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

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

Inclusion of health-related services and other services having impact on human health such as sanitation, water and environmental services in General Agreement on Trade in Services (GATS) met with vehement criticism and resistance.[1] Despite the potential of health-related services liberalisation to supplement and complement a World Trade Organisation (WTO) Members' public health services through enhanced quality and efficiency of supplies and increase foreign exchange earnings,[2] WTO Members have been reluctant to commit themselves to full liberalisation in service sectors having direct or indirect health implications.[3] The low level of commitments are indicative of scepticism whether liberalisation of healthcare services through GATS restricts the public health policies and affects the provision of healthcare services which are pertinent for the right to health. It further indicates wariness that if a Member liberalise services in sectors having implications for human health, it may lose the regulatory freedom to devise health policy measures according to its public health needs. The fundamental importance of healthcare services and regulatory freedom to device public health policies is evident in the current Covid-19 pandemic. For example, Spain chose to nationalise all of its hospitals and healthcare services provision[4] and the UK on the other hand planned to rent private hospital beds in order to meet the resource needs demanded by the pandemic.[5]

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1 See for example, David WOODWARD, "The GATS and Trade in Health Services: Implications for Health Care in Developing Countries" (2005) 12(3) Review of International Political Economy 511; Allyson M POLLOCK and David PRICE, "The Public Health Implications of World Trade Negotiations on The General Agreement on Trade in Services and Public Services" (2003) 362 The Lancet 1072.

2 David P. FIDLER, Carlos CORREA, Obijiofor AGINAM, "Legal Review of the General Agreement on Trade in Services GATS from a Health Policy Perspective" WHO, Globalization, Trade and Health Working Papers Series, November 2005, 29; World Health Organization/World Trade Organization, *WTO Agreements and Public Health—A Joint Study by the WHO and the WTO Secretariat* (World Trade Organization/World Health Organization 2002).

3 As of January 2020 only 32% WTO Members have committed to liberalise health-related services sectors as opposed to 80% commitments in tourism and related services and 68% commitments in financial services. Very few WTO Members have committed themselves to opening their markets in not only health-related services, and professional services provided by nurses and physiotherapists but also services that have direct or indirect implications for human health such as environmental services. Only 49 out of 164 WTO Members (counting European Unions as one) have made commitments in hospital services; of those 23 Members have made also commitments in other human health services, whereas only 2 Members have made commitments exclusively in other human health services (making it 25 in total).[3] In terms of health related professional services, only 52 WTO Members have made commitments in Medical & dental services. The number is even lower (22) for services provided by midwives, nurses and physiotherapists.

4 "Coronavirus: France Imposes Lockdown as EU Calls For 30-Day Travel Ban" *Guardian* (16 March 2020), online: Guardian <https://www.theguardian.com/world/2020/mar/16/coronavirus-spain-takes-over-private-healthcare-amid-more-european-lockdowns>.

5 "Coronavirus: 8,000 Private Hospital Beds Rented to NHS For £2.4million Per Day" *Mirror* (14 March 2020), online: Mirror <https://www.mirror.co.uk/news/politics/coronavirus-nhs-steps-up-fight-21694418?utm_source=facebook.com&utm_medium=social&utm_campaign=sharebar&fbclid=IwAR1pZKCSSfH6wTDtqdhcwlDmlNZnZsdvsSJOM3mlolgla8xw3oCBxr_EOxo>.

The call for embracing human rights agenda from within the international trade law is not new. After Second World War, the two regimes (international human rights and international trade law) seem to have evolved in isolation for lack of communication and dialogue between these two traits of liberalism.[6] Scholarship exploring the tension between human rights and international trade and economic regulations followed. Former WTO director Lamy conceded that 'trade and human rights go hand in hand, although progress still needs to be made to ensure better coherence between principles and realities.'[7] A number of scholars have scoped the international trade and human rights regimes, identifying areas of tension and means of possible reconciliation. Whereas some scholars built their thesis upon the values common to both regimes,[8] others identified methods to prevent or resolve any normative conflict through application of rules of public international law,[9] and some scholars even went on to claim that the WTO jurisprudence has already accommodated the human rights into the utilitarian trade rules.[10] However, as Howse and Teitel noted, it is imperative to identify precise and specific interconnections between the legal concepts and doctrines in the treaty texts of both regimes.[11] Whereas the scholarship thus far has looked at human rights and international trade regimes in general and attempted to identify the ways in which one can complement the other, this paper approaches this issue from the standpoint of integrating a right to health measure in GATS compliance through an interpretation of the public health exception under Article XIV(b).

This paper demonstrates how a right to health approach in the interpretation of public health exception in GATS Article XIV(b) can bring about harmonious application of international human rights and international trade law regimes. Focusing on the interpretive value of the right to health for the public health exception in GATS, it examines whether a WTO Member that has committed itself under GATS to fully liberalise all the services sectors having implications for health (e.g., hospital and other healthcare services) still retains the regulatory space to undertake measures to fulfil its right to health obligations and can justify a public health measure incompatible with GATS obligations when undertaken to fulfil its right to health obligation. It argues that a right to health approach to an interpretation of the public

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[6] Thomas COTTIER, "Trade and Human Rights: A Relationship to Discover", (2002) 5(1) Journal of International Economic Law 111 at 113.

[7] Pascal LAMY, 'Trade and human rights go hand in hand' speech to UNITAR on 26 September 2010, available https://www.wto.org/english/news_e/sppl_e/sppl172_e.htm

[8] For example, Ernst-Ulrich PETERSMANN, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration," (2002) 13(3) EJIL 621 at 622; Robert HOWSE and Ruti G. TEITEL, "Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization", Dialogue on Globalisation, Friedrich-Ebert-Stiftung, Occasional Papers No. 30, April 2007.

9 See Makau W. MUTUA and Robert L. HOWSE, "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization" (2000) Human Rights in Development Yearbook 1999/2000: The Millennium Edition 51; Gabrielle MARCEAU, "WTO Dispute Settlement and Human Rights" (2002) 13(4) EJIL 753.

10 Stephen P. POWELL, The Place of Human Rights Law in World Trade Organization Rules, <https://works.bepress.com/stephen_powell/10/> accessed 21 April 2019; M. Gregg BLOCHE, "WTO Deference to National Health Policy: Towards An Interpretive Principle" (2002) 5(4) Journal of International Economic Law 825 at 827.

[11] Howse and Teitel, *supra* note 8 at 7.

health exception in GATS can bring complementarity between international human rights and international trade law regimes. A good faith and harmonious interpretation of the public health exception in GATS taking into account the right to health further advances systemic integration and responds to the challenge of fragmentation of public international law.

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

The inquiry of this article is limited to the normative relationship between the right to health and the public health exception from the perspective of a WTO Member that is also a State Party to ICESCR. Since very few WTO members have committed themselves in this area of trade, the discourse in this paper helps the responding Member by identifying the potential legal strategies to strengthen the argument for the right to health interpretation of health exception in GATS. Given the burden of proof lies on the State raising health exception, it is judicious for health policy experts and Member States to formulate legal strategies to work within the international legal framework that GATS and related rules of international law create while responding to their public health needs.

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

A. Health Services under GATS

A number of services included in GATS have direct (hospital services, medical and dental services, services provided by midwives, nurses and physiotherapists) or indirect (environmental services) implications for human health. GATS provides a flexible legal framework for international trade in services wherein the services can be provided across States in four different ways (known as modes of supply):

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

International Trade in Health related services	Mode 1 (Cross-Border Trade)	Mode 2 (Consumption abroad)	Mode 3 (Commercial Presence)	Mode 4 (Movement of Natural Persons)
How Services are delivered	Both the service providers and consumers do not leave their respective countries.	Consumer physically travels from one country to another to obtain a service.	A service supplier offers a service in another country through, e.g., an agency, branch, subsidiary or joint venture.	People temporarily enter another country in order to provide a service.
Examples	Telemedicine: A foreign medical specialist sends advice via internet to domestic doctors or hospitals, e.g., tele-radiology; tele-pathology.	Medical tourism, wellness tourism; patients seeking affordable high quality treatment or alternative treatment travel to the country of service provider.	Joint venture between foreign and domestic partners to establish a hospital, clinic or diagnostic facility or management of these facilities.	Healthcare professionals (doctors, nurses, specialists etc.) and supporting personnel move overseas to provide health related services.

Some GATS obligations are horizontal in that those apply across all service sectors in all modes of delivery whether or not a Member has liberalised that sector: for example, non-discrimination rule of most favoured nation,[12] competition principles on monopoly and exclusive service suppliers,[13] procurement by government of services.[14] On the other hand, specific obligations relating to market access,[15] and national treatment,[16] apply only when a Member wishes to liberalise a service sector and makes specific commitments in specific modes of delivery in that sector.

Market access obligation requires a Member to accord foreign services and service suppliers treatment under the terms, limitations and conditions agreed and specified in its Schedule. National treatment requires that no measure (be it in the form of a law, regulation, rule,

12 GATS Article II (MFN obligation) requires a Member to treat all services and service suppliers equally regardless of country of ownership or origin. It, however, allows Members to enter into Economic Integration Agreements or recognise the standards and regulations of one or more trading partners provided it fulfils certain conditions.
13 GATS Article VIII.
14 GATS Article XIII.
15 GATS Article XVI.
16 GATS Article XVII.

procedure, decision, administrative action, or any other form)[17] should modify the conditions of competition in favour of domestic services or service suppliers, or act to the detriment of foreign 'like' services or service suppliers unless such conditions are specified in the schedule of commitment.[18]

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

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

At the same time, aforementioned services having implication for human health, particularly health-related services are crucial for maintenance of a functioning and affordable public health system mandated by the right to health obligation.[19] According to the Committee on Economic, Social and Cultural Rights (CESCR), a State party to ICESCR is under a legal obligation to provide sufficient as well as functioning public healthcare facilities, goods and services that include not only the hospitals, clinics and other health-related buildings, adequately qualified and trained medical professionals and essential drugs but also the basic necessities for good health such as safe and potable drinking water and adequate sanitation facilities.[20] Subsequently a State party to both WTO and ICESCR is faced with the challenging task of balancing the seemingly competing obligations arising from the respective international legal regimes.

B. A Hypothetical Scenario

By way of illustration, let us imagine that a WTO Member, Country X that has fully liberalised the healthcare services sector and as such is now obligated to grant full market access to foreign hospital and other health-related services providers and treat them 'like' domestic hospitals and other health-related services providers. Consequently, foreign healthcare services providers

17 GATS, Article XXVIII (a).
18 Woodward, supra note 1 at 513.
19 *CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health (Art.12)*, Office of the High Commissioner for Human Rights, UN Doc. E/C.12/2000/4 (2000) [General Comment 14]
20 *Ibid*. at para 11

have established tele-medicine, tele-pathology services as well as opened tertiary hospitals providing ambulatory as well as inpatient care in Country X. Because Country X is also a party to ICESCR, it is bound to provide functioning public hospitals and other health-related services including medical services.

To begin with, not every public health measure necessarily violates GATS obligations. For example, let us imagine that Country X provides certain subsidies to strengthen the financial support to its public sector hospitals. This measure does not violate Country X's GATS obligations since there is no GATS provision prohibiting subsidies in services sector. Moreover, services are excluded from the scope of Subsidies and Countervailing Measures (SCM) Agreement, which specifically prohibits trade-distorting subsidies by WTO Members. SCM Agreement expressly refers to the purchases of goods but omits any reference to the purchase of services.[21] Acknowledging the trade-distortive effect of subsidies in certain circumstances, Article XV of GATS provides for further negotiations to develop necessary multilateral disciplines. However, currently, no concrete proposals have been submitted to date in the negotiations under Article XV. As it stands, a Member which considers itself to be adversely affected by another Member's measure may request consultation with that Member as within the Agreement's current structure, it would not be possible to challenge measures granting subsidies.[22] Thus, if the financial support to its public health sector by Country X is deemed trade-distortive by another Member, the only means of recourse available to the affected Member is to request a consultation.

As noted earlier, GATS Article XVI sets out specific obligations for Members that have undertaken specific market access commitments in their schedules. Article XVI:1 specifically obliges Members to accord services and service suppliers of other Members 'no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.'[23] The AB in *US – Gambling* emphasised that a full market access commitment given in a particular sector or sub-sector extends to the whole of that sector, including all of its sub-sectors.[24] Similarly, a full market access commitment given for supply of a service applies to any means of delivery included in Mode 1 (i.e., cross-border supply of services via means of tele-communication).[25]

Suppose that in order to tackle the issue of brain drain,[26] or to ensure that there are enough doctors and nurses in the public sector hospitals, Country X has decided to limit the number of

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[21] *United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint* (*US – Civil Aircraft 2nd Complaint*), [2011] Panel Report at para. 7.968.
[22] Rudolf ADLUNG, "Public Services and the GATS", WTO Staff Working Paper No. ERSD-2005-03, July 2005 at 29.
[23] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, [2005] Appellate Body Report at para. 214.
[24] *Ibid.* at para. 219.
[25] *Ibid.* at para. 220.
[26] Brain drain, i.e., where scarce human resources (like trained medical professionals) move to the private sector for better remuneration and infrastructures to the detriment of the poor. For more, see *Liberalization of Trade in*

medical practitioners (such as doctors, nurses and clinicians) in the private sector hospitals for both domestic and foreign subsidiaries. Since Country X has undertaken a GATS obligation not to apply any quantitative restriction by making a full commitment without specifying any limitation in its schedule of commitments. It is required under GATS Article XVI:2 (d) not to limit 'the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service' unless it is specified in its schedule. Medical professionals, including doctors, nurses, clinicians, paramedical staff, patient attendants, medical lab technicians are natural persons necessary and directly related to supply of hospital services. Since Article XVI:2(d) specifically prohibits quantitative limitation on 'the total number of natural persons' that may be employed in a service sector or by a service supplier, the public health measure to restrict the number of medical practitioners in the private sector hospitals is inconsistent with the market access commitment undertaken by Country X.

Whereas market access obligation under GATS Article XVI:2 applies to six quantitative measures identified therein (noted earlier), the national treatment measure extends generally to 'all measures affecting the supply of services.'[27] Suppose that Country X imposes a differential taxation system where a specific tax is imposed only on private health services providers (i.e., private sector hospitals, tele-medicine services, tele-pathology/radiology services) for both domestic and foreign subsidiaries in order to generate revenues to fund the public sector hospital services (which cater to the healthcare needs of the poor population at a very nominal cost).On first glance it may be argued that there is no violation of national treatment commitment by Country X since it applies to both domestic and foreign private hospitals alike and public services are exempted in GATS. However, the scope of GATS is very wide as the Agreement applies to any measures taken by the government at any level (central, regional or local) including the measures taken by non-governmental bodies in the exercise of powers delegated by any of these governmental authorities,[28] having an effect on trade in services in any service in any sector.[29]

Although 'services supplied in the exercise of governmental authority' are excluded, they ought not to be supplied on commercial basis or in competition with one or more service suppliers.[30] Given the textual ambiguities and interpretive controversy regarding meaning of 'governmental authority', 'commercial basis' or 'competition', it is not clear whether the supply of healthcare services at a very low subsidized rate would fall within the sectoral scope

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Services and Human Rights, Report of the High Commissioner, UN Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2002/9 (2002) at 20.

[27] *China — Certain Measures Affecting Electronic Payment Services* (*China – Electronic Payment Services),* [2012] Panel Report at para. 7.652.

[28] GATS Article I:1.

[29] Adlung, *supra* note 22 at 6.

[30] GATS Article I:3 (c).

of GATS.[31] The mere fact that the services are provided for a fee, no matter how nominal or notional, would likely classify them as being provided on commercial basis. Since the public hospitals in Country X provide services at nominal cost, they are not exempted from the application of GATS rules. Since Country X is obligated not to discriminate between domestic and foreign services and services suppliers, the question is whether domestic public hospital services are 'like' foreign private hospital services? To this end, 'likeness' analysis is crucial to determine whether Country X has acted inconsistently with the non-discrimination obligations under WTO.

'Likeness' analysis under GATS includes considerations relating to both the services and the service suppliers.[32] In *Argentina – Financial Services*, the Appellate Body (AB) noted that the criteria for assessing 'likeness' in the context of trade of goods (including consumers' tastes and habits or consumers' perceptions and behaviours in respect of the products) may also be employed in assessing 'likeness' in the context of services provided that they are adapted to the specific characteristics of the trade in services.[33] Accordingly, test of 'likeness' or 'substitutability' to services implies determining whether the service consumer considers the services or service suppliers to be descriptively identical and/or directly substitutable.[34] The AB observed that an analysis of the nature and extent of a competitive relationship is an essential pre-requisite for a 'likeness' analysis.[35] Where the services are determined to be essentially or generally the same in competitive terms, they are found to be 'like' services for purposes of GATS Article XVII.[36] In most States, health-related services such as hospital services, diagnostic or laboratory services are increasingly provided by both public and private sector service providers on a user-fee basis where the service consumers choose the services on the basis of availability, quality, price, portability of medical insurance and move freely between the two sectors.

In the healthcare services market of Country X, public hospital services (provided on user-fee basis) coexist with private hospital services. Since determination of likeness depends on the degree of competitiveness and substitutability,[37] application of 'consumer perception,' 'properties, nature and quality,' 'end-use' and 'substitutability' criterion set out by Panel in *EC – Asbestos*, will result in a finding of 'direct competitive relationship' and 'likeness' between the domestic public sector hospitals and the foreign private sector hospitals. Following the Panel's reasoning in *EC – Bananas III*, 'where each of the different services activities taken

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31 Markus KRAJEWSKI, "Public Services and Trade Liberalization: Mapping the Legal Framework" (2003) 6(2) Journal of International Economic Law 341 at 351.
32 *Argentina — Measures Relating to Trade in Goods and Services (Argentina – Financial Services)*, [2016] Appellate Body Report at para 6.29.
33 *Ibid.* at paras 6.30 – 6.33.
34 Fidler, Correa and Aginam, *supra* note 2 at 47.
35 *Argentina – Financial Services*, supra note 32 at paras 6.30 – 6.33.
36 *China – Electronic Payment Services*, supra note 27 at para. 7.702
37 *European Communities—Measures Affecting Asbestos and Products Containing Asbestos (EC—Asbestos)*, [2001] Appellate Body Report at para 98.

individually is virtually the same…to the extent that the entities provide these like services, they are like service suppliers,[38] domestic public hospital services providers are 'like' foreign private hospital services providers. Thus it is more than likely that if disputed, the differential tax measure by Country X to finance its public hospital services will be deemed to violate the national treatment obligation of GATS.

Nonetheless, as the Panel in *China – Electronic Payment Services* noted, 'even if relevant services are determined to be "like" and a measure of a Member is found to result in less favourable treatment of "like" services of another Member, it may still be possible to justify that measure under one of the general exceptions set out in Article XIV of the GATS.'[39] These exceptions, *inter alia* affirm a Member's right to take measures for the protection of human life or health. This observation is in line with the General Agreement on Tariffs and Trade (GATT) Panel determination in 1987 in *Japan - Alcoholic Beverages*.[40] In that case, while discussing the claim of Japan that discriminatory or protective taxes on various alcoholic beverages could be justified as designed to meet the objective of taxation, the Panel noted that "… [t]he 'general exceptions' provided for in GATT Article XX might also justify internal tax differentiations among like or directly competitive products, for instance if 'necessary to protect human …life or health' (Article XX(b)).'"[41] Therefore, even if the public health measures are found to be inconsistent with its market access and national treatment obligations, Country X can justify these measure on the basis of public health exception under the GATS to which we turn now.

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

Recognising the importance of certain non-trade interests and obligations for a State, the general exception clause (Article XIV) affirms the right of the Members to pursue various regulatory objectives as identified therein even if in fulfilling those objectives, Members act inconsistently with the obligations set out in the Agreement.[42] The AB in *Argentina – Financial Services* affirmed a Member's right to pursue national policy objectives as recognised in the preamble of GATS,[43] which covers a wide array of objectives and Members retain the right to use various means to pursue these objectives. Through these exceptions GATS 'seeks to strike a balance between a Member's obligation assumed under the Agreement and that Member's

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[38] *European Communities — Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, [1997] Panel Report at para. 7.322.
[39] *China – Electronic Payment Services*, supra note 27 at footnote 895
[40] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, [1987] GATT Panel Report L/6216, 34S/83.
[41] *Ibid.* at para. 5.13.
[42] GATS preamble recognises 'the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.'
[43] *Argentina – Financial Services*, supra note 32 at para 6.113.

right to pursue national policy objectives.'[44] It is important to note that the pursuit of a Member's national policy objective does not necessarily involve a breach of its GATS obligations. Therefore unless the measure imposed is in inconsistent with its GATS obligations, i.e., modifies the conditions of competition to the detriment of like services or service suppliers of another Member, the Member imposing that measure would not need to invoke exception.[45] For example, if the differential tax measure of Country X does not modify the conditions of competition to the detriment of foreign hospital services and service suppliers, it would not need to invoke the exception. In terms of health policy as well as the right to health measures, Article XIV(b) is most relevant for our analysis as it provides an exception for non-compliant measures that are 'necessary to protect human, animal or plant life or health'. It is in interpretation of the public health exception that the right to health can provide interpretive and evidentiary value as the following discussion demonstrates.

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

In accordance with Article 3.2 of the WTO Dispute Settlement Understanding, Dispute Settlement Bodies (DSBs) can only apply WTO Agreements to disputes, those Agreements are nonetheless to be interpreted 'in accordance with customary rules of interpretation of public international law.' Interpretation is the very first technique used by international judges to ensure the consistency of the rules which they apply.[46] As the International Court of Justice stated in the *Right of Passage* case, 'it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.'[47] The act of interpretation thus entails the act of selecting the pertinent meaning from the plethora of potentially different meanings.

The scope of possible meanings of the words are restricted by Art. 3.2 since the DSB cannot add or diminish 'the rights and obligations provided in the covered agreements.'[48] However, the general rule of interpretation, as set forth in the Vienna Convention on the Law of Treaties (VCLT),[49] provides a pathway to integrate the right to health in the interpretation of the general exceptions clauses in WTO Agreements.[50]

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[44] *Ibid.* at para 6.114.
[45] *Ibid.* at para 6.117.
[46] Jean D'ASPREMONT, "Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation Under the Guise of Conflict of Norms-Resolution" in Malgosia FITZMAURICE and Panos MERKOURIS, eds., *The European Convention On Human Rights And The UK Human Rights Act* (Brill: Martinus Nijhoff Publishers 2011), 5.
[47] *Case concerning the Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, [1957] I.C.J. Rep. 125 at 142.
[48] Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3.2 [DSU].
[49] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 United Nations, Treaty Series 331 (entered into force 27 January 1980) [VCLT].
[50] *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, Office of the United Nations High Commissioner for Human Rights, UN Doc. HR/PUB/05/5 (2005) at 4 [OHCHR]

It is true that right to health is not part of the applicable law in WTO dispute settlement, nor can a defence against the claim of a violation of GATS be based solely on the right to health, yet the right to health can be raised in the argument when interpreting the public health exception in GATS. Moreover, interpretation does not 'add' anything to the instrument being interpreted but constructs the meaning by a legal technique that takes into account other institutional and normative context. Indeed, the Office of the United Nation High Commissioner for Human Rights has noted that general exceptions provide a mechanism for raising human rights argument within WTO and thus act as a means to ensure that WTO law can be interpreted and implemented with due regard for international human rights norms.[51]

In assessing the potential role of the right to health in the interpretation of the public health exception in GATS, Article 31(3)(c) of VCLT is of particular importance. It refers to 'any relevant rules of international law' 'applicable in the relations between the parties' must be 'taken into account.'[52] Advancing on one of the earliest and most fundamental principles of international law—*pacta sunt servanda* – Article 31(3)(c) thus places treaty interpretation against the whole background of international law.[53] The term 'any relevant rules of international law' provides a wide authority to examine public international law sources.[54] These rules assist in interpretation of the treaty terms by providing a contemporary interpretation of the ordinary meaning of a term.[55] Absence of any restrictions and in fact use of the word 'any' gives a wide meaning to the phrase and must be taken to refer to any recognised source of international law that can be of assistance in the process of interpretation.[56] Corresponding with the notion of the sources of international law as in Article 38(1) of ICJ-Statute, the applicable rules maybe general, regional or local customary rules, bilateral or multilateral treaties and general principles of international law so long as they are in force at the time of the interpretation of the treaty.[57] Consequently, in the interpretation of WTO provisions, Art 31 (3)(c) directs the WTO panels and Appellate Bodies to take into account human rights law, in addition to all WTO treaty provisions.[58] As ILC stated, all international law exists in systemic relationship with other law, accordingly a tribunal 'must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say "other" international law.'[59] Referring to 'the international legal system as a whole

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[51] *Ibid*. at 3.
[52] VCLT Article 31 (3)(c).
[53] Mark E. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden : Martinus Nijhoff, 2009), 432
[54] Gabrielle MARCEAU, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties" (2001) 35(6) Journal of World Trade 1081 at 1087.
[55] Villiger, *supra* note 53 at 432
[56] Oliver DÖRR, "Article 31: General Rules of Interpretation" in Oliver DÖRR, Kirsten SCHMALENBACH, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Berlin ; London : Springer, 2012), 521 at 549.
[57] Villiger, *supra* note 53 at 433
[58] Joost PAUWELYN, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP, 2009) at 254.
[59] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc.A/CN.4/L/682 (2006), at 212 [ILC Study Group Report].

as part of the context of every treaty concluded under international law, Article 31 (3)(c) lays the foundation for the systemic approach to treaty interpretation.[60] Article 31(3)(c) is thus as an expression of the principle of 'systemic integration,'[61] where all treaty rights and obligations exist alongside rights and obligations established by other treaty provisions and the rules of customary international law and their relationship is approached through a process of reasoning that 'makes them appear as parts of some coherent and meaningful whole.'[62] The principle of systemic integration points to the need to take the wider normative environment into account which means that specific norms must be read against other norms bearing upon those same facts as the treaty under interpretation.[63] The principle of systemic integration in treaty interpretation achieves harmonisation of rules in international law.[64] The right to health provides the wider normative environment that the principle of systemic integration points to in context of treaty interpretation. Since the public health measures of Country X that are to be justified under Article XIV(b) do have a bearing on the right to health obligation of Country X, a right to health based interpretation of the public health exception for justification of the public health measures undertaken by Country X follows the principle of integration.

The question arises as to which 'other' rules of international law are considered 'applicable in the relations between the parties' when the composition of membership does not match between different treaty regimes. For example, in *EC – Banana III*, the AB reviewed Lomè Convention in its interpretation of Lomè waiver incorporated within GATT 1994, which was concerned with special rights and obligations of a group of WTO Members. This ruling demonstrates a willingness by the DSBs to consider non-WTO agreements that it deemed 'applicable in the relations between the parties' in order to resolve a dispute. On the other hand, the panel in *EC – Biotech* interpreted 'applicable in the relations between the parties,' narrowly to exclude the 1992 Convention on Biodiversity and the 2000 Biosafety Protocol from consideration and held that only those rules which are applicable in the relations between the WTO Members are to be taken into account when interpreting WTO agreements.[65] This narrow interpretation of 'parties' would imply all WTO Members. Given that WTO membership extends to non-sovereign members, (e.g., the EU) it cannot possibly have exactly the same membership as any other international treaty.[66]

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[60] Dörr, *supra* note 56 at 548
[61] For commentary on Art 31(3)(c) particularly in context of systemic integration see also Richard GARDINER, *Treaty Interpretation* (OUP Oxford 2015); Campbell MCLACHLAN, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention", (2005) 54(2) The International and Comparative Law Quarterly 279; Panos MERKOURIS, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* (Leiden: Brill - Nijhoff, 2015); Christian DJEFFAL, *Static And Evolutive Treaty Interpretation : A Functional Reconstruction* (CUP 2016).
[62] ILC Study Group Report, *supra* note 59 at 208.
[63] *Ibid*. at 209.
[64] McLachlan, *supra* note 61 at 318.
[65] WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (*EC-Biotech*), [2006] Panel Report at 7.68.
[66] OHCHR, *supra* note 50 at 8

Therefore to require that a non-WTO rule to be used to interpret WTO obligations have to have same identical membership or at least the WTO membership would frustrate the application of the principle of systemic integration.[67] This narrow approach to interpretation of 'applicable in the relations between the parties' has not only been rejected by the ILC but also by the International Court of Justice (ICJ).[68] The ILC noted that unlikeness of precise congruence in the membership of multilateral conventions will make it unlikely 'that *any* use of conventional international law could be made in the interpretation of such conventions,' which is 'contrary to the legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers.'[69] In *Namibia* opinion, the ICJ observed that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'[70] Later in in the *Oil Platform* case, ICJ once again held that it cannot accept that a specific rule of a Treaty was intended to operate wholly independently of the relevant rules of international law,[71] thus making the application of the relevant rules of international law an integral part of the task of interpretation entrusted to the Court. The European Court of Human Rights (ECtHR) too has freely drawn from the international normative environment in interpreting the European Convention on Human Rights.[72]

The AB in *US - Gasoline* made it clear that the WTO Agreement is not to be read in clinical isolation from public international law,[73] thus fulfilling its obligation to take into account 'applicable rules of international law between the parties.' A broad reading of 'between the parties' does not restrict the application of international law to only when it applies to all WTO Members.[74] This approach was adopted by the AB in *US – Shrimp* wherein it examined the use of the term 'natural resources' in a number of multilateral environmental agreements including the Convention on International Trade in Endangered Species 1973.[75] The AB did not refer to all the parties and the fact that not all the disputants had ratified or signed these conventions did not seem to pose any problem.[76] Similarly, reference to a number of Regional and Bilateral Trade Agreements was made in *US – FSC* to interpret 'foreign-source income' in the context

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[67] Marceau, *supra* note 9 at 781
[68] Howse and Teitel, *supra* note 8 at 8
[69] ILC Study Group Report, *supra* note 59 at para 471
[70] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, [1971] I.C.J. Rep. 16 at 31, para 53.
[71] *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), Judgment, [2003] I. C. J. Reports at 182, para 41.
[72] For ECtHR case law, see Jean-Marc SOREL, Valérie Boré EVENO, "Art.31 1969 Vienna Convention" in Olivier CORTEN, Pierre KLEIN, eds., *The Vienna Conventions on the Law of Treaties* (OUP 2011), 804 at 828 fn 154
73 *United States - Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, [1996] Appellate Body Report at 17.
[74] OHCHR, *supra* note 50 at 8
[75] Signed at Washington, 3 March 1973, 993 U.N.T.S. 243.
[76] Isabelle VAN DAMME, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) at 369.

of the Subsidies and Countervailing Measures Agreement.[77] Therefore interpretation of 'the parties' as referring to a large number of WTO Members is in line with the WTO jurisprudence. Given that 84 percent of WTO Members also bound by the ICESCR obligations, the right to health can be seen as a relevant rule of international law 'applicable in the relations between the parties'.

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

The DSBs have repeatedly acceded that protection of human life and health is both vital and of 'highest importance'[78] and that '[m]embers have the right to determine the level of protection of health that they consider appropriate in a given situation.'[79] Given the textual similarities between GATT Article XX and GATS Article XIV, the AB in *US – Gambling* found the case law of GATT Article XX to be relevant for the analysis under GATS Article XIV.[80] Consequently, GATT jurisprudence on Article XX is important for analysing and interpreting GATS Article XIV(b) especially for the lack of GATS case-law analysing public health exception.[81]

The burden of proof (to establish that the challenged measure meets all the requirements of the exception) lies with the Member that invoked an exception clause to justify its measure that would otherwise violate the GATS obligation. Therefore, if challenged, the onus to prove that its public health measures are justified under GATS Article XIV(b) lies with Country X in the previous scenario, requiring it to satisfy three-tiered test developed by the Panel in *US – Gasoline*.[82] First of all, the impugned measure must pursue one of the policy objectives outlined in the exceptions; second, the impugned measure must be 'necessary' to achieve that policy objective; and finally, the impugned measure must satisfy the requirement of the chapeau, i.e., the opening clause of Article XIV.[83] Since Country X is a WTO Member and also a State Party to the ICESCR, it would be contextually relevant for the DSB to examine the relationship between the challenged measure and the WTO Member's health policy objectives by reference to WTO Member's obligations to respect, protect and realise progressively to the maximum of its available resources,[84] 'the right to the highest attainable standard of health.'[85]

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[77] *United States - Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities (US — FSC)*, [2002] Appellate Body Report at paras. 141-145 (especially footnote 123).
[78] See e.g., *Brazil — Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, [2007] Appellate Body Report at para. 179; *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products (Indonesia – Chicken)*, [2017] Panel Report at para. 7.225.
[79] *EC – Asbestos*, *supra* note 37 at para. 168.
[80] *US – Gambling*, *supra* note 23 at para 291.
[81] Fidler, Correa and Aginam, *supra* note 2 at 150
[82] *US – Gasoline*, Panel Report at para. 6.20 Although the dispute related to health exception in GATT Article XX(b), the test prescribed is relevant for analysis of GATS Article XX(b) following the AB reasoning in *US – Gambling*, *supra* note 23.
[83] Sarah JOSEPH, *Blame it on the WTO?* (OUP 2011) at 107
84 ICESCR, Article 2.
85 ICESCR, Article 12.

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

Country X would first need to show that its non-complying public health measures falls within Article XIV(b), i.e., that the measure relates to the protection of human, animal and plant life or health. The Panel in *EC – Asbestos* followed the approach in *US – Gasoline* to first examine whether the EC measure was designed to protect human health, i.e., the measure is designed to achieve a health objective.[86] In *EC – Tariff Preferences*, the Panel held that European Communities' Drug Arrangements failed to establish the link between the market access improvement and the protection of human health in the European Communities.[87] Thus, Country X will first need to prove that its measure restricting the number of medical practitioners in private sector and the differential tax measures are aimed at protection of public health.

The terms 'to protect' and 'human life or health' in their ordinary meaning are very broad and have considerable potential to accommodate human rights, in particular the right to health.[88] So far, there is very limited direction on the term 'to protect' in WTO jurisprudence. In *EC – Seals*, the AB expounded on 'to protect' to imply 'a particular focus on the protection from or against certain dangers or risks,'[89] thus limiting it to an identifiable danger or risk. There is no evidence of agreed interpretation of the full scope of this term in the *travaux preparatoires*, nor is there any evidence to suggest that the scope of this exception is limited to sanitary measures.[90] It is clear that human health is a value that, as WTO adjudicators have concluded, is both vital and of highest importance and by signing the ICESCR, the parties bound themselves to respect, protect and fulfil economic, social and cultural rights preceding human values underlying the rights as fundamental over the secondary, human interests.[91] A right to health approach would thus give more specific definition to terms that are relatively vague.

The CESCR expounded the normative content of the right to health in its General Comment 14.[92] The right to health entails an obligation to *protect*, which imposes positive duties on State Parties, for example, to adopt legislation or take other measures. It further requires State Parties:

- To ensure equal access to healthcare and health-related services, whether provided by the public or private healthcare sector;

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[86] *EC – Asbestos*, [2000] Panel Report at para. 8.184.
[87] *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Preferences)*, [2003] Panel Report at paras. 7.206-7.207.
[88] OHCHR, *supra* note 50 at 5.
[89] *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, [2014] Appellate Body Report at para. 5.197.
[90] OHCHR, *supra* note 50 at 11.
[91] Howse and Teitel, *supra* note 8 at 21
[92] General Comment 14, supra note 19 at para 35.

- To ensure that medical professionals meet adequate standards of education, skills and ethical codes;
- To ensure that privatisation of healthcare sector does not jeopardise the availability, accessibility, acceptability and quality of healthcare facilities, goods and services;
- To control the trading of medical equipment and medicines by third parties; and
- To ensure that third parties do not limit people's access to healthcare services.[93]

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

2. *Tier 2: the challenged measure is 'necessary'*

To pass the second-tier of the test, Country X would need to demonstrate that its public health measures meet all the requirements of Article XIV(b), i.e., the non-complying measures are 'necessary' to protect human life or health. Necessity test, developed through GATT XX(b) jurisprudence, has been first applied by the Panel in the analysis of GATS Article XIV(c) in *US – Gambling*.[94] Whereas Members retain the right to regulate and pursue their policy objectives, a non-conforming measure is permissible only if it is 'necessary' to achieve those policy objectives. The 'necessity test' thus balances the freedom of Members to choose the measures to achieve the regulatory objectives they set against the overly trade restrictiveness of those measures.[95]

The requirement that the public health measure must be 'necessary' to protect 'human life or health' entails interpretation of what is 'necessary'. To determine the necessity of a measure, the Panel must assess all the relevant factors including the contribution made by the measure in achieving the policy objective, its trade restrictiveness and possible less trade-restrictive alternatives.[96] A comprehensive necessity analysis is a sequential process that begins with assessment of the 'relative importance' of the interests or values underlying the challenged measure, followed by 'weighing and balancing' of all the relevant factors and finally, comparing the challenged measure with possible less trade restrictive alternatives.[97]

The assessment of relative importance of interests or values that underlie the challenged measure does not mean that the necessity of the policy objective is to be examined. Rather, it

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[93] *Ibid*.
[94] *US – Gambling*, [2004] Panel Report at para. 6.537.
[95] *Necessity Test in the WTO: Note by the Secretariat*, Working Party on Domestic Regulation, WTO Doc. S/WPDR/W/27 (2003), para 4 [WPDR].
[96] *Brazil – Retreaded Tyres*, *supra* note 78 at para 156.
[97] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China – Publications and Audiovisual Products)*, [2009] Appellate Body Report at para 242.

is the necessity of the measure to achieve the intended policy objective that is under examination.[98] However, the more vital or important the interest that the challenged measure aims to protect, the easier it is for the measure to be accepted as necessary.[99] As noted earlier, GATT jurisprudence has acknowledged that protection of human life or health is of vital importance.[100]

A right to health approach could further substantiate the challenged measure's objective to protect human life or health with evidentiary value.[101] According to CESCR, the right to health entails the following interrelated and essential elements:[102]

1. Availability of functioning public health and healthcare facilities, goods and services;
2. Accessibility of these health facilities, goods and services within safe physical reach, which must also be affordable for everyone without discrimination;
3. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate; and
4. Must also be scientifically and medically appropriate and of good quality.[103]

As noted earlier, the right to health requires the State to provide a sufficiently functioning public healthcare system comprising not only of goods and services but also the healthcare personnel, essential drugs and basic necessities of health such as safe and potable drinking water and adequate sanitation facilities. States must take all necessary steps to raise adequate revenue and mobilize resources for health and to that end taxation, according to the UN Special Rapporteur, is 'an instrument with which States may ensure that adequate funds are available for health through progressive financing, as required under the right to health.' [104] Availability of a sufficiently functioning public healthcare sector thus calls for adequate number of medical staff as well as financial resources to maintain provision of good quality services to the populous. To the extent that the public health measures taken by Country X are grounded in those obligations, the differential tax measure as well as the measure imposing quantitative restriction on the number of medical practitioners in private sector can be proven to be of vital importance to Country X.

The contribution of the measure to achieve the objective pursued is the next step in the 'holistic' weighing and balancing part of the necessity analysis. Here again a right to health approach forms the basis for scrutinising the actual contribution of the challenged measure to

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[98] WPDR, *supra* note 95 at para 12.
[99] *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia – Textiles)*, [2016] Appellate Body Report at para 5.71.
[100] *Brazil – Retreaded Tyres*, *supra* note 78 at para 179.
[101] Diana DESIERTO, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (OUP 2015), at 194.
102 Although their precise nature will vary depending on the State party's development level.
103 General Comment 14, *supra* note 19 at para 12.
[104] *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental* Health, United Nations General Assembly, UN Doc. A/67/302 (2012), at. 4.

the objective.[105] Although not enough as a standalone component, '[t]he greater the contribution, the more easily a measure might be considered to be 'necessary'.'[106] Therefore to be necessary, a measure has to make a 'material' contribution to the achievement of its objectives.[107] Contribution is determined through an assessment of the relationship between the objective pursued and the measure at issue.[108] A trade restrictive measure may still be found to be necessary if it makes a 'material' contribution to the achievement of its objective.[109]

The Member seeking to prove that the challenged measure is necessary may submit evidence or data to establish that the contribution made by the measure is 'material'. Depending on the nature, quantity and quality of the data, the Panel may conduct its analysis in either quantitative or qualitative terms.[110] The Panel's reliance on scientific data in *EC – Asbestos* was justified by the AB, which further stressed that there is no requirement to quantify the risk under GATT Article XX and that the risk may be analysed in quantitative or qualitative terms.[111] A right to health discourse is useful for qualitative analysis as it provides the normative content to the DSBs to understand the responding Member's duties under the ICESCR as well as to map how the responding Member's policy measures are programmatically shaped and circumscribed by these obligations.[112]

Since the burden to prove that the challenged trade restrictive measure is 'necessary,' rests with the responding Member, it would not sufficient for Country X to claim that its measures (i.e., differential tax measure as well as quantitative restriction on healthcare professionals in private sector) are aimed at fulfilling its right to health obligation. It will needs to substantiate its claim services with quantitative or qualitative evidence to showcase that its GATS inconsistent measures materially contributed to its public health objectives. The degree of contribution of the measure to achieve the objective must be clear.[113] While a Panel must always assess the actual contribution made by the measure to the achievement of the objective,[114] the contribution need not be 'immediately observable' and 'could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.'[115] The Panel in *Brazil – Retreaded Tyres* assessed the necessity of a measure that formed part of a broader policy scheme that was not likely to have an immediately discernible impact on its objective. Yet the AB sought to determine whether the measure was 'apt to make a material contribution to its objective' by

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[105] Desierto, *supra* note 101 at 194
[106] *Colombia – Textiles*, *supra* note 99 at para 5.72
[107] *EC – Seal Products*, *supra* note 89 at paras. 5.213
[108] *Brazil – Retreaded Tyres*, *supra* note 78 at para 211
[109] *Indonesia – Chicken*, *supra* note 78 at para. 7.227.
[110] *EC – Seal Products*, *supra* note 89 at para 5.214.
[111] *EC – Asbestos*, *supra* note 37 at paras 167–8
[112] Desierto, *supra* note 101 at 195.
[113] *Colombia – Textiles*, *supra* note 99 at para 5.116.
[114] *China – Publications and Audiovisual Products*, *supra* note 97 at para 253.
[115] *Ibid.* at para 251-253.

assessing the extent to which it was 'apt to do so at some point in the future.'[116] Following the CESCR interpretation, the right to health obligation requires Country X to a well-functioning public healthcare system providing equal access to health facilities, goods and services, the contribution of the challenged measures in achieving these objectives may be indicative of the 'material' contribution of the measure to the achievement of the health policy objective. Because the ICESCR calls for progressive realisation[117] of the right to health over a period of time, the contribution of the challenged measures may not be immediately apparent. However, so long as they are assessable at some point in future, Country X can claim that they make a material contribution in achieving its public health objectives.

In addition, the Office of UN High Commissioner recommend that the DSBs may call upon human rights experts to ensure that human rights norms and standards are interpreted consistently and to provide evidence that the challenged measure under the public health exception addressed the right to health.[118] Since DSBs do not have expertise in human rights issues, seeking expert evidence from human rights treaty bodies would be useful to assess whether there is a genuine basis for the right to health argument raised in justification of the public health exception under GATS Article XIV(b). Such an approach has already been taken in *Thailand – Cigarettes* case where the Panel consulted WHO experts on the effects of smoking and whether Thailand's import ban on foreign cigarettes was an appropriate response to tackle the health problem faced.[119] Similarly, the comments and reports of the CESCR's, particularly General Comment 14, which elaborates and provides the normative content and the core minimum obligation to ensure the satisfaction of minimum essential levels of the right to health under Art 12 of the IESCR can be used as an expert doctrine for the interpretation of the right to health obligations of the responding Member. It is important to note that the human rights expertise here is to assist the DSBs to assess whether the challenged measure has a genuine underpinning in the right to health, i.e., whether the measure could in fact be considered a bona fide measure in furtherance of the right to health and if so, whether it is necessary to achieve the stated health policy objective.[120] What is more, the DSBs here are not determining whether the Member has violated its right to health obligation but 'what is necessary in terms of relaxation of *WTO* disciplines for the Member to *fulfil* its duties under the ICESCR.'[121]

Weighing and balancing exercise further entails assessment of trade restrictiveness of the challenged measure, which requires the panel to assess the degree of restrictions, not merely whether or not the measure involves some restrictions on trade.[122] A material contribution made

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[116] *EC – Seal Products*, *supra* note 89 at paras. 5.213
[117] ICESCR Article 2.
[118] OHCHR, *supra* note 50 at 15.
[119] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand – Cigarettes)*, [1990] GATT Panel Report DS10/R, 37S/200.
[120] OHCHR, *supra* note 50 at 16.
[121] Howse and Teitel, *supra* note 8 at 9
[122] *Colombia – Textiles*, *supra* note 99 at paras. 5.95.

by a measure can still outweigh a trade restriction to the highest degree.[123] However, there is no 'pre-determined threshold' of 'materiality' to ascertain the contribution of the measure to the objective.[124] Moreover, a measure's contribution is only component of the necessity calculus, i.e., 'whether a measure is necessary cannot be determined by the level of contribution alone.'[125]

A measure cannot be justified as necessary 'if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.'[126] The same reasoning applies to examination of 'reasonably available less trade-restrictive alternative measure' in GATS Article XIV(B). The responding Member is not required to show that there are no reasonably available alternatives to achieve its objective. The burden to identify the alternative measure lies with the complaining party.[127] To be reasonably available, an alternative measure has to be more than merely 'theoretical,' i.e., where the responding member is not capable of taking it.[128] Although it may involve some change or administrative cost, it should not impose 'undue burden' such as prohibitive costs or substantial technical difficulties on the responding Member.[129]

Since the responding Member has a right to choose the level of health protection it deems appropriate, a less trade restrictive alternative measure is not reasonably available if it does not meaningfully contribute to achieving the party's desired level of protection.[130] Therefore it is not for Country X to show that there are no reasonably available alternatives that would achieve its objectives and any alternative must not only be both practically and financially feasible but also provide an equivalent contribution to the achievement of its health policy objectives fulfilling its right to health obligation.

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

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[123] *Indonesia – Chicken*, *supra* note 78 at para. 7.227.
[124] *EC – Seal Products*, *supra* note 89 at paras. 5.213.
[125] *Ibid.* at paras. 5.214.
[126] *Thailand – Cigarettes*, *supra* note 119 at para 5.26 referring to the Panel Report on "*United States - Section 337 of the Tariff Act of 1930*", L/6439, adopted on 7 November 1989.
[127] *Brazil – Retreaded Tyres*, *supra* note 78 at para. 156.
[128] *US – Gambling*, *supra* note 23 at para. 308.
[129] However, it is for the responding member to establish that the alternative measure would impose undue burden on it. *China – Publications and Audiovisual Products*, supra note 97 at para 327.
[130] *EC – Seal Products*, *supra* note 89 at para. 5.279.

'appropriateness' of the level of the health protection and the contribution of the public health measures undertaken by Country X.

3. *Tier 3: chapeau of article xiv and good faith*

The third and final analytical step to satisfy the requirements of GATS Article XIV(b) is to prove that the challenged measures meet all the requirements contained in the introductory paragraph (also known as the chapeau) of Article XIV.[131] The chapeau of Article XIV (which is substantially identical to the chapeau of GATT Article XX) requires that the impugned measures are 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.' The chapeau aims to prevent the abuse of the exceptions by ensuring that a Member exercising its right under the exception does not frustrate the rights accorded under GATS to other Members.[132] The AB made clear in *US – Gasoline* that the chapeau focuses on the manner in which the measure is applied and not on the content thereof.[133] The central question the chapeau raises is whether the non-compliant measures have been 'applied reasonably, with due regard to both the legal duties of the party claiming exception and the legal rights of the other parties concerned.'[134] The burden to prove that it has not abused its right under the exception lies with the state invoking it. The doctrine of *abus de droit,*[135] which prohibits the abusive exercise of a State's rights, has been applied by the AB in *US – Shrimp* as a good faith principle in the reading of chapeau of GATT Article XX.[136] The requirement that a measure must not be applied arbitrarily or unjustifiably is thus an obligation on the WTO Members to act in good faith.[137]

Despite the lack of a definition in positive terms, most commentators concede that principle of good faith has a great deal of normative appeal and it is a well-accepted fundamental norm in many domestic and international legal systems.[138] Although not a source of obligation in itself where none would exist,[139] good faith is '[o]ne of the basic principles governing the creation and performance of legal obligations'.[140] The principle of good faith is also incorporated in VCLT Article 26 (*Pacta Sunt Servanda*) that obligates the State parties to a

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[131] Fidler, Correa and Aginam, *supra* note 2 at 151
[132] *US – Gambling*, *supra* note 23 at para. 339.
[133] *US – Gasoline*, supra note 73 at 22
[134] *US – Gasoline*, *supra* note 73 at 22.
[135] A French term meaning 'abuse of right.'
[136] *United States – Import of Certain Shrimps and Shrimps Products (US – Shrimps)*, [1998] Appellate Body Report at para 162.
[137] *Ibid.* at para 158.
[138] Andrew MITCHELL, "Good Faith in WTO Dispute Settlement" (2006) 7(2) Melbourne Journal of International Law 339 at 340.
[139] *Border and Transborder Armed Actions* (*Nicaragua v Honduras*), Jurisdiction and Admissibility, [1988] I.C.J. Rep. 69 at 105.
[140] *Nuclear Tests* (*Australia v France*), Merits, [1974] I.C.J. Rep. 253 at 268.

treaty to perform the same in good faith.[141] The International Court of Justice (ICJ) affirmed the obligation to act in good faith as a general principle of law as and also part of international law.[142] The AB also identified good faith as 'at once a general principle of law and a principle of general international law.'[143] Good faith plays an important role in WTO law, on different levels and under different guises.[144]

In its application of good faith, the WTO jurisprudence has made reference to *Pacta Sunt Servanda* in a number of cases.[145] Not only has the AB viewed good faith as an 'organic' and 'pervasive general principle…that underlies all treaties,' but in several decisions presumed good faith, corresponding to the traditional understanding of good faith in general international law.[146] This includes a general obligation on the State parties to a treaty to perform that treaty in good faith, i.e., to refrain from acts which would defeat the object and purpose of a treaty to which they are members.[147] The good faith requirement in the chapeau calls for the public health measures of Country X (even though necessary to protect human life or health), to be applied in a non-arbitrary manner, not discriminating between trade partners and above all, not to be a disguised restriction on trade in services. It is easier for a public health measure grounded in the right to health obligation to pass the scrutiny of the chapeau if the objective to fulfil the right to health obligation is not used to guise trade protectionism. Even if the public health measures fail to pass the test laid out in the chapeau, it does not mean that the measures are not necessary to achieve the right to health objectives, but only that Country X will have to apply the measures in a consistent and non-discriminatory manner.

Finally, the principle of good faith not only requires the Members to apply the measures in good faith, but also serves as a mechanism of accountability of the treaty interpreter. VCLT Article 31 (1) calls for interpretation in good faith, establishing a general standard of behaviour for treaty interpreters by requiring that they act reasonably and fairly.[148] The principle of good faith can thus help the interpreters to justify choices in applying articles 31 (3)(c) of the VCLT,[149] and take into account the right to health raised by Country X in assessing the justification of its measures inconsistent with the provisions of GATS. A good faith

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[141] VCLT, Article 26.
[142] *Certain Norwegian Loans* (*France v Norway*), Jurisdiction, [1957] I.C.J. Rep. 9 at 53.
[143] *US — FSC*, *supra* note 77 at para 166.
[144] For example, apart from DSU Articles 3.10 and 4.3, it is mentioned explicitly in Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement Articles 24.4, 24.5, 48.2 and 58.
[145] See for example, *US – Shrimps*, *supra* note 136 at para 158; *European Communities — Trade Description of Sardines (EC — Sardines)*, [2002] Appellate Body Report at para. 278, *United States — Continued Dumping and Subsidy Offset Act of 2000 (US — Offset Act (Byrd Amendment))*, [2003] Appellate Body Report at paras. 296–298.
[146] Helge Elisabeth ZEITLER, "'Good Faith' in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism" (2005) 8(3) Journal of International Economic Law 721 at 724.
[147] *Ibid*. at 730.
[148] Eric De BRABANDERE and Isabelle VAN DAMME, "Good Faith in Treaty Interpretation" in Andrew MITCHELL, M SORNARAJAH and Tania VOON, eds., *Good Faith and International Economic Law* (OUP, 2015) at 38.
[149] *Ibid*. at 42.

interpretation of GATS Article XIV(b), consistent with the notion of systemic interpretation,[150] accommodates application of the right to health as an interpretive as well as evidentiary tool as the discussion above demonstrated.

III. CONCLUSION

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

First of all, not every public health measure affecting the international trade in services is necessarily inconsistent with the GATS obligations. However, if a public health measure is challenged by another Member for violating the GATS obligations, the responding Member can justify its measure as necessary to protect human life or health. In doing so, the responding Member will need to prove that its public health measures are not arbitrary trade-restrictive measure in disguise and are in fact necessary to achieve its policy objectives that aim to protect human life or health. The paper argued that in its defence, the responding Member can raise its right to health obligation to prove:

- that a public health measure is a vital and important health policy objective under GATS Article XIV(b);
- that a right to health approach can assist the DSBs to interpret seemingly vague terms such as 'to protect' by providing a wider normative environment as well as specificity;
- that in determination of 'necessity' of the challenged measure, the right to health approach can provide evidentiary value in assessing the 'material' contribution of the measure to the achievement of the health policy objective, to which end the acknowledged human rights experts may also be called to provide evidence that the challenged measure fulfilled the right to health requirement;
- that a public health measure to fulfil a right to health obligation has better chances of passing the test in the chapeau of GATS Article XIV if the responding State can prove

[150] The principle of harmonization requires a treaty to be read in harmony and consistently within the broader context of international customary and treaty law. For more see Van Damme, *supra* note 76. Also, for evolutionary interpretation and Good Faith, see Eirik BJORGE, *The Evolutionary Interpretation of Treaties* (OUP 2014).

that its measure shows a good faith application of the right to health and is not a discriminatory and disguised trade restriction.

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

Lastly, a right to health approach to interpretation of the public health exception furthers, through systemic integration, the compatibility of the two regimes. Although a Member cannot justify the measure inconsistent with its GATS obligations solely on the basis of the right to health, the right to health approach can assist the DSBs in defining concepts, determining the necessity of health policy objectives and assessing of the contribution of the measure towards the achievement of the health policy objectives. Some scholars caution that such approach in extreme could lead to the modification of the treaty.[151] It is worth noting that the human rights approach to interpretation of general exception in WTO treaties does not mean that these exceptions are interpreted through direct application of the human rights treaties. As demonstrated in this paper, the right to health approach does not require the DSBs to determine whether or not the Member has violated its right to health obligation but whether it is necessary to relax the GATS disciplines for the Member to fulfil its right to health obligation. Furthermore, the application of the right to health as an evidentiary and interpretive tool through VCLT Article 31(3)(c) does not add anything to GATS Article XIV(b) but constructs its meaning through a legal technique that takes into account wider normative context. A right to health approach will not only reinforce the intention of the parties that remained in the text but also develop complementarity between the two regimes and address in part fragmentation of public international law.

[151] Sorel and Bore-Eveno, *supra* note 72 at 826.