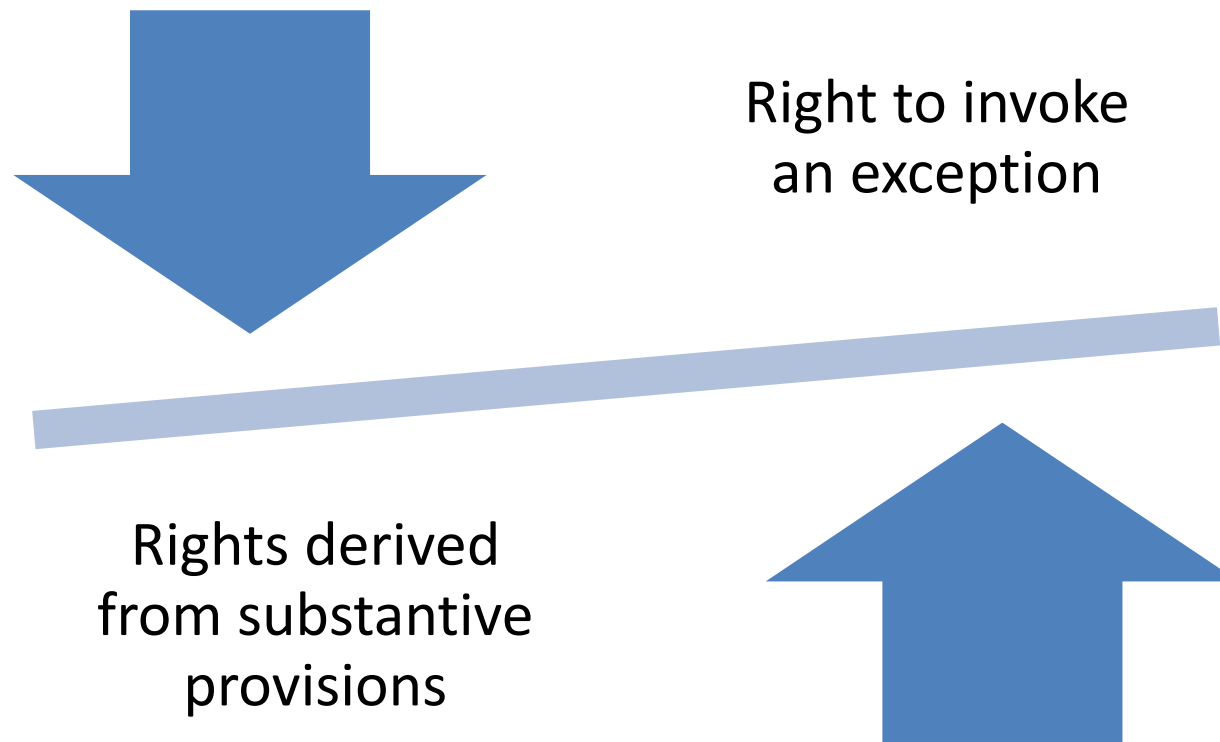


Domestically Produced

Requirement of “even-handedness” in the imposition of restrictions.

Step 2: Compliance with the *chapeau*

Objective of the *chapeau*: **balance**



The requirements of the *chapeau*

Article XX

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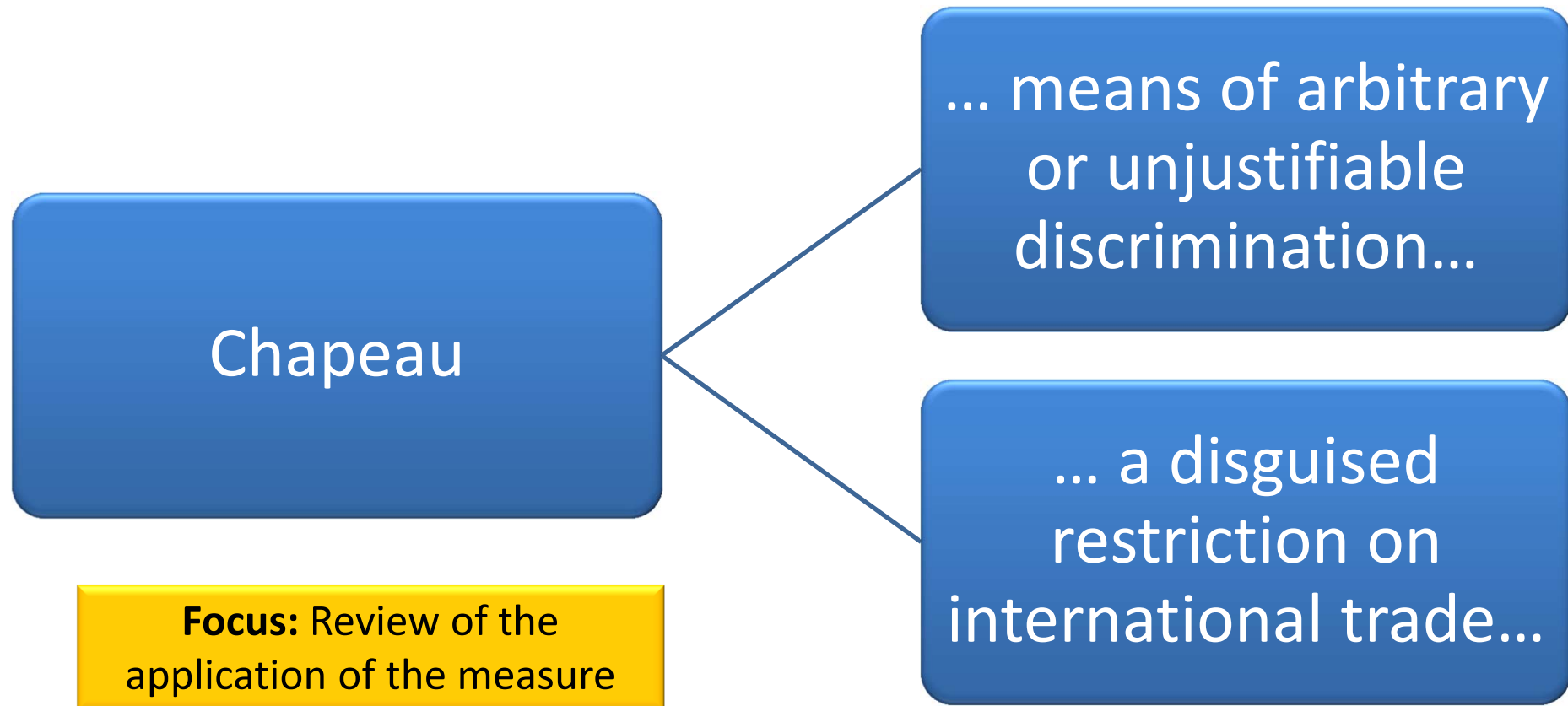
...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

The *chapeau* requirements



Different Types of Discrimination

Effective treaty interpretation: Types of discrimination cannot be the same

Discrimination
under
GATT Articles I
& III



Discrimination
under the
Chapeau
Article XX

Under the chapeau the analysis focus on
the **cause or rational for discrimination**

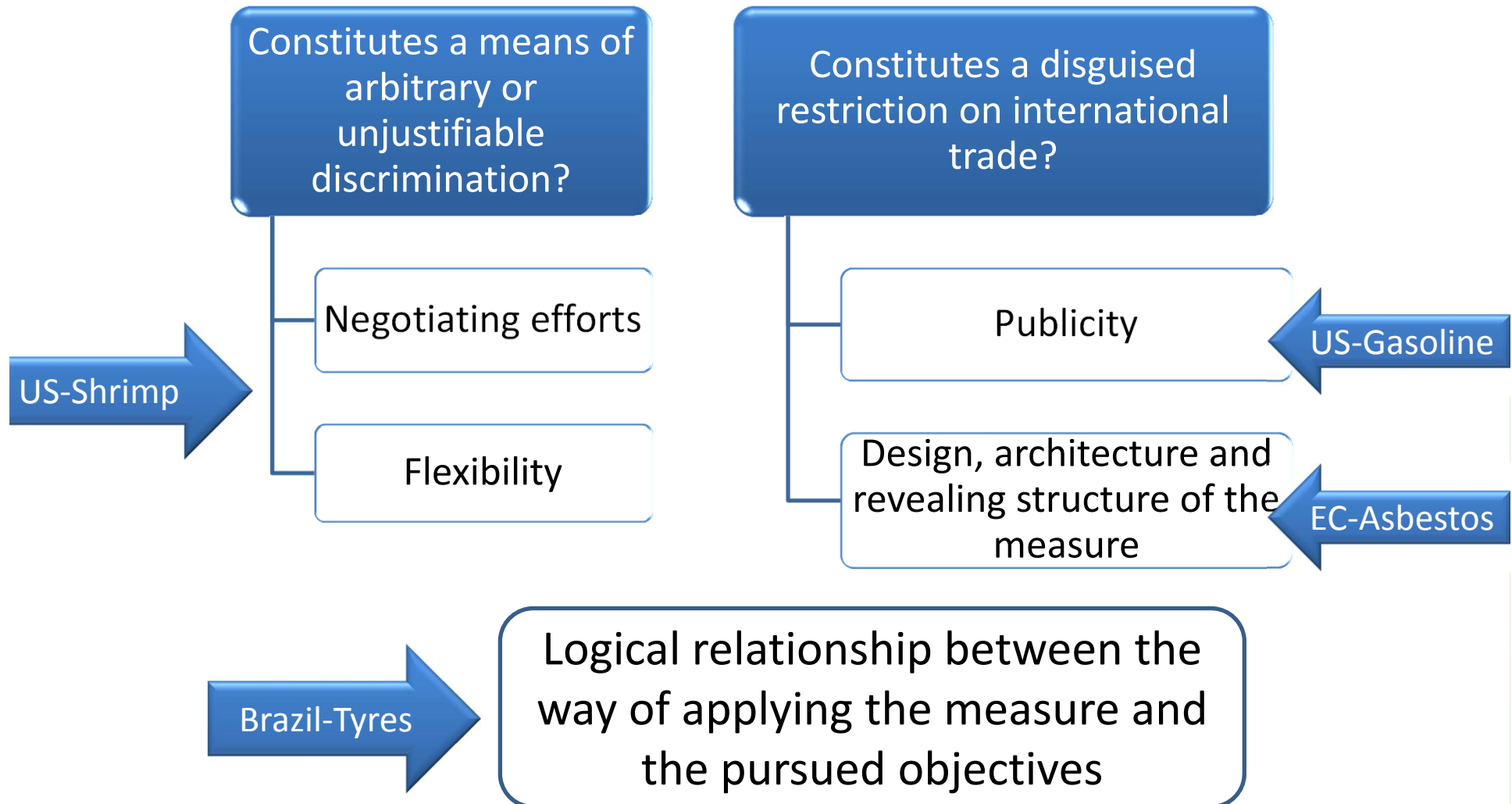
Arbitrary or Unjustifiable Discrimination

When is there **arbitrary or unjustifiable discrimination**, within the meaning of the chapeau of Article XX?

Rational justifying
discrimination
resulting from
application of the
measure

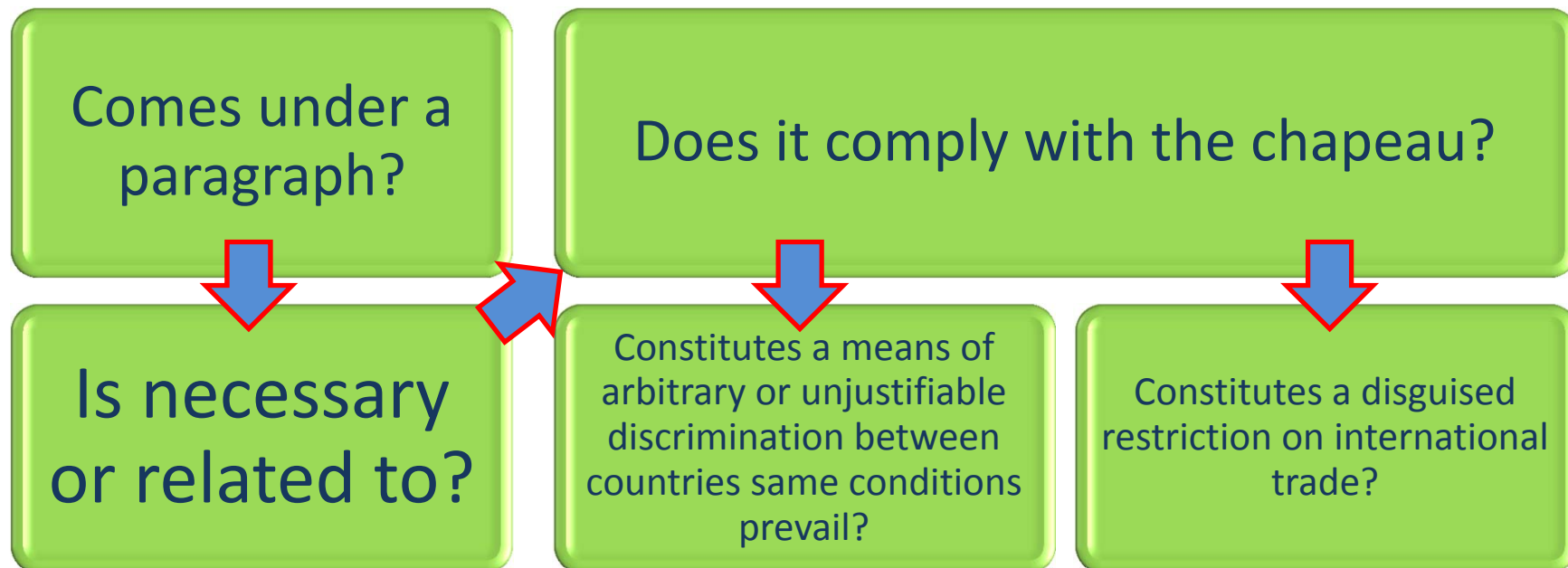
Legitimate **Objective**

Criteria for assessing compliance with the chapeau (examples taken from case law)



Conclusion

Application of Article XX



ARTICLE XX AND THE TBT AGREEMENT



WORLD TRADE
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TBT Article 2.1

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded *treatment no less favourable* than that accorded to *like products* of national origin and to like products originating in any other country.

TBT Article 2.1 and the concept of “legitimate regulatory distinction”

Detrimental impact on imports ?

«Treatment no less favourable» between like products?

And

Detrimental impact on imports stems *exclusively* from a legitimate regulatory distinction or reflect *discrimination* against the group of imported products

TBT Article 2.1 and the concept of “legitimate regulatory distinction”



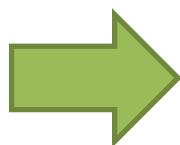
A detrimental impact on imports that stems exclusively from a legitimate regulatory distinction will not lead to a “less favourable treatment”

A panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.

TBT Article 2.1 and the concept of “legitimate regulatory distinction”

In recent TBT cases, the measures’ objectives have been found legitimate

However, the measures have been found inconsistent with Article 2.1 as their detrimental impact on imports did not stem exclusively from a legitimate regulatory distinction



Any discrimination must be justified by a « legitimate regulatory distinction »

Relevance of TBT Article 2.1 to GATT Article XX analysis

Important parallels

Both do not operate to prohibit *a priori* any obstacle to international trade

Concepts of “arbitrary or unjustifiable discrimination” and “disguised restriction on international trade” found in Chapeau and in 6th TBT recital

Significant differences

Different legal standards

Different function and scope

TBT Article 2.2

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*. For this purpose, technical regulations shall not be *more trade-restrictive than necessary to fulfil a legitimate objective*, taking account of the risks non-fulfilment would create. (...)

Avoid unnecessary obstacles to trade

Legitimate objectives

National security requirements

Protection of human health or safety

Protection of animal or plant life or health

Protection of the environment

Prevention of deceptive practices

...Inter alia...

The TBT Agreement and the right to regulate

Sixth recital

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

The TBT Agreement and the right to regulate

US – Clove Cigarettes

The sixth recital suggests that Members' right to regulate should not be constrained if the measures taken are ***necessary to fulfil certain legitimate policy objectives***, and provided that they are ***not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination*** or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an ***even handed manner*** and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.

The factors required for an evaluation of necessity under TBT Article 2.2

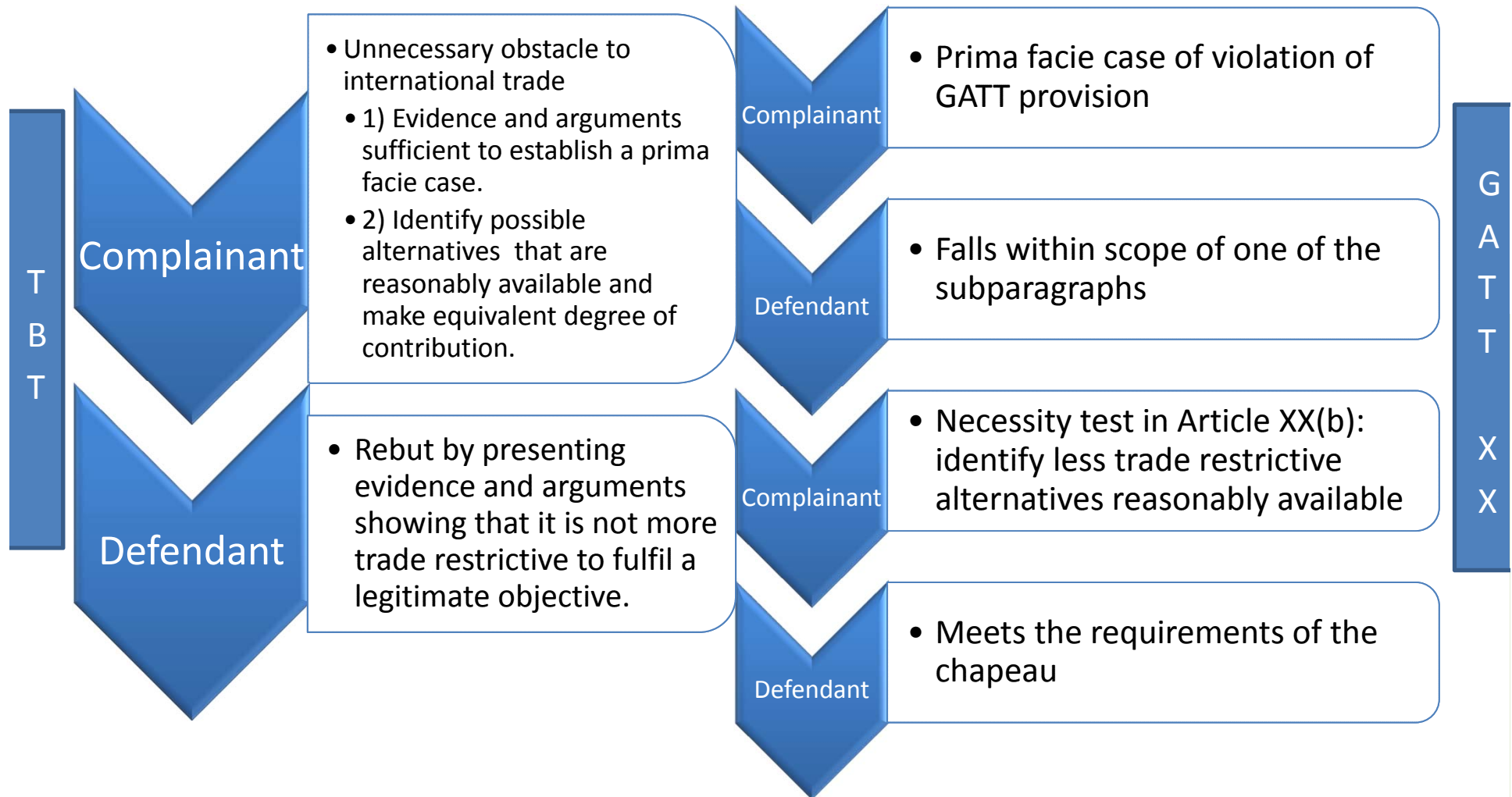
The *Degree of contribution* made by the measure to the legitimate objective at issue

The *trade-restrictiveness* of the measure

The nature of the *risks* at issue and the *gravity* of consequences that would arise from non-fulfilment of the objective(s)

The existence of a *reasonably available less trade restrictive alternative measure* that would make an equivalent contribution to the relevant legitimate objective

Burden of proof under TBT Article 2.2 and GATT Article XX



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