



International Economic Law

Sessions 10-11

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General and Security Exceptions

General Exceptions under the GATT 1994

1. Introduction

- ▶ Potential conflicts between: (a) trade liberalization, Market Access and non-discrimination rules and (b) other important societal values and interests
- ▶ There are circumstances a member state need to adopt trade restrictive measures to protect public interests such as public health, consumer safety, the environment and employment



- ▶ Need for 'exceptions' in the WTO law

General and Security Exceptions

General Exceptions under the GATT 1994

Article XX GATT 1994

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

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

General and Security Exceptions

General Exceptions under the GATT 1994

2. Key Features of Art XX of the GATT

- ▶ Invoked when an inconsistency between the measure in question and another GATT provision was found
- ▶ The purpose: to justify the GATT-inconsistent measure
- ▶ A balancing provision



General and Security Exceptions

General Exceptions under the GATT 1994

2. Key Features of Art XX of the GATT

Thailand – Cigarettes (Philippines) (2011)

It is true that, in examining a specific measure, a panel may be called upon to analyze a substantive obligation and an affirmative defence, and to apply both to that measure. It is also true that such an exercise will require a panel to **find and apply a "line of equilibrium"** between a substantive obligation and an exception. Yet this does not render that panel's analyses of the obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the "further and separate" assessment of whether such measure is otherwise justified.

General and Security Exceptions

General Exceptions under the GATT 1994

3. Scope of application of Art XX of the GATT

- ▶ Q1. Whether Art XX may also justify inconsistency with obligations set out in WTO agreements other than the GATT 1994
 - (a) China-Publications and Audiovisual Products (2010)
 - (b) China-Raw Materials (2012)
- ▶ Q2. Is there limitation on the kind of measures that can be justified under Art XX?
US-Shrimp (1998) (Appellate Body)
- Q3. Is there a territorial Limitation on the scope of application?

General and Security Exceptions

General Exceptions under the GATT 1994

4. Two-tier test under Article XX of the GATT 1994

▶ US-Gasoline (1996):

... In order that the justifying protection of Article XX may be extended to it, 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. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.

▶ US-Shrimp (1998):

The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse.



General and Security Exceptions

General Exceptions under the GATT 1994

4. Two-tier test under Article XX of the GATT 1994

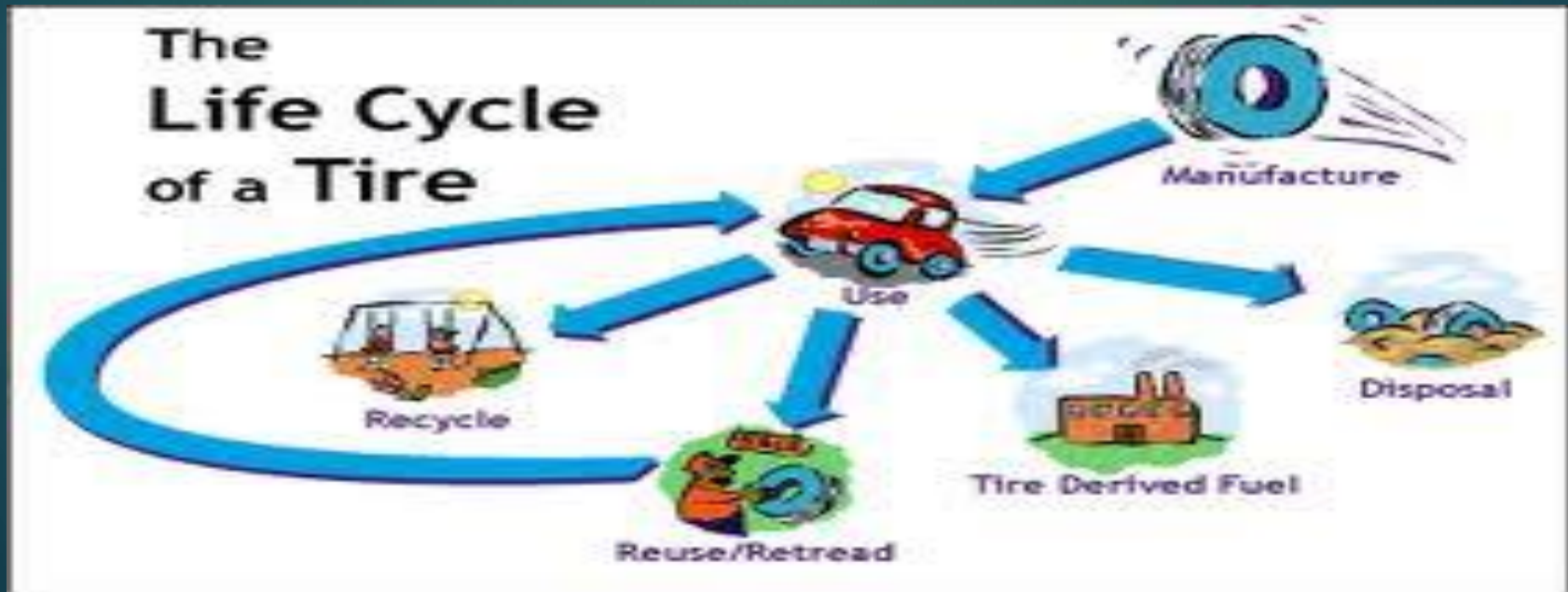
- ▶ For a successful invocation of Article XX, it must meet:
 - (1) the requirements of one of the exceptions listed in paras (a) to (j) of Article XX;
 - (2) the requirements of the introductory clauses, commonly referred to as the 'chapeau', of Article XX.

General and Security Exceptions

General Exceptions under the GATT 1994

4. Two-tier test under Article XX of the GATT 1994

- ▶ Case study: Brazil-Retreaded Tyres (2007)



General and Security Exceptions

General Exceptions under the GATT 1994

4. Two-tier test under Article XX of the GATT 1994

▶ Case study: Brazil-Retreaded Tyres (2007)

Appellate Body's findings

(i) The first step: 'necessity' requirement

- WTO Members have the right to determine the level of protection that they consider appropriate in a given context
- The contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it.
- the Import Ban can be considered "necessary to protect human, animal or plant life or health."

General and Security Exceptions

General Exceptions under the GATT 1994

4. Two-tier test under Article XX of the GATT 1994

▶ Case study: Brazil-Retreaded Tyres (2007)

(c) Appellate Body's findings

(ii) The second step: chapeau

- the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX. Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination.
- Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR.
- (however) the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b)
- the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

General and Security Exceptions

General Exceptions under the GATT 1994

4. Two-tier test under Article XX of the GATT 1994
 - ▶ Only one successful application of Article XX
 - ▶ However, the Appellate Body often find that there was no inconsistency with the GATT 1994 (e.g. EC-Asbestos (2007)) – in such cases no need to invoke Article XX

General and Security Exceptions

General Exceptions under the GATT 1994

5. Specific Exceptions under Article XX of the GATT 1994

(1) Article XX(b)

- ▶ A significant degree of deference as to the policy objective of a measure was to protect life or health of humans, animals and plants
- ▶ Of particular importance is the 'necessity' requirement

EC-Asbestos (2001)

- While the AB had found that the measure at issue in this case – a French ban on asbestos and asbestos products – was not inconsistent with Article III:4 of the GATT 1994 and the panel's findings relating to Article XX(b) were therefore moot, the AB nevertheless addressed some of the issues that arise when determining whether an otherwise GATT-inconsistent measure is justified under Article XX(b). Their findings include:
 - (i) the more important the societal value pursued by the measure at issue (e.g. human life and health) and the more this measure contributes to the protection or promotion of this value, the more easily the measure at issue may be considered to be 'necessary'.

General and Security Exceptions

General Exceptions under the GATT 1994

EC-Asbestos (2001)

The Appellate Body's findings

- (ii) (On the existence of less trade-restrictive alternative measures): in determining whether a suggested alternative measure is 'reasonably available', several factors must be taken into account, alongside the difficulty of implementation.
- (iii) It is for WTO members to determine the level of protection of health or the environment they consider appropriate.

General and Security Exceptions

General Exceptions under the GATT 1994

(2) Article XX(g)

- ▶ Three-tier test requiring that a measure: (1) relate to the 'conservation of exhaustible natural resources'; (2) 'relate to' the conservation of exhaustive natural resources; and (3) be 'made effective in conjunction with' restrictions on domestic production or consumption.
- ▶ As to (1), the Appellate Body in *US-Shrimp* (1998) adopted a broad, 'evolutionary' interpretation of the concept of 'exhaustive natural resources'. (Issue: whether Art XX(g) applies only to conservation of mineral or non-living natural resources)

From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary". It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. ...

General and Security Exceptions

General Exceptions under the GATT 1994

(2) Article XX(g)

- ▶ With respect to (2): the Appellate Body in US-Shrimp stated that Art XX(g) requires a 'close and real' relationship between the measure and the policy objective – affirmed in China-Raw Materials (2012)
- ▶ With respect to (3), the Appellate Body in US-Gasoline (1996) stated that this is a requirement of 'even handedness' (rather than identical treatments) in the imposition of restrictions on imported and domestic products.

General and Security Exceptions

General Exceptions under the GATT 1994

7. Chapeau of Article XX

(1) Object and purpose of the chapeau

► US-Gasoline (1996)

The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.⁴³ It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions of [what was later to become] Article [XX]."⁴⁴ This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.

General and Security Exceptions

General Exceptions under the GATT 1994

7. Chapeau of Article XX

(1) Object and purpose of the chapeau

► US-Shrimp (1998)

Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory.

General and Security Exceptions

General Exceptions under the GATT 1994

7. Chapeau of Article XX

(2) Arbitrary or Unjustifiable discrimination

- ▶ The chapeau of Article XX does not prohibit discrimination per se, but rather arbitrary and unjustifiable discrimination.
- ▶ US-Shrimp: the Appellate Body elaborated this concept by identifying the three elements:
 - (i) The application of the measure at issue must result in discrimination:
 - (ii) This discrimination must be arbitrary or unjustifiable in character;
 - (iii) This discrimination must occur between countries where the same conditions prevail

General and Security Exceptions

General Exceptions under the GATS

1. Introduction

Article XIV

General Exceptions

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

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective⁶ imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

General and Security Exceptions

General Exceptions under the GATS

1. Introduction

- ▶ Comparison with Article XX GATT: inclusion of maintenance of public order, the protection of safety and privacy, and the equitable and effective imposition or collection of direct taxes, the protection of national treasures of artistic value
- ▶ Article XX GATT and its jurisprudence does provide guidance on how to interpret and apply Article XIV of the GATS

General and Security Exceptions

General Exceptions under the GATS

2. Two-tier test under Article XIV GATS

US-Gambling (2005)

Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a "two-tier analysis" of a measure that a Member seeks to justify under that provision.³⁵² A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected. The required nexus—or "degree of connection"—between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as "relating to" and "necessary to".³⁵³ Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV

General and Security Exceptions

Security Exceptions under the GATT 1994

Article XXI

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of **which it considers** contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action **which it considers** necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

General and Security Exceptions

Security Exceptions under the GATT 1994

Long rather dormant, but increasing number of cases – e.g. Request for the Establishment of a Panel by the United States, Canada—Additional Duties on Certain Products from the United States, WT/DS557/2 (Oct. 19, 2018); Request for the Establishment of a Panel by Norway, United States—Certain Measures on Steel and Aluminium Products, WT/DS552/10 (Oct. 19, 2018) (and more)

Interpretation of 'self-judging' security exception clauses

A self-judging security exception clause is subject to the general obligation of good faith

- ▶ **Russian Federation — Measures Concerning Traffic in Transit (DS 512, Panel Report of 5 April 2019)**
- Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 ICJ Rep. 177, 225, para. 145 (June 4, 2008)

Interpretation of 'self-judging' security exception clauses

Elements to be considered

Risk of abuse of the concept of national security	Need for the protection of national security
<p>The concept of national security has expanded and become ambiguous</p> <ul style="list-style-type: none">- Emergence of new threats to national security due to social and technological advancement	<p>New types of threats do not respect borders: protecting national security of one country is in the interest of other states</p>
<p>Backlash against globalisation and spread of protectionism</p>	<p>The potential risk of new types of threats is difficult to assess</p>

General and Security Exceptions

Security Exceptions under the GATS

Article XIV bis

Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of **which it considers** contrary to its essential security interests; or

(b) to prevent any Member from taking any action **which it considers** necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1 (b) and (c) and of their termination.