

GENERAL ARTICLES

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Interpreting and Applying Article XX(f) of the GATT 1994: “National Treasures” in International Trade Law

Abstract: Article XX(f) of the GATT 1994 provides WTO Members with the possibility to adopt measures, which would otherwise be inconsistent with the GATT 1994, when such measures are “imposed for the protection of national treasures of artistic, historic and archaeological value”, and when the requirements of the so-called “chapeau” of Article XX are complied with. This provision has never been tested by WTO Panels or the Appellate Body (AB), and scholarly doctrine has not been unanimous in its reading. This paper analyzes this provision, combining previous AB jurisprudence and public international law rules on treaty interpretation and application in order to elucidate the scope of this provision. It is argued, first, that certain forms of cultural expressions such as books, music, or food, even though they may be (re)produced through industrial processes, may fall under the scope of Article XX(f). Second, and most importantly, it is submitted that not all uncertainties concerning Article XX(f) can be resolved at once. This is due to the inherently fluid and ever-evolving nature of artistic, historic, and archaeological value attached to certain goods and to the need to leave enough space for crystallized rules to adapt to values which evolve over time.

Keywords: international trade, cultural heritage, World Trade Organization, Article XX(f) of the GATT 1994, general exceptions

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Introduction

The special significance attached to certain goods which feature a particular artistic, historic, archaeological, or cultural value leads countries to regulate their export and import. Trade in illicitly excavated or stolen art and heritage damages and threatens heritage protection and conservation.¹ Similarly, trade in legally obtained pieces of art and heritage, if not regulated, may deprive countries of important resources.

At the same time, the national rules regulating, controlling, and/or restricting trade in art and heritage may hamper international trade in general, and this may be inconsistent with disciplines of trade laid down by international agreements and, first and foremost, by the Covered Agreements at the World Trade Organization (WTO). This is why, in order to leave WTO Members a certain leeway to adopt measures concerning goods which feature special values, the General Agreement on Tariffs and Trade (GATT 1994)² at the WTO contains a specific provision, Article XX(f), which can be used to justify measures “[i]mposed for the protection of national treasures of artistic, historic or archaeological value” once certain conditions are complied with.

Understanding the exact meaning and scope of application of Article XX(f) is thus relevant to determining which trade-related measures touching on national treasures may be justified under this provision, and which measures would otherwise be WTO-inconsistent and thus engage the responsibility of the State.

Unfortunately, the precise scope and meaning of this provision have never been clarified in a dispute at the WTO by a Panel and/or the Appellate Body (AB). The unclear language of this provision, together with the sensitive nature of trade in national treasures, may have played an important role in this lack of case law. Given the absence of a “jurisprudential” clarification of this Article, a number of interpretative tools may be used to pinpoint its exact scope. In particular, this paper refers to well-established AB jurisprudence on Article XX in general, and public international law tools on treaty interpretation, including evolutionary interpretation and subsequent international agreements on trade and/or heritage, to relevant rules of international law and international jurisprudence. The premise of this contribution is that although one may distinguish between the interpretation and application of a treaty, interpretation and application have an “inseparable link”,³ to a point where, in practical terms, interpretation may encompass all aspects of a treaty’s application.⁴ For this reason, these two terms will sometimes be used interchangeably in this text.

¹ J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, p. 23.

² General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

³ F. Berman, *International Treaties and British Statutes*, “Statute Law Review” 2005, Vol. 26, p. 10.

⁴ S. Sur, *L’interprétation en droit international public*, “Revue Internationale de Droit Comparé” 1975, Vol. 27, p. 317.

Given the different doctrinal positions on Article XX(f), this contribution argues that the scope of this provision may be enlarged in order to cover, under certain conditions, literary expressions (such as books and magazines), music, and specific cultural expressions (such as food, beverages, and goods). This however does not dispel all the uncertainties existing vis-à-vis Article XX(f). Indeed, this study submits that there are uncertainties that are inherent to Article XX(f) and that cannot be clarified once and for all. This is related to the nature and ever-evolving concepts of artistic, historic, and archaeological “national treasures” and may even be “positive” for the multilateral trading system.

This contribution is articulated as follows. First, it will briefly address the interpretative and implementation questions arising out of the invocation of Article XX of the GATT 1994 in general. Next, it discusses more specifically the issues raised by Article XX(f). Then it focuses on how rules of treaty interpretation are applied in the context of the WTO. A discussion then follows on the possible extension of the scope of Article XX(f) of the GATT 1994 through the combined use of AB jurisprudence and international law tools on treaty interpretation. The contribution closes with concluding remarks.

Interpreting Article XX of the GATT 1994: A Comfortable Walk or a Slacklining Exercise?

The GATT 1994 can be described as an international multilateral agreement disciplining both international trade and domestic measures which range from tariffs and quotas to domestic policies which affect trade in goods.⁵ The Agreement generally provides for binding tariff levels and non-discrimination rules, together with the inapplicability of import/export quotas coupled with the possibility of contingent protection.⁶ WTO Members may nonetheless need to promote societal values and interests through measures which may violate their obligations under the GATT 1994. For this reason, the Agreement contains a number of exception provisions.⁷

As already noted, letter (f) of Article XX of the GATT 1994 allows WTO Members to adopt measures in violation of the Agreement when they are imposed for the protection of national treasures featuring an artistic, historic, or archaeological value and when these measures comply with the conditions set forth in the so-called “chapeau” of the provision. As a case in hand, measures which treat national and foreign “like” objects differently may violate the national treatment obligation under Article III of the GATT 1994, and quantitative restrictions on imports and exports, including on cultural objects, are prohibited under Article XI of the GATT 1994.

⁵ P. C. Mavroidis, *Trade in Goods*, Oxford University Press, Oxford 2012, pp. 25-26.

⁶ *Ibidem*.

⁷ P. van den Bossche, W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 4th ed., Cambridge University Press, Cambridge 2017, pp. 544-545.

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Therefore, in the event some of the measures mentioned are adopted and some WTO obligations violated thereby, Members may still invoke Article XX. Under this provision, a two-tier test has to be performed: “the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX”.⁸ And consistency with conditions set forth in the “chapeau” has proved decisive in several disputes.⁹

Importantly, the paragraphs of Article XX use a different language, requiring for instance that a measure is “necessary” to protect public morals or human, animal and plant life or health, but that it is “imposed for” the protection of national treasures. Therefore, a different kind of degree of connection between the measure and the goal pursued is required depending on the relevant paragraph.¹⁰

In addition, a debate exists over the interpretative approach to be adopted with regard to the exception provisions. GATT Article XX should be read in the light of the Agreement’s object and purpose; and the relationship between Article XX and other affirmative commitment provisions can be given meaning within this general interpretative scheme only on a case-by-case basis,¹¹ depending on the specific provisions breached in the first place. Indeed, the Appellate Body has stressed that an exception is based on a treaty provision, which should be interpreted in accordance with its terms, context, and in light of the object and purpose of the treaty – which are the ordinary rules of treaty interpretation.¹² Also, the AB has repeatedly recognized that the exceptions in Article XX of the GATT 1994 embody domestic policies regarded as important and legitimate in character.¹³ In particular, in *US – Shrimp* the AB, after recalling that there are some binding principles of interpretation that panels should abide by,¹⁴ emphasized that GATT Article XX(g) must be read “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment”, a legitimate goal of national and international policy.¹⁵

These general remarks on Article XX and the interpretative approaches to be adopted to apply it show that a case-by-case analysis, which takes into account the nature and design of the measure at stake, has to be favoured. No narrow interpre-

⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996 (“Standards for Gasoline”), p. 22.

⁹ L. Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, “American Journal of International Law” 2015, Vol. 109, pp. 95-96.

¹⁰ *Standards for Gasoline*, pp. 17-18.

¹¹ *Ibidem*, p. 18.

¹² Appellate Body Report, *United States – Measures Affecting the Cross-Border Supplying of Gambling and Betting Services*, WT/DS285/AB/R, adopted on 20 April 2005, para. 291.

¹³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, para. 121.

¹⁴ *Ibidem*.

¹⁵ *Ibidem*, para. 129.

tation or application should be favoured simply because Article XX is an exception provision, and due regard should be given to the WTO Member’s underlying conditions. Furthermore, while there are a number of common observations that apply to all specific exceptions contained in Article XX, relevant differences exist among them and deserve specific consideration. This is key to elucidating the questions raised by Article XX(f) in the next section.

The Questions Raised by Article XX(f) of the GATT 1994

Using a magnifying lens, it is possible to assert that almost all terms used in Article XX(f) raise questions: “protection”, “national”, “treasure”, and “artistic, historic or archaeological value”. All these terms present interpretative and application issues. Although theoretically one may distinguish all these terms and perform a separate analysis of each one of them, the meaning of the entire provision comes out of a holistic approach.

While an analysis of the “chapeau” of Article XX falls outside the scope of this paper, it is nonetheless worth recalling that the chapeau clause of Article XX was inserted to prevent any measure which is, in reality, an indirect trade protection measure from being justified under the subparagraphs of Article XX.¹⁶ In other words, it is designed to prevent abuses of the general exceptions provisions,¹⁷ an issue of significant importance in the case of culture-related trade measures.

Leaving aside the “chapeau” of Article XX and the term “imposed for”, which refers to the adoption and implementation of a measure and which may signal the trade-conflicting nature of the relevant measure(s), the first question concerns the exact meaning and scope of “protection”. In the context of international trade law, protection has a very specific meaning, referring to restrictions on trade as opposed to trade liberalization.¹⁸ It thus seems legitimate to wonder whether “protection” in the context of Article XX(f) means the same thing and applies to the same types of measures restricting trade, such as tariffs and non-tariff barriers. Unfortunately, this question is left unanswered and neither Article XX, nor the GATT 1994, nor other Covered Agreements provide any assistance in this regard.

“National treasures” is the element of the provision which has certainly commanded the most attention in the scholarly doctrine. It is, however, worth noting that the term “national treasures” does not mean anything specific, nor can it be successfully applied if not coupled with the qualifying adjectives, i.e. of “artistic, historic or archaeological value”, as is stipulated in Article XX(f). In this sense, these adjectives inform the expression “national treasures” and have to be assessed

¹⁶ A. Porges, F. Weiss, P. C. Mavroidis, *Guide to GATT Law and Practice: Analytical Index*, 6th ed., General Agreement on Tariffs and Trade, Geneva 1994, p. 563.

¹⁷ *Ibidem*, p. 564.

¹⁸ J. N. Bhagwati, *Protectionism*, The MIT Press, Cambridge, MA – London 2000, pp. 3-15.

together. Some scholars have highlighted that this provision has been the subject of only limited analysis,¹⁹ while others have pointed out that it does not “refer to the broad notions of ‘cultural property’ or ‘cultural heritage’” but to a more restrictive concept.²⁰ Following this line of thinking, it has been stressed that Article XX(f) does not resolve the problematic relation between trade liberalization and the protection of culture, with specific regard to the complex legal nature of cultural “services” and “industries”, which include television and cinema.²¹ This idea is further supported by the lack of a paragraph addressing national treasures, cultural heritage, or culture in the general exceptions provision of the General Agreement on Trade in Services (GATS).²² This is all the more relevant bearing in mind that the GATS general exceptions provision follows the model of Article XX of the GATT 1994.²³

As a result, the doctrinal spectrum of views is very wide and varied. Some scholars seem to have adopted middle course solutions, including “discrete items of cultural property” under the scope of Article XX(f) but excluding culture in general.²⁴ Since Article XX(f) does not mention “cultural value [...] this concept is covered only to the extent that it is coextensive with ‘artistic, historic or archaeological value’”, and current audiovisual products could be excluded from the scope of the provision.²⁵ At the other extreme of this doctrinal spectrum, it has been eminently argued that, through evolutionary interpretation instruments, the provision may be interpreted in a broader and more contemporary manner to include “mundane” cultural goods such as works of poetry, art movies, and music, which are threatened by globalization.²⁶

In order to fully appreciate the debate above, it is worth mentioning that although the general exceptions provision of the GATS does not make reference to “national treasures”, thus apparently excluding cultural industries from the scope

¹⁹ J. A. R. Nafziger, R. Kirkwood Paterson, A. Dundes Renteln, *Cultural Law: International, Comparative and Indigenous*, Cambridge University Press, Cambridge 2010, p. 299.

²⁰ A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, Oxford 2014, p. 83.

²¹ F. Francioni, *The Evolving Framework for the Protection of Cultural Heritage in International Law*, in: S. Borrelli, F. Lenzerini (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, Brill/Nijhoff, Leiden – Boston 2012, p. 24.

²² General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183.

²³ T. Cottier, P. Delimatsis, N. F. Diebold, *Article XIV GATS: General Exceptions*, in: R. Wolfrum, P.-T. Stoll, C. Feinäugle (eds.), *Max Planck Commentaries on World Trade Law, WTO – Trade in Services*, Vol. VI, Martinus Nijhoff, Leiden – Boston 2008, pp. 287-328.

²⁴ C. Carmody, *When “Cultural Identity was not an Issue”: Thinking About Canada – Certain Measures Concerning Periodicals*, “Law and Policy of International Business” 1999, Vol. 30, p. 256.

²⁵ T. Voon, *A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS*, “UCLA Entertainment Law Review” 2007, Vol. 14, p. 13.

²⁶ P. van den Bossche, *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures*, “Maastricht Faculty of Law Working Paper” No. 2007-4, pp. 53-55, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=979530 [accessed: 1.10.2019].

of this provision, the nature of cultural goods such as books and magazines is mixed. In fact books and magazines feature elements of both goods and services.²⁷ Therefore, Article XX of the GATT 1994 may still be applied in cases concerning them. This would not exclude, however, the possibility to find a violation of obligations stemming from the GATS which, as noted, lacks an Article XX-identical general exceptions provision on national treasures.

Recourse to the negotiating history of the GATT 1994 and the GATT 1947 provides only limited assistance. Article 32(i) of the 1946 United States Draft International Trade Organization Charter already contained an exception provision relating to national treasures featuring the same wording as Article XX(f) of the GATT 1994.²⁸ Article 32(i) was very similar to Article 4(5) of the 1927 Convention on the Abolition of Import and Export Prohibitions and Restrictions.²⁹ This latter provision was, however, a bit more specific in its drafting as it referred to “export prohibitions or restrictions issued for the protection of national treasures of artistic, historic and archaeological value”. The 1927 Convention formed a basis for later multilateral trade negotiations.³⁰ This proves not only that international trade law has always recognized the legitimacy of goals such as the protection of national treasures,³¹ but also that the provisions preceding Article XX(f) were not clearer nor more detailed than this latter Article itself.

This wide spectrum of views on Article XX(f) testifies to the difficulty in addressing the questions raised by this provision. Nonetheless, this contribution argues below that the better view is to consider the provision as broader and more contemporary in character, as has been argued by other scholars. In addition to this, it is submitted that not only is it difficult to find satisfactory answers to these questions once and for all, but that this would not even be useful. On one hand, the term “national treasure” constantly evolves. On the other hand, the need to preserve the functioning of the multilateral trading system, and concurrently maintain a space for measures aimed at protecting “national treasures”, requires a certain level of vagueness. The alternatives of either explicitly excluding cultural objects from the application of the multilateral trading system rules, or including in the

²⁷ Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted on 19 January 2010 (as modified by the Appellate Body Report), paras. 7.496-7.500; Panel Report, *Canada - Certain Measures Concerning Periodicals*, WT/DS31/R, adopted on 30 July 1997 (as modified by the Appellate Body Report), para. 3.33.

²⁸ Suggested Charter for an International Trade Organization of the United Nations, Department of State (United States of America), Publication 2598, Commercial Policy Series 93.

²⁹ 8 November 1927, 46 Stat. 2461, Treaty Series 811.

³⁰ F. Ortino, *Liberalization of Trade in Goods in the EEC: Origin and Early Evolution*, in: M. Cremona et al. (eds.), *Reflections on the Constitutionalisation of International Economic Law - Liber Amicorum for Ernst-Ulrich Petersmann*, Martinus Nijhoff, Leiden - Boston 2014, p. 9.

³¹ P. Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, “American University International Law Review” 1999, Vol. 14, p. 1136.

system a clear exception or exemption may create problems, since “an almost unlimited range of products” may be considered cultural expressions.³² Nevertheless, in order to respond to the questions raised by Article XX(f), one has to identify the tools and techniques applicable to this provision. This has to be done with specific regard to the nature of WTO law. The following section explores this point.

WTO Agreements and International Rules on Treaty Interpretation (and Application)

It is universally accepted that WTO law is a branch of public international law.³³ As a consequence, the general rules of public international law apply in the context of the WTO. And these rules include customary rules of treaty interpretation, to which Article 3.2 of the Dispute Settlement Understanding (DSU) makes specific reference.

As stated by the AB itself, Article 3.2 DSU provides for directions which reflect “a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law”.³⁴ And the customary rules of interpretation of public international law Article 3.2 DSU refers to are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”).³⁵

Article 31 of the Vienna Convention famously requires that treaty interpretation be conducted in good faith, looking at the ordinary meaning of terms in their context and in light of the object and purpose of the relevant treaty. The provision

³² T. Voon, *UNESCO and the WTO: A Clash of Cultures?*, “International and Comparative Law Quarterly” 2006, Vol. 55, p. 639.

³³ J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, “American Journal of International Law” 2001, Vol. 95, p. 538.

³⁴ Standards for Gasoline, p. 17.

³⁵ 23 May 1969, UNTS 1155, p. 331; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, ICJ Reports, 2016, p. 3, para. 35; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, ICJ Reports, 2015, p. 3, para. 138; *Maritime Dispute (Peru v. Chile)*, Judgment of 27 January 2014, ICJ Reports, 2014, p. 3, para. 57; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, ICJ Reports, 2009, p. 213, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports, 2007, p. 43, para. 160; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, ICJ Reports, 2002, p. 625, para. 37; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, ICJ Reports, 1999, p. 1045, para. 18; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, ICJ Reports, 1994, p. 6, paras. 38-42; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, ICJ Reports, 1991, p. 53, para. 48; Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted on 13 June 2012 (as modified by the Appellate Body Report), para. 7.51; *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports, 2011, p. 10, para. 37; *Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, 27 RIAA 35, para. 45.

clarifies that “context” includes, in addition to the text of the relevant treaty, its preamble, its annexes, and also, where relevant, 1) subsequent or connected agreements or instruments; ii) subsequent practices in the application of the treaty establishing an agreement between the parties concerning the interpretation of the treaty; and iii) relevant rules of international law. Still, even following the interpretative steps identified in Article 31, the meaning of a term may still be ambiguous or obscure or the result of its application absurd or unreasonable. This possibility is explicitly foreseen by Article 32, which clarifies that in these latter cases, recourse may be had to preparatory works and the circumstances of conclusion of a treaty as supplementary means of interpretation.

The variety of elements referred to by the Vienna Convention rules on treaty interpretation makes it possible for them to be used in different contexts and even to support conflicting arguments. In either case, the rules on treaty interpretation undoubtedly can be used to strengthen the persuasiveness of legal arguments.³⁶ Therefore, one should have recourse to these rules bearing in mind that they “are not a set of simple precepts that can be applied to produce a scientifically verifiable result”.³⁷

In the context of the WTO, the customary rules on treaty interpretation have been regarded as principles rather than rules, with the result that although they are commonly referred to, their application has produced, at times, divergent outcomes.³⁸ More specifically, the AB has had the occasion to refer to a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.³⁹ Subsequent agreements, however, seem to provide only limited help for the questions discussed here. Indeed, the AB has been very cautious on this point. In *US – Tuna II (Mexico)*, the AB concluded that a Decision of the Technical Barriers to Trade (TBT) Committee on Principles for the Development of International Standards could be considered, pursuant to Article 31(3)(a) of the Vienna Convention, a “subsequent agreement” in relation to the TBT Agreement.⁴⁰ But the AB clarified that “[t]he extent to which this decision will inform the interpretation and application of a term or provision of the TBT Agreement in a specific case, however, will depend on the degree to which it ‘bears specifically’ on the interpretation and application of the respective term or provision”.⁴¹ On the other

³⁶ A. Bianchi, *The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle*, in: A. Bianchi, D. Peat, M. Windsor (eds.), *Interpretation in International Law*, Oxford University Press, Oxford 2015, p. 44.

³⁷ R. Gardiner, *Treaty Interpretation*, Oxford University Press, Oxford 2015, p. 7.

³⁸ I. Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, Oxford 2009, p. 56.

³⁹ Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted on 24 April 2012, paras. 258-269.

⁴⁰ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna-Products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted on 13 June 2012, paras. 371-379.

⁴¹ *Ibidem*, para. 372.

hand, subsequent practice and relevant rules of international law (Article 31(3)(c)) may have a more significant role to play.

In order to be relevant, subsequent practice has to be concordant, common, and consistent; does not need to have a specific form (national legislation nonetheless being particularly relevant); and although it must fall under the scope of application of the relevant treaty, it only has to relate to the treaty as a whole.⁴² Subsequent practice may not only have an interpretative value, but may also alter “the legal relations between the parties established by the treaty in question”.⁴³ Some international tribunals have gone so far as to assert that, if the parties so agree, subsequent practice in the application of a treaty may override the terms of the treaty.⁴⁴ The International Court of Justice (ICJ) has not hesitated to refer to States’ national legislation as state practice in order to clarify the meaning of undefined treaty terms.⁴⁵ However, some scholars have warned that the WTO AB tends to limit or exclude the relevance of subsequent practice (and, as pointed out, subsequent agreements) to interpret WTO Agreements.⁴⁶ Although an assessment of virtually all WTO Members’ legislation would be required to support an incontrovertible view on what WTO Members intend by the term “national treasures”, as further discussed in the next section of this contribution national laws could be referred to in order to support the view that the uncertainties in the interpretation and application of the term “national treasures” are inherent to this very same concept.

With respect to Article 31(3)(c) of the Vienna Convention, a detailed account of the relevance of this provision in international law falls outside the scope of this paper, and treatises have been written about it.⁴⁷ Here, it seems sufficient to point out that the provision establishes the general principle of “systemic integration” in international law, according to which treaties exist and operate within the international legal system and have to be interpreted and applied in accordance with the general principles of international law.⁴⁸ Even in the context of the WTO it appears reasonable to consider that “general international law supplements WTO law

⁴² O. Dörr, *Article 31. General Rule of Interpretation*, in: O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer Verlag, Berlin – Heidelberg 2012, pp. 595-603.

⁴³ M. Shaw, *International Law*, Cambridge University Press, Cambridge 2017, p. 708.

⁴⁴ European Court of Justice, *Joined Cases C-464/13 and C-465/13 Europäisches Schulle München v. Silvana Oberto and Barbara O’Leary* [2015], ECLI:EU:C:2015:163, para. 61.

⁴⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports, 1996, p. 226, paras. 55-56.

⁴⁶ G. Nolte, *Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body*, in: E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford 2011, pp. 140-141.

⁴⁷ E.g. D. Rosentreter, *Article 31 (3) (c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration*, Nomos, Luxembourg 2015.

⁴⁸ C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, “The International and Comparative Law Quarterly” 2005, Vol. 54, p. 288, also quoting A. McNair, *The Law of Treaties*, Oxford University Press, Oxford 1961, p. 466.

unless it has been specifically excluded, as do other treaties which should, preferably, be read in harmony with the WTO covered treaties”.⁴⁹ Hence, clearly the rules apply not only with regard to WTO law, but also with respect to other treaties and their connection with the WTO. At the WTO, the AB has paid attention, for example, to other norms of international law when defining “exhaustible natural resources”. It has been argued that the AB did this because the norms referred to in trade/environment disputes “cannot simply be those that pertain to the trade regime but must include in the relevant meaning of ‘international community’ environmental interests and constituencies”.⁵⁰ Echoing this statement, some commentators have maintained that the application of Article 31(3)(c) of the Vienna Convention in light of the presumption against conflicts between international treaties means that “where a measure is implemented pursuant to an international treaty, that measure should be presumed to be compliant with the WTO-covered agreements”.⁵¹

But the relevance of Article 31(3)(c) of the Vienna Convention goes even beyond the idea of systemic integration. Although Articles 31 and 32 are silent on the temporal dimension of treaty interpretation,⁵² it has been eminently stressed that Article 31(3)(c) subsumes the principle of evolutionary interpretation.⁵³ This principle, which is widely used by international courts and tribunals, should help promote coherence in international law.⁵⁴ According to the principle of evolutionary interpretation, “[a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”.⁵⁵ The premise underlying this approach is the presumption that when parties use generic terms in a treaty, they intend for those terms to have an evolving meaning.⁵⁶

⁴⁹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, Fifty-Eight Session, Geneva, 1 May - 9 June and 3 July - 11 August 2006, para. 169, http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf [accessed: 1.10.2019].

⁵⁰ R. Howse, *The Use and Abuse of Other “Relevant Rules of International Law” in Treaty Interpretation: Insights from WTO Trade/Environment Litigation*, “NYU Law IILJ Working Paper” 2007/1, pp. 16-17, <http://iilj.org/wp-content/uploads/2016/08/Howse-The-use-and-abuse-of-other-relevant-rules-of-international-law-in-treaty-interpretation-2007-1.pdf> [accessed: 1.10.2019].

⁵¹ B. McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet*, Cambridge University Press, Cambridge 2011, p. 46.

⁵² P.-M. Dupuy, *The Law of Treaties Beyond the Vienna Convention*, in: E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford 2011, pp. 126-127.

⁵³ G. Z. Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between WTO Agreement and MEAs and Other Treaties*, “Journal of World Trade” 2001, Vol. 36(6), pp. 1088-1090.

⁵⁴ G. Z. Marceau, *WTO Dispute Settlement and Human Rights*, “European Journal of International Law” 2002, Vol. 13, pp. 785-786.

⁵⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports, 1971, p. 16, para. 53.

⁵⁶ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, op. cit., para. 66; see also *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, ICJ Reports, 1978, p. 32, para. 77.

Yet treaty interpretation or application is not an easy exercise in general, including of course in the case of WTO law. The interpretative tools available are many and may prove decisive, depending on the specific treaty provision at stake and the circumstances of each case. Since however, as mentioned, no specific dispute has emerged yet with regard to Article XX(f) of the GATT 1994, the next section builds upon the observations of this section to analyse Article XX(f) and try to pinpoint its scope of application.

Enlarging the Scope of Article XX(f) of the GATT 1994?

As already noted, the discussion regarding the possibility to enlarge the scope of Article XX(f) of the GATT 1994 has to proceed carefully, through an analysis of the terms used in this provision. It is worth bearing in mind that it refers to measures “imposed for the protection of national treasures of artistic, historic or archaeological value”.

The term “protection” is the first one presenting interpretive challenges in Article XX(f). As noted above, each subparagraph of Article XX uses a different terminology, according to which different degrees of connection or relationship are required. Article XX(f) does not explain what “protection” means. And “protection” in international trade law echoes the term “protectionism”, which generally has a pejorative sense and refers to any measure or policy instruments used by governments to protect domestic firms against foreign competition.⁵⁷ In the case of “national treasure”, the meaning of the word cannot be the same. Unfortunately, it is difficult to draw conclusions based on the language used in other international instruments on culture. As noted, although the connection between a measure and the protection of “national treasures” has to be very strong under paragraph (f), it is submitted here that “protection” may still have a broad meaning, thus justifying measures adopted both to protect (i.e. preserve) certain national treasures, as well as measures adopted to restrict trade in, and even prevent the export of, national treasures. Indeed, as previously noted Article XX(f) adopts a slightly more general wording than one of its predecessors, i.e. Article 4(5) of the 1927 Convention on the Abolition of Import and Export Prohibitions and Restrictions.⁵⁸

The second term which requires elucidation is the adjective “national”. In order to fully understand the relevance of this qualifier, as already noted it is necessary to perform a holistic analysis of the entire wording of this provision “national treasures of artistic, historic or archaeological value”, as these terms can be given significance only if they are read together.

The word “national” may refer not only to cultural heritage (*rectius*, “treasures”) which has originated in the territory of the country, but also to objects which are considered to pertain to the national cultural patrimony. In this regard, museum

⁵⁷ A. O. Sykes, *Regulatory Protectionism and the Law of International Trade*, “The University of Chicago Law Review” 1999, Vol. 66.

⁵⁸ See footnote 29.

heritage, though mainly composed of pieces coming from different countries, is commonly considered as part of national cultural heritage. And indeed, Article 4 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property refers to both “[c]ultural property created by the individual or collective genius of nationals of the State concerned” and to “cultural property found within the national territory” and acquired through missions with the consent of the relevant authority, freely exchanged, legally purchased, or received as a gift.⁵⁹ *Beyeler v. Italy*⁶⁰ may serve as a case in point. It concerned a painting by Van Gogh, a Dutch artist, painted while in France but owned by an Italian collector, who had been refused an export license. The applicability of Italian Law no. 1089 of 1 June 1939⁶¹ was not at issue, nor was it challenged or discussed. According to that law, public authorities could refuse the possibility to sell a good which features an artistic or historic interest for the national heritage,⁶² and its geographical origin or the nationality of the artist is not considered a relevant element for this qualification. Somewhat similarly, the national laws on cultural heritage cited later in this paper do not refer either to the geographical origin of the goods, except in certain specific cases.

This nonetheless leaves open several seminal questions regarding “treasures with an artistic, historic or archaeological value”. The first aspect to be noted with respect to this part of Article XX(f) is that it recalls the never-ending debate regarding definitional issues in cultural heritage law. Broadly speaking, and according to some authors, cultural heritage encompasses every manifestation of the culture of human beings,⁶³ and can be almost anything man-made or given value by man.⁶⁴ In a narrower sense, it covers (“cultural”) tangible or material objects and intangible or immaterial ideas related to such objects.⁶⁵ The issue of a clear definition of “cultural heritage” is not a theoretical one. In order to determine the precise scope of application of (national and) international law on cultural heritage, accurate definitions are needed.⁶⁶ International legal instruments on cultural heritage contain

⁵⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231 (“1970 UNESCO Convention”).

⁶⁰ European Court of Human Rights, *Beyeler v. Italy*, Application No. 33202/96, Judgment of 5 January 2000.

⁶¹ *Legge 1 giugno 1939, n. 1089 Tutela delle cose d'interesse artistico o storico* [Law no. 1089 of 1 June 1939 on the protection of objects of artistic or historic interest], *Gazzetta Ufficiale* No. 184, 8 August 1939.

⁶² *Ibidem*, Articles 26, 35, and 54.

⁶³ J. A. R. Nafziger, *Cultural Heritage Law: The International Regime – Report of the Director of Studies*, in: J. A. R. Nafziger, T. Scovazzi (eds.), *Le patrimoine culturel de l'humanité / The Cultural Heritage of Humanity*, Centre for Studies and Research in International Law and International Relations; Académie de droit international de La Haye, Leiden – Boston 2008, p. 145.

⁶⁴ C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London 2010, p. 2.

⁶⁵ *Ibidem*.

⁶⁶ M. Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, “International Review of the Red Cross” 2004, No. 854, p. 367, <https://www.icrc.org/en/international-review/article/cultural-property-v-cultural-heritage-battle-concepts-international-law> [accessed: 1.10.2019].

slightly different definitions and concepts: besides “cultural heritage”, they refer to “cultural property”,⁶⁷ “cultural patrimony”,⁶⁸ or “cultural objects”.⁶⁹ Some scholars have analysed the “linguistic” dimension of these different terms and concluded that each language appears to privilege a specific word and meaning.⁷⁰ Others have clearly taken a position in favour of the term “cultural heritage” as preferred over “cultural property”, due to its broader scope.⁷¹ To avoid these “*embarras terminologiques*”, critics have classified these differences as the result of a simple, haphazard coincidence.⁷² With specific regard to the 1972 World Heritage Convention and its definition of cultural heritage of “outstanding universal value”, it has been stressed that the lack of a precise definition gives some flexibility as regards the type of cultural heritage to be included in the World Heritage List under this Convention.⁷³ This latter view could perhaps be extended to other conventions on cultural heritage: the integration of these different terms could make the scope of international cultural heritage law wider and more flexible overall. Similarly, here it is argued that the use of the expression “national treasures” adds some flexibility in the context of international trade law and fulfils the specific needs of the multilateral trading system, i.e. preserving a space for Members to protect their “national treasures” while concurrently safeguarding the multilateral trading system.

It is also worth mentioning that the European Union (EU) has used the same wording of Article XX(f) in the Treaty on the Functioning of the European Union. This latter treaty states that the provisions on quantitative restrictions on imports and exports and all measures having an equivalent effect shall be prohibited between EU Member States, with the exception of imports and exports of goods justified, among others, on grounds of the “protection of national treasures possessing artistic, historic or archaeological values”.⁷⁴ Eminent scholars have suggested that the concept of “treasures” does not overlap with the generality of cultural goods, but constitutes a narrower category of goods which present an “indissoluble link

⁶⁷ E.g. the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 215, and the 1970 UNESCO Convention.

⁶⁸ E.g. Article 9 of the 1970 UNESCO Convention.

⁶⁹ E.g. the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.

⁷⁰ M. Frigo et al., *Dictionnaire comparé du droit du patrimoine culturel*, CNRS Éditions, Paris 2012.

⁷¹ L. V. Prott, P. J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, “International Journal of Cultural Property” 1992, Vol. 1, p. 311.

⁷² T. Scovazzi, *La notion de patrimoine culturel de l’humanité dans les instruments internationaux – Rapport du directeur d’études de la section de langue française du Centre*, in: J. A. R. Nafziger, T. Scovazzi (eds.), *Le patrimoine culturel de l’humanité / The Cultural Heritage of Humanity*, Centre for Studies and Research in International Law and International Relations; Académie de droit international de La Haye, Leiden – Boston 2008, pp. 14-15.

⁷³ S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value – Value-Based Analyses of the World Heritage and Intangible Cultural Heritage Conventions*, Altamira Press, Lanham, MD 2013, p. 28.

⁷⁴ Article 36 (former Article 30 TEC) of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47.

with the cultural history of a specific country, however widely defined”.⁷⁵ The corollary of this view would be that a treasure has to have a strong link with the “geographical” territory of the country it is located in. Somewhat similarly, other commentators have adopted a narrower view, highlighting that “il ne s’agit donc pas de préserver la plus ou moins grande richesse d’un patrimoine artistique, mais bien d’en sauvegarder les éléments essentiels et fondamentaux”.⁷⁶ On the other hand, in comparing the concept of “treasures” with the concept of “cultural property” under the 1970 UNESCO Convention, some authors have taken the mixed view that though the former concept may be narrower than the latter, “national treasures” may be taken to include intangible cultural heritage or cultural expressions.⁷⁷

Two points are worth mentioning in this context. First, as maintained authoritatively,⁷⁸ the adoption and high number of signatures and ratification of the 2005 UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions⁷⁹ make it possible (and reasonable) to consider “cultural expressions” as covered by Article XX(f), where they are especially relevant. This means that specific, particularly significant literary works, music, and goods or objects, even if made in series, may be subject to protective measures justified under Article XX(f). Secondly, the European Court of Justice has had occasion to touch upon some of these questions in some cases.⁸⁰ In particular, in the 2009 case *Fachverband der Buchund Medienwirtschaft v. LIBRO Handelsgesellschaft GmbH*, the Court performed a comparative analysis which led to the result that it did not justify the measure under scrutiny, since less restrictive alternatives were available. But it also found that the exception under EU law does not cover cultural diversity in general. Thus, *a contrario*, it seems possible to draw from this finding that it nonetheless protects cultural diversity when specific expressions are at stake.

On a similar note, commentators have argued that Article XX(f) is similar to legislation on export controls in countries such as Canada, Japan, or the United Kingdom.⁸¹ Conversely, countries such as Mexico adopt a far stricter approach, since they seek to prohibit the export of indigenous heritage going beyond “national

⁷⁵ A. Biondi, *The Merchant, the Thief and the Citizen: the Circulation of Works of Art Within the European Union*, “Common Market Law Review” 1997, Vol. 34(5), p. 1180.

⁷⁶ P. Pescatore, *Le commerce de l’art et le Marché commun*, “Revue Trimestrielle de Droit Européen” 1985, Vol. 21, p. 456.

⁷⁷ T. Voon, *Restricting Trade in Cultural Property: National Treasures at the Intersection Between Cultural Heritage and International Trade Law*, in: F. Francioni, P. Vrdoljak (eds.), *Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2018, p. 10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3093448&download=yes [accessed: 1.10.2019].

⁷⁸ P. van den Bossche, *op. cit.*

⁷⁹ 20 October 2005, 2240 UNTS 346.

⁸⁰ See e.g. European Court of Justice, Case C-531/07 *Fachverband der Buchund Medienwirtschaft v LIBRO Handelsgesellschaft GmbH* [2009] ECR I-3717; European Court of Justice, Case C-7/68 *Commission v Italy* [1968] ECR 424.

⁸¹ J. A. R. Nafziger, R. Kirkwood Paterson, A. Dundes Renteln, *op. cit.*, p. 299.

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treasures”.⁸² In reality, several countries, including Canada and Japan,⁸³ tend to enlarge the list of objects subject to export controls. The text of the 1985 Canadian Cultural Property Export and Import Act seems to support such an assertion. Under its Article 4, the Canadian Act establishes that, unless they are less than 50 years old and made by a natural person who is still living, not only archaeological and prehistoric objects, but also books, records, documents, photographs and negatives, drawings, original prints, and “any other objects that have a fair market value in Canada of more than three thousand dollars” may be inscribed in the Canadian Cultural Property Export Control List.⁸⁴

Dutch legislation distinguishes between archaeological monuments, protected cultural objects, and cultural heritage, among others.⁸⁵ Cultural heritage includes both “tangible and intangible resources inherited from the past [...] that people [...] identify as reflection and expression of continuously evolving values, beliefs, knowledge and traditions [...]”.⁸⁶ This testifies to the possibility that something which is not yet a “national treasure” could become such with the passage of time. On this point, a French law on the protection of national treasures stipulated that though a specific certificate could be issued attesting that specific goods were not national treasures, for goods being less than 100 years old the certificate had a duration of only 20 years.⁸⁷ This testifies to the changing quality of certain objects and resources as national treasures. The famous *Brancusi v. United States* case also featured this point.⁸⁸ The case revolved around whether a piece of art by the famous artist Brancusi could be qualified as a sculpture for tariff-levying purposes. Highlighting the development of art and artistic movements, the court recognized that the concept of artwork has to adapt to the changing conditions over time.

Finally, any measure in violation of a WTO obligation, though justified under Article XX(f), would still need to pass the test of the “chapeau” of Article XX. To be justified, a measure affecting export or import of national treasures should not single out specific countries, i.e. it should apply with respect to all WTO Members

⁸² Ibidem.

⁸³ E. Kachiuki, *Cultural Heritage Protection System in Japan: Current Issues and Prospects for the Future*, “GRIPS Discussion Paper” 2014, Vol. 14-10.

⁸⁴ *Cultural Property Export and Import Act* (R.S.C., 1985, c. C-51).

⁸⁵ Article 1.1 of the *Wet houdende bundeling en aanpassing van regels op het terrein van cultureel erfgoed (Erfgoedwet)* [Act relating to the combining and amendment of rules regarding cultural heritage (Heritage Act)], 9 December 2015.

⁸⁶ Ibidem.

⁸⁷ Article 1 of the *Loi n.2000-643 du 10 juillet 2000 relative à la protection des trésors nationaux et modifiant la loi n.92-1477 du 31 décembre 1992 relative aux produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie et de douane* [Law no. 2000-643 of 10 July 2000 on the protection of national treasures and modifying Law no. 92-1477 of 31 December 1992 on the products submitted to certain restrictions of circulation and on the complementarity among police services, gendarmerie and customs authorities], *Journal officiel de la République française* No. 159, 11 July 2000, p. 10481, text no. 3.

⁸⁸ *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928).

where the same conditions prevail,⁸⁹ and be preceded by negotiations in good faith.⁹⁰ Thus the way in which a measure is implemented is key.⁹¹

The preceding remarks make it possible to clarify two points. First, using public international law rules on treaty interpretation and following the AB jurisprudence, but without overlooking international instruments on culture and cultural heritage, there seems to be no reason to exclude the possibility to enlarge the scope of Article XX(f). Of course, this does not mean to extend Article XX(f) to any cultural expression. But cultural expressions which may be subject to standardized production feature elements of a good and present a special value may fall under the scope of Article XX(f). Second, the uncertainties concerning practically all the issues relating to the definition, interpretation, and application of concepts such as cultural heritage and national treasures are not necessarily negative. The constantly evolving nature of the values which determine the character of certain goods and resources as “treasures” makes it impossible to fix satisfactory replies to these questions once and for all. And the ample spectrum of doctrinal views on the subject reflects the tensions existing between the need for certainty and the inevitable evolution of meanings and values, in particular with regard to national treasures. Even more importantly, in the context of international trade room for manoeuvre is needed for Members in order to keep the multilateral trading system alive and functioning (notwithstanding the current problems besieging the system), while at the same time being able to adopt measures to protect “national treasures” where deemed appropriate.

Conclusions

Any reflection on “national treasures of artistic, historic or archaeological value” unavoidably faces a number of difficult but relevant questions. The polar star of any such reflection has to be the inherently fluid and evolutionary nature of the artistic, historic, and archaeological value attached to certain goods, in particular to those which become “national treasures”.

The wording, and the application by the WTO AB of Article XX, as well as international law rules on treaty interpretation and application are equally relevant to identify the scope of Article XX(f). A combined reference to them allows for the assertion that the scope of Article XX(f) can be extended to cultural expressions such as music, books, and other expressions which, owing to their value, amount to national treasures, even though they may be subject to mass, standardized production.

⁸⁹ M. J. Trebilcock, R. Howse, A. Eliason, *The Regulation of International Trade*, 4th ed., Routledge, London – New York 2013, p. 734.

⁹⁰ J. H. B. Pauwelyn, A. Guzman, J. A. Hillman, *International Trade Law*, 3th ed., Wolters Kluwer, New York 2016, p. 433.

⁹¹ K. Nadakavukaren Schefer, *Social Regulation in the WTO: Trade Policy and International Legal Development*, Edward Elgar, Cheltenham 2010, p. 275.

It seems safe to assume that while trying to safeguard the possibility for Member States to adopt measures for the protection of their national treasures, the drafting of Article XX(f) had to be such as to not threaten the wellbeing and functioning of the multilateral trading system. Adopting too broad a language would have endangered the entire system, first set up under the GATT 1947 and, later under the WTO. Concurrently, the provision had (*ergo*, has) to allow for the protection of certain resources, the qualification of which changes over time.

This is why the uncertainties highlighted by some commentators with regard to the terms and notions used in Article XX(f)⁹² should not be made into criticisms. Rather they should be welcomed. Solving the issue of interpretation and/or application of Article XX(f) once and for all seems impossible, and not even practical – the amount of flexibility needed in this field and the protection of national treasures requires broad and evolving definitions.

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⁹² T. Voon, *Restricting Trade...*

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